Court File No. CV-15-10926-00CL

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 LABRADOR IRON MINES HOLDINGS LIMITED, LABRADOR IRON MINES LIMITED and SCHEFFERVILLE MINES INC. (the "Applicants")

BOOK OF AUTHORITIES OF THE APPLICANTS
(Stay Extension)
Returnable April 30, 2015

April 28, 2015

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Tab 1

2010 ONSC 1102
Ontario Superior Court of Justice [Commercial List]

Dura Automotive Systems (Canada) Ltd., Re.

2010 CarswellOnt 894, 2010 ONSC 1102, 63 C.B.R. (5th) 66, 81 C.C.P.B. 88

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., c. C036, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DURA AUTOMOTIVE SYSTEMS (CANADA) LTD. (Applicant)

Morawetz J.

Heard: February 11, 2010
Judgment: February 17, 2010
Docket: 09-8434-00CL

Counsel: Christopher Besant, Frank Spizzirri for Applicant, Dura Automotive Systems (Canada) Ltd.
Hugh O'Reilly, Amanda Pask for International Association of Machinists and Aerospace Workers
Barry Wadsworth for CAW-Canada
Mark Bailey for Superintendent of Financial Services (Ontario)
Roger Jaipargas, James Szumski for Monitor, PricewaterhouseCoopers Inc.
James H. Grout, Larry Ellis for Morneau Sobeco Limited Partnership, in its Capacity as the Plan Administrator of the Registered Pension Plans of Dura Automotive Systems (Canada) Ltd.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Applicant, DA Ltd., obtained stay of proceedings in bankruptcy proceedings — DA Ltd. brought motion to extend stay period from February 11, 2010 to March 12, 2010 and for order establishing process for filing, determining and barring of claims against DA Ltd. and its current and former officers and directors — In addition, DA Ltd. requested order, in connection with claims determination procedure, in case of registered pension plans, that MS LLP be entitled to file single claim and vote claims related to each of three registered pension plans after certain pre-conditions had been satisfied — Motion dismissed — DA Ltd. had not

met s. 11.02(3) test — DA Ltd.'s negotiations with CAW, IAMAW and plan administrator had not established that negotiations as between parties were such that it was unrealistic to expect that any viable plan could be put forward — Further, by questioning representative status of parties at last possible moment, DA Ltd. had demonstrated that it could not be said to be acting in good faith and with due diligence.

Table of Authorities

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 22(2) — considered

MOTION by DA Ltd. to extend stay period from February 11, 2010 to March 12, 2010 and for order establishing process for filing, determining and barring of claims against DA Ltd. and its current and former officers and directors.

***Morawetz J.*:**

1 Dura Automotive Systems (Canada) Ltd. ("Dura Canada" or the "Applicant") brings this motion to extend the Stay Period from February 11, 2010 to March 12, 2010 and for an order establishing a process for the filing, determining and barring of claims against the Applicant and its current and former officers and directors. In addition, Dura requests an order, in connection with the claims determination procedure, in the case of registered pension plans, that Morneau Sobeco LLP be entitled to file a single claim and vote the claims related to each of the three registered pension plans after certain pre-conditions have been satisfied.

2 For the following reasons, the motion is dismissed.

3 Dura Canada filed for CCAA protection on October 30, 2009.

4 The International Association of Machinists and Aerospace Workers ("IAMAW") has, from the outset of the proceedings, raised concerns about the actions of Dura Canada. These concerns are set out in the Notice of Motion of the IAMAW which was also returnable February 11, 2010.

5 The IAMAW seeks a declaration that there is no basis for the remedy sought by the Applicant through the CCAA application, in that the liability to make payments into the Canadian pension

and benefit plans is held by Dura Automotive Systems Inc. (Delaware) and its subsidiaries ("Dura US"), pursuant to the Revised Joint Plan of Reorganization of Dura Automotive Systems Inc. et al dated May 8, 2008, and confirmed by this court on May 22, 2008.

6 The IAMAW also sought an order terminating these proceedings and a declaration that the commencement of the application was an abuse of process; a declaration that the Applicant is estopped from taking the position that the Applicant bears sole liability to make payments to the Canadian pension and benefit plans under the Revised Plan; and a bankruptcy order against Dura Canada.

7 The IAMAW is not alone in its opposition to the motion. The Canadian Auto Workers - Canada ("CAW-Canada") and Morneau Sobeco as the Administrator of the three registered pension plans (the "Canadian Plans") (the "Plan Administrator") joined IAMAW in opposition.

8 In addition, the Superintendent of Financial Services opposes the relief sought, submitting that there is no basis on which to conclude that a viable plan can be put forward. Counsel to the Superintendent also raised, as did counsel to the Plan Administrator, an issue as to whether there is a constitutional question that should have been brought to the attention of the appropriate Ministries.

9 Finally, the Monitor, in its comprehensive Sixth Report, does not support the extension of the Stay Period. The Monitor is not convinced that the Applicant is acting in good faith and with due diligence.

10 The opposition of the IAMAW, the CAW-Canada and the Plan Administrator has been consistently put on the record throughout these proceedings. The Applicant has been aware of this opposition and continually negotiated with the two unions and the Plan Administrator in an effort to develop a plan.

11 As late as January 29, 2010, the Applicant recognized the legitimacy of the IAMAW, the CAW-Canada and the Plan Administrator as the parties with whom they should be negotiating. The role of the Superintendent was also recognized. The endorsement of January 29, 2010 recites the presence of counsel to the Applicant, the IAMAW, the Plan Administrator, FSCO, the CAW-Canada and the Monitor and reads as follows:

> The parties are in negotiations in respect of the structure of the plan. I am satisfied that the Applicant continues to work in good faith and with due diligence such that a short extension to February 11, 2010 is appropriate. The parties are conducting their negotiations in accordance with a schedule of events which are outlined in an email from Mr. Spizzirri (counsel to the Applicant) to Mr. O'Reilly (counsel to IAMAW) dated January 28, 2010 at 5:10 p.m. This email is to form part of this endorsement...

12 The parties to the negotiations as listed in the email include the Monitor, IAMAW, CAW-Canada, FSCO and the Plan Administrator.

13 The Plan Administrator takes the position that Dura Canada and Dura US owe approximately $9 million to the Canadian Plans as at December 31, 2009 on account of the wind-up deficiencies in the Canadian Plans. In addition, the Applicant acknowledged that there is a debt of approximately $8.2 million owing in relation to benefit plan obligations.

14 In its Initial Application, Dura disclosed total unsecured liabilities of just over $90 million of which $72 million are owed to related entities.

15 Section 22(3) of the CCAA provides that a creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

16 In order to succeed with any plan, the Applicant has to have the required voting support of the claims arising out of the wind-up deficiencies in the Canada Plans and claims relating to the benefit plan obligations.

17 The Applicant has put forth a plan that it submits is a better option for the creditors than the alternative of a bankruptcy.

18 In oral submissions, counsel to the Monitor stated that in the best case scenario, the Monitor expects a return to unsecured creditors of between $0.12 and $0.20 under the plan.

19 The Monitor has confirmed that the recovery for unsecured creditors will likely be better in the plan as opposed to the bankruptcy but this does not take into account any potential recovery associated with any actions that could be taken against Dura US for outstanding pension and benefit obligations. The plan requires a complete release of all claims against Dura Canada and related Dura group parties and their officers, directors and employees (the "Dura Group Parties"), and a release of any claims against third parties which result in a claim against any of the Dura Group Parties, as some of the stakeholders have threatened to sue one or more Dura Group Parties.

20 The Monitor also made recommendations in the Sixth Report.

21 The Monitor has identified a number of risks in the plan outline, which are summarized in detail at Appendix C to the Sixth Report. Generally speaking:

(a) there is uncertainty with respect to the realizable value of the companies' assets;

(b) there is uncertainty with respect to the realizable value of the assets to be contributed by other Dura Group entities;

(c) the back-stop is unsecured and partially conditional in respect of the tax receivable and may or may not provide adequate support for a minimum recovery, as the company has suggested.

22 With respect to the claims process put forward by Dura Canada, the Monitor advises that it has not had adequate time to review the process, which was unveiled at the last minute. However, it did conduct a preliminary review. The Monitor stated that it does not support the relief sought by the company as:

(a) there is no process to properly assess and value "claims" of individual pensioners and therefore, no mechanism for voting such "claims";

(b) the February 9 Skotak Affidavit questions the ability of counsel to the IAMAW and the CAW-Canada to speak for the pensioners and also questions the independence of the Plan Administrator. However, there is no mention of or provision for representative counsel to advise and assist individual pensioners, particularly in the circumstances where the company has proposed to seek broad, third party releases for other Dura Group entities and its officers, directors and employees;

(c) in the event that the court found that counsel for the IAMAW and the CAW-Canada and the Plan Administrator were not "suitable counsel" for the pensioners, and was of the view that other representative counsel was necessary, in the circumstances, such representative counsel would represent an additional cost to the company's estate, whereas the costs of representation on behalf of the IAMAW, the CAW-Canada and the Plan Administrator are not currently being borne by the company; and

(d) the Monitor has significant concerns about the incurrence of additional costs, the lack of resources available to fund the CCAA proceedings, and the fact that no assurances have been offered by the Dura group to support the CCAA proceedings with additional funding.

23 The February 10 Notice of Motion brought by Dura Canada requests an order to establish a process for filing, determining, and barring claims against it and its current and former officers and directors. The Monitor does not support the relief being sought by Dura Canada in respect of the claims process as the Monitor has no details with respect to what Dura Canada is proposing.

24 On the issue of the extension of the Stay Period, the Monitor has summarized its position at paragraphs 46 - 54 of its Report. Included is the statement that the Monitor is of the view that the company has had enough time to attempt to negotiate the framework for a plan. The company has no ongoing operations and no other restructuring activities are necessary in respect of the CCAA proceedings.

25 The Monitor concludes its recommendations with the statement that in its view the continuation of the CCAA proceedings will likely result in the dissipation of the remaining cash in the company's estate, without any reasonable assurance of the outcome of such continuation resulting in a viable plan.

26 Dura Canada has made a number of proposals to the parties with whom it was negotiating. These proposals were forthcoming right up to the morning of this scheduled motion.

27 The final revised plan outline submitted by Dura Canada at 6:15 p.m. on Wednesday, February 10, 2010 was rejected by the stakeholders early in the morning of Thursday, February 11, 2010. The affidavit of Bethune Whitson, an employee of the Plan Administrator, is that the parties are not close to a plan.

28 On February 10, 2010, Dura Canada served its motion record seeking an extension of the stay of proceedings and an order requiring that Dura Canada's last revised plan outline be voted on by the members of the Canadian Plans whose votes Dura Canada submits would be binding upon the Plan Administrator who would then vote upon the revised plan outline.

29 Counsel for Dura Canada submits that, at present, there is no representative appointed for either the individual pension or post-retirement beneficiaries and, as such, the individual pensioners and benefits claimants would have to file and vote their own claims.

30 Counsel to Dura Canada does acknowledge that the unions and the Plan Administrator oppose the notion of the retirees, proving and voting their own claims. Counsel to Dura Canada submits it is questionable whether the unions or the Plan Administrator have any ability to speak for the pension and benefit beneficiaries or can bind them in a plan or litigation in any event.

31 The position taken by Dura Canada is opposed by the IAMAW, the CAW-Canada and the Plan Administrator.

32 In my view, the issue of who can vote in these circumstances does not have to be determined as I have not been satisfied that the Applicant has met the test which would entitle it to obtain a further extension of the Stay Period.

33 The fundamental issue in these proceedings is whether Dura Canada bears sole liability to make payments to the Canadian pension and benefit plans or whether the liability also extends to related Dura entities, including Dura US.

34 Dura Canada was clearly aware of the importance of this issue and negotiated with the IAMAW, the CAW-Canada and the Plan Administrator until such time that it recognized that negotiations were not going to be successful. It has now changed its position and seeks an order

that the plan be presented to the retirees for a vote. It is in the context of this change of tactics at the 11th hour that the motion to extend the stay must be considered.

35 The test for an extension of the stay is set out in s. 11.02(3) of the CCAA:

> 11.02(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.

36 The Applicants gave every appearance that, up to the morning of February 10, 2010, it was negotiating with the appropriate representative groups. If this indeed was the situation, the inescapable conclusion is that the negotiations were not successful and no plan could proceed with any realistic chance of being accepted by the creditors. In these circumstances, to grant a further extension of time would, in my view, not be appropriate.

37 Alternatively, if one accepts the position of Dura Canada that the IAMAW and the CAW-Canada and the Plan Administrator cannot represent the interests of the retirees, it begs the question as to why Dura Canada did not raise this issue long before February 10, 2010. As counsel to the CAW-Canada pointed out, the CAW-Canada put its cards on the table on day one and if representation had been an issue, a formal representation order could have been obtained long ago. I agree.

38 The Applicant changed course at the last moment as they were unable to reach agreement with the IAMAW, the CAW-Canada and the Plan Administrator. The last-minute shift in tactics leads to the inescapable conclusion that Dura Canada did not act in good faith in negotiating with the IAMAW, the CAW-Canada and the Plan Administrator and further that they did not act with due diligence in failing to address these representative issues on a timely basis.

39 I have also taken into account certain factors that are unique to this CCAA proceeding; namely, there is no active business and, consequently, the employment impact of failure to extend the CCAA proceedings is minimal.

40 The Applicant's negotiations with the CAW-Canada, the IAMAW and the Plan Administrator have established to my satisfaction that the negotiations as between these parties, are such that it is unrealistic to expect that any viable plan can be put forward. Further, by questioning the representative status of the parties at the last possible moment, the Applicant has demonstrated that it cannot be said to be acting in good faith and with due diligence.

41 In my view, the Applicant has not met the s. 11.02(3) test. Accordingly, the motion is dismissed.

42 The IAMAW and Morneau Sobeco, the Plan Administrators have brought motions to permit the issuance of a bankruptcy application against Dura Canada and that a bankruptcy order be immediately issued appointing PricewaterhouseCoopers Inc. as Trustee. Counsel to Dura Canada objected to the scope of this relief arguing that Dura Canada should be permitted to dispute any bankruptcy application notwithstanding its acknowledged insolvency.

43 As a result of this decision, there is no stay, such that parties, if so advised, can proceed to issue bankruptcy applications.

44 In my view, it is in the interests of all stakeholders that chaos be avoided. To this end, the CCAA proceedings continue as do any charges created in the proceedings. Stakeholders are encouraged to consider the appropriate next steps and to attend at a 9:30 a.m. appointment later this week for further directions.

45 If any party wishes to raise the issue of costs, they can do so by brief written submission within 20 days.

Motion dismissed.

Tab 2

2007 NSSC 347
Nova Scotia Supreme Court

Federal Gypsum Co., Re

2007 CarswellNS 629, 2007 NSSC 347, 163 A.C.W.S. (3d) 689, 261 N.S.R. (2d) 299, 40 C.B.R. (5th) 80, 835 A.P.R. 299

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 the Applicant, Federal Gypsum Company

A.D. MacAdam J.

Heard: November 5, 2007
Oral reasons: November 5, 2007
Written reasons: January 29, 2008
Docket: S.H. 285667

Counsel: Maurice P. Chaisson, Graham Lindfield for Federal Gypsum Company
Carl Holm, Q.C. for BDO Dunwoody Goodman Rosen Inc.
Thomas Boyne, Q.C. for Royal Bank of Canada
Robert Sampson, Robert Risk for Enterprise Cape Breton Corporation, Cape Breton Growth Fund Corporation
Michael Pugsley for Her Majesty in Right of the Province of Nova Scotia (Nova Scotia Economic Development), Nova Scotia Business Incorporated
Michael Ryan, Q.C., Michael Schweiger for Black & McDonald Limited

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Debtor was granted stay of proceedings for 30 days pursuant to s. 11 of Companies' Creditors Arrangement Act ("CCAA") — Debtor wished to arrange debtor in possession ("DIP") financing, which was essentially new financing that required existing secured creditors to subordinate their interests — Bank was sole secured creditor that objected to DIP financing

— Debtor was granted approval to arrange DIP financing to extent of $350,000 — Debtor was subsequently granted extension of time for filing plan of arrangement along with extension of stay termination date — Debtor wished to increase DIP financing with view to paying off bank — Debtor brought application for permission to increase DIP financing to $1,500,000 and for further extension of stay termination date — Application granted in part — Stay termination date was extended but increase in DIP financing was to be limited to $475,000 with no priority to be given to paying off bank — While debtor's net sales had declined, debtor had also incurred lower expenses and used less of authorized DIP financing than had been projected — Debtor's failure to meet projected sales was concern but information and evidence on file offered positive indications — Debtor was not shown to be in its death throes — Prejudice to creditors was evident but perhaps not so fatal as certain demise of company in absence of further DIP financing and extension of time — Bank's secured position had apparently not deteriorated substantially thus far — Extension of time and additional DIP financing would enable debtor to continue in operation while plan of arrangement was considered and voted on by creditors — Favouring bank was not justified as success of restructuring was not dependent on permitting repayment of this single creditor.

Table of Authorities

Cases considered by *A.D. MacAdam J.*:

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 33 B.L.R. (4th) 68 (Alta. Q.B.) — considered

Cansugar Inc., Re (2004), 2004 CarswellNB 9, 2004 NBQB 7 (N.B. Q.B.) — considered

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

Hunters Trailer & Marine Ltd., Re (2000), 2000 ABQB 952, 2000 CarswellAlta 1776, 5 C.B.R. (5th) 64 (Alta. Q.B.) — considered

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 964, 94 Alta. L.R. (3d) 389, 27 C.B.R. (4th) 236, [2001] 9 W.W.R. 299, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — considered

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

Juniper Lumber Co., Re (2000), 2000 CarswellNB 130, 226 N.B.R. (2d) 115, 579 A.P.R. 115 (N.B. 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]) — referred to

Manderley Corp., Re (2005), 2005 CarswellOnt 1082, 10 C.B.R. (5th) 48 (Ont. S.C.J.) — considered

San Francisco Gifts Ltd., Re (2005), 2005 ABQB 91, 2005 CarswellAlta 174, 10 C.B.R. (5th) 275, 42 Alta. L.R. (4th) 377, 378 A.R. 361 (Alta. Q.B.) — considered

Simpson's Island Salmon Ltd., Re (2006), 2006 CarswellNB 420, 2006 NBQB 244, 24 C.B.R. (5th) 13, 300 N.B.R. (2d) 165, 782 A.P.R. 165 (N.B. Q.B.) — considered

Simpson's Island Salmon Ltd., Re (2006), 302 N.B.R. (2d) 10, 784 A.P.R. 10, 24 C.B.R. (5th) 17, 2006 CarswellNB 453, 2006 NBQB 279 (N.B. Q.B.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(3) — considered

s. 11(4) — considered

s. 11(6) — considered

s. 11(6)(a) — considered

APPLICATION by debtor for permission to increase debtor in possession financing to $1.5 million and for extension of stay termination date.

***A.D. MacAdam J.*:**

1 Federal Gypsum Company, (herein "the Company" or "the Applicant"), having been granted a stay of proceedings pursuant to S. 11 of the *Companies Creditors Arrangement Act*, R.S.C. 1985,

c. C-25 (herein "*CCAA*"), and, subsequently approval of arrangements for debtor in possession (herein "DIP") financing and an Order providing for extension of the Stay Termination Date set out in the initial Order, now applies for approval of arrangements for additional DIP financing.

2 The initial Stay Order provided for a 30-day Stay of Proceedings pursuant to s. 11(3) of the *CCAA*. The initial DIP financing application authorized DIP financing in the principal sum of $350,000.00. The time for filing the Plan of Arrangement under the *CCAA* and the Stay Termination Date were extended to November 29, 2007 at 4:00 p.m, by Order dated October 23, 2007. The Order also provided that "the Company shall file an Application before this Honourable Court relating to the consideration of further debtor in possession financing for a hearing on November 5, 2007 at 9:30 a.m." The Order also stipulated that the extension of the Stay Termination Date to November 29, 2007 was "subject to the right of the creditors of the Company to request a review and reconsideration" of the October 23 Order on the application for further DIP financing.

3 The Company now seeks an increase in the DIP financing from the original authorized $350,000.00 to $1,500,000.00.

4 Appearing on the Company's application were a number of secured creditors, including the Royal Bank of Canada, (herein "Royal Bank"), Cape Breton Growth Corporation, (herein "CBGC"), and Enterprise Cape Breton Corporation, (herein "ECBC"), (herein collectively referred to as the "Federal Crown Corporations"); Nova Scotia Business Inc. (herein "NSBI") and Nova Scotia — Office of Economic Development (herein "NSOED") (herein collectively referred to as the "Nova Scotia Crown Corporations"), each of whom hold, or purport to hold, first secured charges on some of the assets of the Company, as do the Federal Crown Corporations; and Black & McDonald Limited, (herein "BML") who purport to hold a subordinate secured charge on assets of the Company.

The CCAA

5 The relevant provisions of Section 11 of the *CCAA* are as follows:

> 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.
>
> (2) **Initial Application** — An application made for the first time under this section in respect of a company, in this section referred to as an 'initial application' shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior

to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

(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.

(5) **Notice of orders** — Except as otherwise ordered by the court, the monitor appointed under section 11.7 shall send a copy of any order made under subsection (3), within ten days after the order is made, to every known creditor who has a claim against the company of more than two hundred and fifty dollars.

(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.

The Law

6 The purpose of the CCAA was commented on by Justice Turnbull of the New Brunswick Court of Appeal in *Juniper Lumber Co., Re*, [2000] N.B.J. No. 144 (N.B. C.A.), at para. 1:

> The principal purpose of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the 'CCAA'), 'is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business ... When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.' See Arrangements Under the Companies' Creditors Arrangement Act by Goldman, Baird and Weinszok (1991), 1 C.B.R. (3d) 135 at p. 201 where the authors cite Thackray; J. approvingly quoting Gibbs, J.A. from the cases cited on that page. In New Brunswick, the Court of Queen's Bench is defined by the CCAA as the Court to play the 'kind of supervisory role.' The CCAA has a remedial purpose and, therefore, must be interpreted in a broad and liberal fashion. See pages 137-138 in the article previously cited. More often than not time is critical. And, in order to maintain a status quo while attempts are made to determine if a successful compromise or arrangement can be reached, the courts are granted certain powers in s. 11 to hold creditors at bay.

7 Justice Glennie of the New Brunswick Court of Queen's Bench in *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 279 (N.B. Q.B.), at para. 20, after referencing *Juniper Lumber Co.*, referred to *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]), at paras. 5 and 6, where Farley, J. said:

> 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 a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has a 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. ...
>
> 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. ...

Background

(A) The Initial Application

8 On the initial application, the Court having been satisfied the company met the requirements for the filing under the *CCAA*, in that it was, on the evidence tendered, "insolvent" and had total claims exceeding $5,000,000.00, and being further satisfied that the burden stipulated in s. 11(6) had been met, an Order providing for a Stay of Proceedings was issued.

(B) The Initial DIP Financing

9 Shortly after the Stay Order was issued, the Company filed the application for the initial DIP financing in the sum of $350,000.00. Counsel for the company acknowledged the omission in the CCAA of any specific authorization sanctioning DIP financing and granting "super-priority" over existing secured, as well as unsecured, debt. Counsel referenced the legal principles cited by Justice C. Campbell in *Manderley Corp., Re* (2005), 10 C.B.R. (5th) 48 (Ont. S.C.J.), at para 18 where he observes:

> The operative legal principles are set out in the following quotations from Houlden & Morawetz' *Bankruptcy & Insolvency Analysis* (Carswell, 2004), section N16 — Stay of Proceedsings[sic] — CCAA — at page 18:
>
> > Although the C.C.A.A. makes no provision for DIP financing, it seems to be well established that, under its inherent powers, the court may give a priority for such financing and for professional fees incurred in connection with the working out of a C.C.A.A. plan.
> >
> > For the court to authorize DIP financing, there must be cogent evidence that the benefit of the financing clearly outweighs the prejudice to the lenders whose security is being subordinated to the financing: ...
> >
> > The court can create a priority for the fees and expenses of a court-appointed monitor ranking ahead of secured creditors so long as they are reasonably incurred in connection with the restructuring of the debtor corporation and there is a reasonable prospect of a successful restructuring: ...

10 At para 19 Justice Campbell continues:

> In *Skydome Corp., Re*, 1998 CarswellOnt 5922, 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with the issue of 'super-priority' financing

in the context of the specific use to be made of the funds where he was satisfied that the priority accorded the DIP financing would not prejudice the secured creditors. At paragraph 13 he said:

> I am satisfied that the Court has the authority either under s. 8 of the CCAA or under its broad discretionary powers in such proceedings, to make such an order. This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors — in the exercise of balancing the prejudices between the parties which is inherent in these situations — have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) are examples of the flexibility which courts bring to situations such as this. ...

11 To similar effect Wachowich J. in *Hunters Trailer & Marine Ltd., Re* (2001), 295 A.R. 113 (Alta. Q.B.), noted, at para. 32, the necessity to balance the benefit of such financing with the potential prejudice to the existing secured creditors. Justice Glennie in *Simpson's Island Salmon Ltd., Re*, *supra*, at paras. 16-19 held:

> In order for DIP financing with super-priority status to be authorized pursuant to CCAA, there must be cogent evidence that the benefit of such financing clearly outweighs the potential prejudice to secured creditors whose security is being eroded. See *United Used Auto & Truck Parts Ltd., Re*, [1999] B.C.J. No. 2754(B.C.S.C. [In Chambers]), affirmed [2000] B.C.J. No. 409 (B.C. C.A.)
>
> DIP financing ought to be restricted to what is reasonably necessary to meet the debtors urgent needs while a plan of arrangement or compromise is being developed.
>
> I am satisfied on the evidence before me that Simpson's Island and Tidal Run have a viable basis for restructuring. The amount of the DIP facility has been restricted to what is necessary to meet short-term needs until harvest.
>
> A Court should not authorize DIP financing pursuant to the CCAA unless there is a reasonable prospect that the debtor will be able to make an arrangement with its creditors and rehabilitate itself. In this case the Monitor has advised the Court that there is a reasonable prospect that Simpson's Island and Tidal Run will be able to make such arrangements with their creditors.

12 In his written submission counsel for the company, in reference to the three issues for review outlined by Justice Glennie, commented that "[e]ssentially, the court must engage in the balancing act that is the hallmark of DIP financing, as declared by C. Campbell, J. in *Manderley* at para. 27, weighing the benefit and prejudice referred to by Glennie, J."

13 The secured creditors, with the exception of the Royal Bank, neither consented nor strenuously objected to the initial DIP financing sought by the Company. The Royal Bank, on the other hand, objected, on the basis that the funding of the ongoing operations of the company could very well be at the expense of its security on the receivables and inventory. Nevertheless, having balanced prejudice to the secured creditors, in this instance particularly to the Royal Bank, and the benefit of providing financing to enable the Company to pursue a Plan of Arrangement, and on being satisfied the sought-for DIP financing and resulting super-priority were reasonably necessary to meet the Company's immediate needs and there was a reasonable prospect the Company would be able to make arrangements with its creditors and thereby rehabilitate itself, this Court allowed the application.

(C) The First Extension

14 At the expiration of the initial Stay Termination date, the Company applied for an extension, which application was generally opposed by the secured creditors. The Application included a further Affidavit by one of the Directors and Officers of the Company, as well as a further report from the Monitor. In para. 4.7, the Monitor reported:

> Having met with Federal and its legal counsel, and having had preliminary discussions with them as to the general principles and format of a Plan of Arrangement, and having considered the progress made in financing and sales opportunities, and having had initial discussions with senior secured creditors, the Monitor concludes that Federal has acted, and continues to act, in good faith and with due diligence and, if given sufficient time by This Honorable (sic)Court, should be able to file a Plan of Arrangement under CCAA that will have a significant chance of being successful.

15 Included among the Monitor's recommendations was the observation that the Company "... must make an application for an increase in the DIP financing level and such other matters as may relate thereto".

16 In *Cansugar Inc., Re*, 2004 NBQB 7 (N.B. Q.B.), at paras 8 and 9, Justice Glennie in respect to applications for extension of stay termination dates, after referencing ss. 11(4) and (6) of the CCAA, stated:

> In *The 2004 Annotated Bankruptcy & Insolvency Act*, Houlden & Morawetz state at page 1126:
>
> > To obtain an extension, the application must establish three preconditions:
> >
> > (a) the circumstances exist that make the order appropriate;
> >
> > (b) that the applicant has acted and continues to act in good faith; and

(c) that the applicant has acted and continues to act with due diligence.

In my opinion, the requirements of section 11(6) of the C.C.A.A. have been satisfied in this case. The continuation of the stay is supported by the overriding purpose of the C.C.A.A., which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent maneuvers for positioning among creditors in the interim.

17 In support of the application for the extension, counsel referenced para. 17 of the Affidavit of Mr. Simpson, where he states that:

An extension of the Stay of Termination Date would allow the Company to accomplish the following:

(a) continue with its recent efforts to improve sales, which are expected to yield positive results;

(b) provide for additional debtor-in-possession financing to service the Company's cash flow needs in the short and medium term until the Plan is presented to the Company's stakeholders;

(c) complete the appraisal of the assets of the Company;

(d) complete cash flow forecasts and income statement and balance sheet projections for the 2008, 2009 and 2010 years; and

(e) finalize the elements of the Plan.

18 At para 18 Mr. Simpson continues:

I believe that if the Stay Termination Date is not extended, some of the creditors of the Company will commence proceedings against the Company in relation to the enforcement of their security. Such proceedings would be highly prejudicial to the interests of the Company and would significantly impair the Company's ability to complete a successful restructuring.

19 Mr. Simpson's Affidavit, in outlining the present circumstances and the efforts of the company since the date of the initial order, also states that the Company "... is presently formulating a plan to present to its various stakeholders- including its creditors". Counsel notes the Company is arranging for an appraisal of its assets and negotiating with a lender to provide additional financing during the "near and medium term". Counsel suggests these factors demonstrate that:

> ... the Company has been proceeding diligently and in good faith since the Initial Order to assemble the elements of a plan to be presented to its stakeholders. There will be several elements to this plan and the Company requires additional time to bring these elements together. The Company's majority shareholder is motivated by the single goal of putting together a plan which will ensure the survival of the Company and, in so doing, protect, to the fullest extent possible, the interests of the stakeholders as a whole.

20 Counsel references *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.), where, at para. 28, Topolniski. J. comments on the supervisory role of the Court on such an application:

> The court's role during the stay period has been described as a supervisory one, meant to: '... *preserve the status quo and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure*.' That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.

21 The application for an extension of the Stay Termination Date was opposed on the basis that the performance by the Company did not generate confidence it had turned the corner and was likely to survive. The objecting creditors viewed the performance of the Company as further prejudicing their position in respect to the secured positions they held on the various assets of the company. They took this view, notwithstanding the Monitor's assessment that the Company, by its actions, appeared to be acting in good faith and with due diligence and moving forward towards the preparation of a Plan of Arrangement, and that the actual net cashflow of the Company was not adverse to the cashflow plan as presented on the initial Order. On the Application for the Stay Extension, counsel for the Nova Scotia Crown Corporations did not object to the extended Stay, but expressed a concern about the proposed increase in the DIP financing.

22 Considering the position of the creditors and the representations on behalf of the Company, the Stay Termination Date was extended to November 29, 2007 with the proviso that on the Application for further DIP financing the creditors could request a review and reconsideration of the extension.

Issue

23 At issue is whether the Company's application for approval of Arrangements for additional DIP financing should be approved, including the proposed payout of the Royal Bank operating loan, and whether the Court should reconsider the extension of the Stay Termination Date to November 29, 2007.

The Present Applications

Reconsidering the Extension of the Stay Termination Date

24 In respect to the Company's application to extend the Stay Termination Date, counsel on behalf of the Royal Bank had indicated the Bank's opposition both in writing and in oral submission. Counsel noted the burden of proof was on the Applicant. Counsel for the Company suggested circumstances existed that made it appropriate to extend the initial Order, in that the Applicant had acted, and continued to act in good faith and with due diligence. In this respect counsel refers to *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), where Farley, J. observed :

> The good faith and due diligence of the Applicant are not questioned.

25 On the reconsideration application, counsel for the Royal Bank acknowledged that neither the good faith nor due diligence of the Applicant were questioned, but said the Company had failed to show circumstances that made it appropriate to extend the initial Order. Counsel suggested that to cover the losses for the first seven months of 2007 the Company would have to increase its net sales by over 65%, and if one were to include all expenses and only the repayment of $1,000,000.00 per year on the total liabilities of more than $32,000,000.00, the Applicant would have to increase its net sales by 92%. Counsel noted the difficulties the Company has had in marketing its products and that in fact there has been a "decrease in sales from expected levels with a resulting decrease in accounts receivables". Counsel added that in the Monitor's second report he indicated sales were over $150,000.00 less than budget and expressed concern about the trend in sales. Counsel submitted that there is no evidence of a plan, referring again to reasons of Justice Farley in *Inducon Development Corp.*, *supra*, where he stated:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be a requisite for the germ of a plan.

26 Counsel for the Royal Bank suggested it is inappropriate to continue CCAA protection where the Company does not have, "at the least, a minimum outline of a plan".

27 In response to the Company's suggestion that the creditors "will not be materially prejudiced as the company continues to operate ....", Counsel said there is real prejudice, including:

> (a) interference with the rights of secured creditors to deal with their security and to maximize their recovery;
>
> (b) changing market conditions and the loss of potential purchasers of the assets;

(c) deterioration in the value of assets through on-going use;

(d) in the case of Royal Bank of Canada, the eroding of and loss of its security interest through the collection and use of accounts receiveable [sic] to fund the operations of the Applicant during the Stay;

(e) costs of professionals in maintaining these proceedings, which in the case of the Applicant are recognized to be as great as $300,000;

(f) professionals costs to the creditors; and

(g) delay with regard to unsecured creditors in recognizing losses and the decisions that they must make in dealing with their own creditors on a go forward basis.

28 Counsel notes as unique the reality that the Company has never been profitable, whereas in many of the cases where *CCAA* orders are granted, the Companies have been in business for some period of time and, through circumstances, have suffered adversity which may be overcome through forgiveness and restructuring of debt obligations and the injection of equity to enable them to return to a state of profitability. The Company, counsel suggests, has never generated enough sales to even meet its operating expenses. Counsel adds that no evidence has been presented to the Court to indicate such a level of sales can be reached. As a result, counsel concludes, the Company has no reasonable expectation of reaching the required level of sales.

29 Notwithstanding the forceful submission of counsel for the Royal Bank, it is clear that although net sales have declined, the Company has also incurred lower expenses and has used less of the authorized DIP financing than had been projected in the cashflow projections filed on the initial DIP financing application. Like with the Monitor, I am concerned with the failure of the Company to meet the projected sales. There are, however, some positive indications from the information filed in the Monitor's report and outlined in the Affidavit of Rhyne Simpson, Jr., President and a Director of the Applicant. I am not satisfied the Company has reached the stage of "the last gasp of a dying company" or is in its "death throes ", although clearly any Plan of Arrangement will require compromise and cooperation between the Company and its stakeholders. During the course of submissions, counsel for the Company acknowledged that if additional DIP financing was not obtained the inevitable consequence would be the demise of the Company. The effect on the Company of terminating the extension of the Termination Date, as it relates to the opportunity for the preparation and presentation of a Plan of Arrangement, is evident. The prejudice to the creditors, although evident, is perhaps not so fatal. Although not necessarily indicative of the position of the Royal Bank, should, in due course, the Company fail, nevertheless on the financial information filed by the Monitor from information obtained from the Company's officers, it would not appear that there has been a substantial deterioration in the Royal Bank's secured position to date.

30 As a consequence I am prepared to grant the Order continuing the Stay Termination Date until November 29th, 2007, provided the Company is successful on the application for additional DIP financing.

The Additional DIP Financing

31 On the Application to extend the Stay Termination Date and to set the date for filing the Plan of Arrangement, counsel for the Company acknowledged that if the Company was unsuccessful in obtaining approval of arrangements for additional DIP financing, notwithstanding the extension, the Company would not be able to continue in operation while preparing and presenting to its creditors its proposed Plan of Arrangement. On the Application for the $1,500,000.00 DIP financing, the Monitor appointed on the initial application, in his third report to the Court, indicated the purpose was to replace the previous DIP lender, pay out the Royal Bank working capital loan, and provide additional DIP funds to allow the Company to continue operations and provide time to finalize and file a Plan of Arrangement for consideration by the creditors. The Monitor reported that its weekly cashflow projections, as prepared by the Company, indicated the requirement for DIP financing for the week of November 26, 2007 would be approximately $83,000.00 in excess of the present DIP financing approval limit. The report further indicated that beyond the Stay Termination Date of November 29, 2007 the requirement for DIP financing would increase significantly in the month of December 2007.

32 With the sole exception of the Royal Bank, the secured creditors oppose the application for additional DIP financing. The Royal Bank, in view of the stipulated intention to use the additional DIP financing to pay down its working capital loan, leaving only a second loan secured on certain leases, does not oppose the additional DIP financing. Absent the provision for repayment of its working capital loan, it is clear from the representations of counsel, both on this and earlier applications, that the Royal Bank would not consent to nor support the request for additional DIP financing.

33 On the application, counsel for the Company advised that the proposed DIP lender had stipulated certain changes in the terms of the proposed financing to require the first DIP lender to advance the remainder of the amounts authorized under the initial DIP Order and that the full amount of $350,000.00 be subordinated to its charge. There were changes relating to the "borrowing base" for the loans and a requirement that the priority of the "Administration Charge", which priority was provided for in the initial Order, was not to exceed the sum of $75,000.00. During the course of the application counsel also advised that other changes had been approved by the DIP lender, including verification of the amount upon which the lender was entitled to charge fees over and above the interest provided for in the offer of financing.

34 Counsel for the applicant, referencing the comment by C. Campbell, J. in *Manderley Corp., Re*, *supra*, at para 27, acknowledged the Court must engage in "the balancing act that is the hallmark of DIP financing". He notes Justice Glennie applied this balancing in considering the approval of super-priority funds, beyond those initially requested, when, in *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 244 (N.B. Q.B.), at para 9, he declared:

> As stated by MacKenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.):
>
> > [12] ... the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.
> >
> > [28] The object of the CCAA is more than the preservation and realization of assets for the benefits of creditors, as several courts have underlined. In *Chef Ready Foods*, Giggs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed 'to monitor the business and financial affairs of the company' for the court.

35 Justice Glennie was concerned with an application for an increase in the "Administrative Charge", for which priority was granted, to the advisors retained to formulate and present the restructuring plan. He determined that failure to grant the increase would result in the applicants no longer being able to continue their attempts at restructuring. He referred to the decision of Justice Wachowich, also in respect to an administrative charge, in *Hunters Trailer & Marine Ltd.*, *supra*, denying an increase in the amount of DIP financing. He found the applicant had not met the onus under s. 11(6) (a) of the *CCAA* to establish that a stay would be appropriate in the circumstances. At para 10 he observed:

> In my view, the evidence provided by Hunters does not show that the benefits of DIP financing will clearly outweigh potential prejudice to the Objecting Creditors. While DIP financing is the only means for Hunters to continue operating, it is impossible to conclude that this short-term benefit will culminate in Hunters' financial recovery, due to a number of deficiencies in the evidence.

36 Justice Wachowich continued by identifying particular deficiencies such as the absence of appraisals, the absence of current financial information on the Company, the absence of verification of the Company's cashflow projections by the Monitor and uncertainty as to the value of one of the major assets. Counsel suggests that in the present instance these deficiencies do not exist, in that an appraisal has been obtained, the current financial information is available on

an ongoing basis, and the Monitor is being provided with continuing opportunities to verify the Company's cashflow projections and has done so. Counsel also suggests the other deficiency noted by Justice Wachowich, the uncertainty as to the value of a major asset, is not an issue in the current circumstance.

37 Counsel for the Company, suggesting that DIP financing "is merely prolonging the inevitable", cites para. 13 of *Hunters Trailer & Marine Ltd., Re*, 2000 ABQB 952 (Alta. Q.B.):

> Another consideration in assessing the benefit of DIP financing is that even if Hunters' projected cashflows are accurate, they show a continuing net deficit, suggesting that the benefit of DIP financing is merely prolonging the inevitable Even as of September 2001, following the months when the volume of Recreational Vehicle ('RV') sales is highest, Hunters expects a cash flow deficit. After September, the RV sales will slow down significantly as Hunters enters the low season, so cash flow is not likely to increase after September. Hunters can expect continuing difficulties in meeting operating expenses well into the foreseeable future. The sources of Hunters' cash flow problems, as identified by Blair Bondar, the company president, will likely continue to exist. Mr. Bondar states that RV sales have decreased as a result of, in part, increasing gas prices, a weak Canadian dollar, and increased competition. Hunters has no control over these systemic problems, and there is no evidence or reason to believe that they will be resolved in the foreseeable future. As a result, I am not convinced that the cash flow projections themselves are accurate. The Monitor does not verify the accuracy or reasonableness of the projections. Therefore, it is impossible to conclude that the DIP financing will benefit Hunters and its creditors in the long run.

38 Counsel says the current circumstance can be distinguished for a number of reasons, including that the projected cashflow statements "do not disclose uninterrupted deficits, and those deficits that exist for the most part are minimal." Counsel's submission continues:

> ... The sources of the Company's cash flow problems are not expected to continue to exist, or at least to have as severe an effect as they did during the month of October, as noted at paragraph 25 of the Additional DIP Affidavit. Finally, as noted above, the Monitor has verified the reasonableness of the Company's cash flow projections. All of the above circumstances suggest, contrary to those facing Wachowich J. in *Hunters* (2000) (*supra*), that additional DIP financing will benefit the Company and its creditors in the long run, as those funds will allow the Company to take advantage of the opportunities presented, and thereby ultimately bolster its efforts to finalize and present a viable restructuring plan. It is submitted that none of the myriad reasons by Wachowich J. for denying further DIP financing are present in the current situation.

39 Counsel suggests the additional DIP financing is a necessary cost of ensuring there can be a meaningful discussion between the stakeholders about the restructuring plan. Counsel recognizes

that any protection afforded by the CCAA, with its attended super-priority, will necessarily have a prejudicial effect on the Company's creditors. As counsel suggests, what must be examined is whether such prejudice is more than outweighed by the prejudice to the Company and its stakeholders should the requested DIP financing be denied, given that, as counsel suggests, "it would most likely have to cease operations in that instance." Counsel suggests the Affidavit filed in support of the Application "provides clear evidence of improving prospects for the Company, as well as considerable effort on its part to build a sustainable business, the ultimate goal of the *CCAA* restructuring process". Having considered the Monitor's reports and filed documents, including affidavits, together with the representations of Counsel, I am satisfied it is appropriate to continue CCAA protection to enable the Company to finalize preparation of the Plan and its presentation to the creditors. In view of the need for additional DIP financing to enable the Company to continue in operation, while the Plan is considered and voted upon by the creditors, the Company is granted approval for additional DIP financing.

Payout of the Royal Bank

40 Counsel for the Company's submission recognized the possibility that some of the secured creditors would object to the application and, in particular, to the proposed buy-out of the Royal Bank's operating line of credit. Counsel referenced the comments of Farley, J. in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), to the effect that the mere fact a significant secured creditor objects to such financing should in no way preclude the Court's ability to approve DIP financing. Counsel then references *Hunters Trailer & Marine Ltd., Re* (2001), 295 A.R. 113 (Alta. Q.B.), at para 32, where the Court stated that "if super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases."

41 Counsel's submission continues:

> ... the specific issue of the Court's ability to approve an agreement between a CCAA debtor and one or more, though less than all, of its creditors was recently reviewed by the Alberta Court of Appeal in Re. Calpine Canada Energy Ltd. 2007 ABCA 266. As C. O'Brien J.A. noted,
>
> > The power to approve such transactions during the stay is not spelled out in the CCAA. As has often been observed, the statute is skeltal. The approval power in such instances is usually said to be found either in the broad powers under section 11(4) to make orders other than on an initial application to effectuate the stay, or in the court's inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of the debtor until it can present a plan: Re Dylex Ltd., (1995), 31 C.B.R. (3d) 106 at para 8 (Ont. Gen. Div.)

In the result the Court of Appeal upheld the ruling of B.E. Romaine J. at the Court of Queen's Bench: 2007 ABQB 504 (Alta. Q.B.). As Justice Romaine set out,

> ... Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.
>
> . . . . .
>
> ... It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and with the confines of the legislation.

42 In his Affidavit filed on this application, Mr. Simpson, at para. 16, deposes:

> The Company is pursuing this repayment so as to afford the best chance of success for its restructuring plan (the 'Plan') when it is presented to creditors, and thereby the best chance of a reasonable resolution. Throughout the Company's proceedings under the CCAA to this point, the Royal Bank has been consistently vocal in its opposition to the restructuring process. It is most likely that the Royal Bank's continued participation in the process will only hinder it, necessitating the use of further time and the expenditure of additional costs in order to ultimately achieve a fair restructuring, a result that will be most beneficial to the Company, and given the limited alternatives, most beneficial to the creditors as a whole. It is for these reasons that the Company considers repayment of the operating facility to be in the best interests of all stakeholders.

43 After referencing para 16 of Mr. Simpson's Affidavit, Counsel suggests that in view of the Royal Bank's opposition to the process, and in view of the serious discussions and negotiations that will occur between the Company and its creditors:

> ... For the attainable and beneficial goal of a successful restructuring to be achieved, it is the Company's position that the Royal Bank should likely be removed from active participation through the retirement of its operating line, and that this Court is empowered to do so either under s. 11(4) of the CCAA or by way of its inherent jurisdiction.

44 On being examined, Mr. Simpson indicated, in response to the question why provide for the payout of the Royal Bank operating line, that it would "make life easier, but is not necessary". To similar effect, counsel for the Company in his oral submission acknowledged that the rejection of

the proposal to pay out the Royal Bank operating line would not appear to be fatal to the proposed restructuring. In the circumstances, it is clear that the success of the restructuring and the Plan is not dependent on permitting the repayment of this single creditor. As such, there is really no justification for favouring the Royal Bank by authorizing the repayment of its operating line from the DIP financing. The request to pay out the Royal Bank operating line is therefore denied.

Conclusion

45 The extension of the Stay to November 29, 2007 is confirmed and the Company is authorized to drawn down DIP financing in the sum of $475,00.00. The request to pay out the Royal Bank from the DIP financing is denied.

Application granted in part.

Tab 3

2014 ONSC 1856
Ontario Superior Court of Justice [Commercial List]

Growthworks Canadian Fund Ltd., Re

2014 CarswellOnt 3538, 2014 ONSC 1856, 239 A.C.W.S. (3d) 21

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Growthworks Canadian Fund Ltd., Applicant

D.M. Brown J.

Heard: February 11, 2014
Judgment: March 24, 2014
Docket: CV-13-10279-00CL

Counsel: K. McElcheran, for Applicant, Growthworks Canadian Fund Ltd.
J. Dacks, for Monitor, FTI Consulting Canada Inc.
R. Slaght, I. MacLeod, for Allen-Vanguard Corporation
T. Conway, J. Leon, for Offeree Shareholders in Ottawa Court Files Nos. 08-CV-43188 and 08-CV-43544

Subject: Contracts; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

G Ltd. granted initial order under Companies' Creditors Arrangement Act imposing stay of proceedings — A Corp. brought motion for order that stay of proceedings did not apply to continuation of two actions arising out of A Corp.'s purchase of shares in company owned in part by G Ltd. — G Ltd. brought cross-motion for order directing trial of two issues in respect of A Corp.'s claim by way of mini-trial — Disposition of motions deferred until consideration of forthcoming motion to extend stay period — A Corp.'s request in substance was to lift stay of proceedings in respect of G Ltd.'s involvement in two actions — G Ltd.'s motion was in essence seeking to establish procedure for determining A Corp.'s claim under approved claims process — G Ld. would have to apply for further extension of stay of proceedings if it wished to continue to benefit from protection of Act — On return of stay extension motion, evidence to be filed to address requirements for extension and factors relating to request to lift stay of proceedings — Factors included whether plan was likely to fail or whether G Ltd.

was no closer to proposal than at commencement of stay period — Factors included how A Corp. would be significantly prejudiced by refusal to lift stay and instead by required to prove its claim against G Ltd. in summary claims process under Act.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Allen-Vanguard Corp. v. L'Abbé (2013), 2013 ONSC 2950, 2013 CarswellOnt 6646 (Ont. S.C.J.) — referred to

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

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 7882, 61 C.B.R. (5th) 200 (Ont. S.C.J. [Commercial List]) — referred to

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

Stelco Inc., Re (2006), 210 O.A.C. 129, 2006 CarswellOnt 3050, 21 C.B.R. (5th) 157 (Ont. C.A.) — referred to

Timminco Ltd., Re (2012), 2012 ONSC 2515, 2012 CarswellOnt 5390 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 121(2) — considered

s. 135 — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 20(1)(a)(iii) — considered

MOTION for order that stay of proceedings did not apply to continuation of two actions; CROSS-MOTION for order directing mini-trial of issues.

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

I. Lift stay and contingent claim process motions in a CCAA proceeding

1 Two events form the backdrop to these competing motions. First, the October, 2007 closing of the sale of shares in Med-Eng Systems Inc. to Allen-Vanguard Corporation ultimately spawned two 2008 lawsuits up in Ottawa: one initiated by the selling shareholders (the "Offeree Shareholders") (Action No. 08-CV-43188: the "Offeree's Action"), and one by the purchaser (08-CV-43544: the "AVC Action"), collectively the "Ottawa Proceedings". Some 5.5 years after their commencement, the Ottawa Proceedings have not yet gone to trial. Indeed, they have not been set down for trial.

2 Growthworks Canadian Fund Ltd. ("Growthworks" or the "Fund") was one of the selling shareholders of Med-Eng Systems and is a party to the Ottawa Proceedings, which brings me to the second event. On October 1, 2013, Newbould J. granted an initial order in Growthworks' application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Paragraph 14 of the Initial Order contained the standard Model Order stay provision which ordered that:'

> no proceeding...in any court...shall be...continued against...the Applicant...or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

3 Against that background, the parties brought two competing motions in the *CCAA* proceeding. First, Allen-Vanguard Corporation ("AVC") moved for an order that the stay of proceedings under the Initial Order did not apply to the continuation of the Ottawa Proceedings or, alternatively, for an order that the stay of proceedings had no effect on the continuation of the Ottawa Proceedings "against or in respect of any other party named therein, except for Growthworks...on such terms as are just".

4 On its part, Growthworks moved for orders directing the trial of two issues in respect of AVC's claim against it by way of a mini-trial, making the determination of those issues binding on AVC and the Offeree Shareholders for all purposes, and restraining AVC from taking any steps in the

AVC Action that would affect Growthworks in any way. The two issues for which Growthworks seeks a determination at a mini-trial are the following:

> (i) Were the claims of AVC extinguished at law when it amalgamated with Allen-Vanguard Technologies Inc., formerly Med-Eng Systems Inc., on January 1, 2011? and,
>
> (ii) Assuming that AVC is capable of proving fraud on the part of the former management of Med-Eng, is AVC entitled under the August 3, 2007 Share Purchase Agreement to seek damages from Growthworks and the other Offeree Shareholders in excess of the "Indemnification Escrow Amount" for the alleged breaches and misrepresentations of Med-Eng?

I will refer to these two issues as the "Proposed Claims Issues".

5 At the hearing of the motion I informed counsel that I would contact RSJ Hackland in Ottawa to ascertain the state of the trial list there. I did so. On March 17, 2014, I received an email from Monitor's counsel advising that McEwen J. had extended the *CCAA* stay of proceedings until April 10, 2014 and informing me about the Sixth Report of the Monitor posted on its website. I have read that report and other court materials posted by the Monitor on the case website. On March 17, 2014, I received an email report from Master MacLeod regarding a case conference held that day in the Ottawa Proceedings, which I forwarded to counsel.

II. Growthworks Canadian Fund Ltd. and its initiation of CCAA proceedings

6 Formed in 1988, Growthworks is a labour-sponsored retail venture capital fund with an investment portfolio focused on small and medium-sized Canadian businesses. Growthworks filed for *CCAA* protection because it could not make a $20 million payment obligation to Roseway Capital S.a.r.l. due on September 30, 2013 under its May, 2010 Participation Agreement with Roseway. The Fund's debt to Roseway is its only outstanding secured debt. Growthworks informed the court that it lacked access to short-term financing and would have difficulty realizing upon assets in its portfolio because of their illiquidity consisting, as they did, of minority equity positions in private companies and restricted equity securities in a publicly traded company. Nevertheless, as of September 30, 2013, the total net asset value of the Fund was about $84.62 million, with assets of approximately $115 million.

7 Ian Ross, the Fund's Chair, in his September 30, 2013 affidavit sworn in support of the Initial Order, explained why Growthworks needed the benefit of a stay of proceedings:

> If the Fund is protected from the negative effects of a fire sale of its assets by a stay in these proceedings, and if it is able to continue to service its Venture Portfolio to preserve the value of its assets pending a restructuring, the Fund expects to be able to satisfy the obligations

> owing to Roseway in full through a combination of judicious dispositions, new debt financing and/or a merger or other transaction.
>
> The Fund has been in serious discussions with a possible merger partner and has received a letter agreement setting out a proposed transaction...A stay of proceedings would permit the Fund time to continue discussions with the merger partner, with the goal of a successful merger transaction, while at the same time enabling it to explore other options without the threat of a forced sale of its interests and related losses.
>
> . . .
>
> [T]he Fund seeks the protection of the Court pursuant to the [*CCAA*], including a stay of proceedings, to provide a safe context to restructure the Fund by refinancing, merger or judicious divestitures, and to resolve its legal and factual disputes with Roseway and the Manager, while at the same time ensuring the Fund has access to its critical documents and systems and the assistance of the Manager and GWC as needed to provide transitional services that enable the Fund to continue to operate and service its Venture Portfolio pending such a restructuring.

In his discussion about why the Fund required a stay of proceedings Ross did not refer to the Ottawa Proceedings.

8 Ross appended to his affidavit filed in support of the Initial Order the 2012 audited financial statements of the Fund (as of August 31, 2012). Those statements did not refer specifically to the Ottawa Proceedings. Note 10, dealing with "Contingencies", stated:

> In the normal course of operations, various claims and legal proceedings are initiated against the Fund. Legal proceedings are often subject to numerous uncertainties and it is not possible to predict the outcome of individual cases. In management's opinion, the Fund has made adequate provision or has adequate insurance to cover all claims and legal proceedings. Consequently, any settlements reached should not have a material effect on the Fund's net assets.

9 The stay of proceedings granted under the Initial Order ran until October 31, 2013. Growthworks moved to extend the stay period until January 15, 2014. In his October 25, 2013 affidavit in support of that extension Ross reported on the Fund's on-going efforts to finalize and execute a merger agreement with a potential merger partner by November 15, 2013. Ross stated: "[O]ne of the elements of that transaction will be the ability for the Fund to canvass the market to seek competing bids...in an attempt to identify a superior offer to any merger transaction". Ross made no mention of the Ottawa Proceedings in that affidavit.

10 In its First Report (October 8, 2013), the Monitor stated that "there are no known creditors of the Fund who have a claim of more than $1,000..." Neither the Monitor's First Report nor its Second Report (October 28) mentioned the Ottawa Proceedings.

11 On October 28, the day before the stay extension hearing, AVC delivered its motion materials seeking relief in respect of the Ottawa Proceedings. The hearing of that motion ultimately was adjourned to February 11, 2014. I will turn shortly to the subject-matter of the Ottawa Proceedings, but first it would be worthwhile to provide an overview of how the *CCAA* proceeding has unfolded since October 29, 2013, because that history provides a necessary part of the context for consideration of the competing motions.

12 First, by order made October 29, 2013, Mesbur J. extended the stay period until January 15, 2014.

13 Next, by order made November 18, 2013, Morawetz J. approved a sale and investor solicitation process ("SISP") for all of the Fund's property which used a Phase 1 Bid Deadline of December 13 and a final, Phase 2 Bid Deadline of roughly late January or early February, 2014. Running the second phase depended upon receipt of a qualified letter of intent in Phase 1 and a determination by the Fund's special committee of directors that there existed a reasonable prospect of obtaining a qualified bid.

14 In its Third Report (November 15) dealing with the SISP motion, the Monitor commented on the Ottawa Proceedings:

> The outcome of this dispute could potentially impact the timing of distributions from any proceeds realized in the SISP process to stakeholders other than Roseway. Accordingly, it is the view of the Fund and the Monitor that this limited issue should be resolved quickly.

15 By order made November 28, 2013, Mesbur J. authorized Growthworks to make distributions of collateral to Roseway under its security agreement and to repay Roseway from any proceeds of the SISP, subject to the payment of certain priority payables.

16 By order made January 9, 2014, McEwen J. extended the stay period to March 7, 2014 and approved a claims process (the "Claims Procedure Order"). According to the affidavit filed by Ross, the Fund proposed a claims process to identify and ultimately quantify and adjudicate claims against the Fund "to provide potential bidders with clarity, to the extent required for the form of transaction they may propose, regarding the claims against the Fund". In his affidavit Ross explained in some detail why the Fund thought clarity about claims was "important and likely essential for any proposed merger transaction":

> [A]ny potential merger partner (and possibly other bidders depending on the type of transaction proposed) will want to identify the claims against the Fund and either adjudicate and quantify such claims prior to closing or specifically identify the disputed and undisputed claims and address them in their bid.
>
> . . .
>
> Accordingly, identifying the disputed and undisputed claims against the Fund may be required shortly after the Phase 2 Bid Deadline, depending on the form of transaction identified and the closing date of any such transaction.
>
> . . .
>
> The timely identification of claims against the Fund is also important for the restructuring process generally and for the Fund's stakeholders, in particular, in order to permit distributions to be made (beyond distributions to Roseway Capital S.a.r.l... in relation to its agreed upon secured obligations) to the extent possible.

17 Ross identified two types of known claims against the Fund. First, Roseway and the Fund's manager were asserting contractual claims. Second, the Fund was named as defendant in two lawsuits — the AVC Action in which $650 million was claimed, and a Nova Scotia proceeding in which AGTL Shareholders claimed $28 million in damages from the Fund.

18 The approved claims process set March 6, 2014 as the claims bar date. The process required the filing of proofs of claim with the Monitor, review by the Monitor, and a dispute resolution process before the Monitor with the Monitor able to seek directions from the court concerning an appropriate process to resolve the dispute. The AVC claim received separate treatment in the Claims Procedure Order, with the order deeming AVC to have submitted a proof of claim in the amount of $650 million (the "AVC Claim"), deeming the Monitor to have disallowed the claim, and deeming AVC to have submitted a dispute notice. The order stated that the procedure for determining the AVC Claim would not be determined until after the determination of the two present motions "or by further Order of the Court".

19 The AVC and Growthworks motions were heard on February 11, 2014.

20 Finally, by order made March 6, 2014, McEwen J. extended the stay period until April 10, 2014. On that motion the Fund reported that by the SISP's final deadline it had received two proposals, but neither was a qualifying bid that would pay in full and in cash the claims of Roseway. Growthworks did not receive an offer to complete a merger transaction, only a bid to purchase a portion of the Fund's assets and one to take over management of the portfolio. In his supporting affidavit Ross deposed that the Fund was recommending that it continue to manage and realize

its assets to repay Roseway and to preserve value for other stakeholders. The Fund advised that it would discuss with Roseway "an appropriate cost reduction and asset management proposal" and it sought an extension of the stay period to allow the Fund to develop a management arrangement, identify exit opportunities to realize on the value of its investments, and assess and address tax implications for its shareholders.

21 In its Sixth Report (March 5) the Monitor provided additional details about the SISP process: it had seen overtures to 157 parties, the execution of confidentiality agreements by 55 parties, 36 of whom were deemed to be qualified bidders and who had received a confidential information memorandum, with 30 bidders gaining access to the electronic data room. In Phase 1 seven (7) letters of intent were received and six of the parties were invited to participate in Phase 2. By the Phase 2 deadline only two proposals had been received, neither of which constituted qualified bids, and neither of which was pursued. The Monitor made no suggestion that the existence of unresolved claims against the Fund, including the AVC Claim, had influenced the results of the SISP.

22 The Monitor also reported that since there was no deadline by which it was required to review and adjudicate received proofs of claim, it would:

> use its discretion to respond to and, if necessary, adjudicate disputed claims only when and if circumstances necessitate doing so. Other than in accordance with the Claims Procedure, the Monitor does not anticipate responding to or adjudicating disputed claims until such time as Roseway is paid in full and there are, or are likely to be, remaining funds for distribution to unsecured creditors of the Fund.

23 So, there sits the Fund's *CCAA* proceeding. Let me now turn to consider the dispute involving AVC.

III. The Med-Eng share sale

24 Growthworks, Schroder Venture Managers (Canada) Limited, Schroder Ventures Holding Limited, Richard L'Abbé and 1062455 Ontario Inc. (collectively the "Offeree Shareholders") owned approximately 80% of the shares of Med-Eng; Growthworks held about 12.4% of the Med-Eng shares.

25 By Share Purchase Agreement made as of August 3, 2007, the Offeree Shareholders sold their shares in Med-Eng to AVC for about $650 million. The transaction closed on September 17, 2007, with the Fund receiving about $72 million for its 12.4% shareholding. Shortly thereafter Med-Eng was amalgamated with Allen-Vanguard Holdings Ltd., which changed its name the following year to Allen-Vanguard Technologies Inc. ("AVTI"), which ultimately merged with AVC on January 1, 2011.

26 The SPA included an Escrow Agreement which provided that $40 million of the purchase price paid by AVC was to be held in escrow to indemnify AVC should certain types of claims arise (the "Indemnification Escrow Amount"). Section 4.1(a) of the Escrow Agreement stipulated that if AVC was entitled to indemnification in accordance with sections 7.02 or 7.04 of the SPA, it could draw upon the Indemnification Escrow Amount for such claims. Section 7.02 of the SPA specified the circumstances in which Med-Eng was required to indemnify AVC from claims incurred by the purchaser resulting from Med-Eng's breach of covenants, certain reps and warranties, or breach of a Teaming Agreement. Section 7.04 dealt with third party indemnification.

27 Section 7.02(2) placed a $40 million cap, or limit, on the amount for which AVC could seek indemnification under section 7.02:

> 7.02(2) Notwithstanding any of the other provisions of this Agreement, the Corporation will not be liable to any Purchaser Indemnitee in respect of:
>
> . . .
>
> (b) any inaccuracy or misrepresentation in any representation or warranty set forth in Section 3.01 or any contravention of, non-compliance with or other breach, on or before the Closing Date, of the GD Teaming Agreement:
>
> . . .
>
> (ii) in excess of the Indemnification Escrow Amount;
>
> other than, in all cases, any Claim attributable to fraud.

28 The Escrow Agreement provided that on December 21, 2008, the Indemnification Escrow Amount was to be reduced by the value of any claims made by AVC under SPA ss. 7.02 and 7.04 which remained pending as of that date, with the balance of the amount to be distributed to the Offeree Shareholders.

29 On September 10, 2008, about a year after the closing, AVC delivered a notice of claim under the SPA and Escrow Agreement alleging breaches of representations and warranties, and contending that the aggregate amount of its claims was $40 million. AVC did not break-down the dollar amount of its claim by category of alleged breach. On October 6, 2008, the Offeree Shareholders delivered a notice of objection.

30 Litigation then ensued.

IV. The Ottawa Proceedings

A. The Offeree's Action

31 First to file were the Offeree Shareholders who issued their Statement of Claim in the Offeree's Action on November 12, 2008 seeking a declaration that they were entitled on December 21, 2008 to the payment and distribution of the Indemnification Escrow Amount of $40 million. AVC and AVTI filed a statement of defence dated December 18, 2008.

B. The AVC Action

32 Instead of filing a counter-claim in the Offeree Action, AVC commenced its own action on December 18, 2008 seeking:

> Indemnification and/or damages for fraudulent and/or negligent misrepresentation and breach of contract in the amount of $40,000,000, which shall be distributed to Allen-Vanguard Corporation in accordance with the terms of the Escrow Agreement.

The Offeree Shareholders defended on February 10, 2009.

33 As originally framed, both actions put in play entitlement to the $40 million Indemnification Escrow Amount, and Growthworks was not exposed to any liability beyond foregoing its notional *pro rata* share of the funds held in escrow.

C. History of the Ottawa Proceedings: 2009 - 2013

34 On these motions the parties filed evidence describing the (slow) progress of the Ottawa Proceedings. The slow pace to date of the Ottawa Proceedings will inform, in part, my exercise of discretion under the *CCAA*, so let me highlight the key points.

35 The proceedings went into case management in September, 2009 at which time the court ordered productions to be completed by the end of that year. That did not occur. In February, 2010 Master MacLeod was continuing to order AVC to complete its productions.

36 He also ordered the parties to agree on dates in June, 2010 for the start of discoveries. That did not occur. The first discovery did not start until December, 2010. Most discoveries were completed by the summer of 2011, with a few further days of examination of AVC's representative in late 2012 and early 2013. To date the scorecard of examination dates has been: 21 days of examination of AVC's representative, 6 days of Schroder Venture, 1 day for Richard L'Abbé, 2 days for 1062455 Ontario, and one (1) day for Growthworks' representative, for a total of 31 days of examinations for discovery. As put by David Luxton, AVC's chair, in his affidavit in support of AVC's motion:

The single day of discovery of Richard Charlebois (a retired employee of Growthworks Capital Ltd.) reflects the very limited involvement and role of Growthworks in the litigation.

37 I highlight these delays in productions and discoveries not to ascribe blame to one side or the other — Master MacLeod has commented on the conduct of some parties during the course of his various decisions — but to illustrate the on-going non-compliance with judicial case management timetables which, in turn, causes me to discount representations made on these motions about the feasibility of quickly moving the Ottawa Proceedings to trial. The track record of these proceedings cannot support such optimism.

38 On September 10, 2008, AVC defended a separate, earlier action brought by Paul Timmis, a former executive with Med-Eng, in respect of an escrow fund related to his compensation. Master MacLeod in Ottawa case managed both the Ottawa Proceedings and the Timmis action.

39 By case conference endorsement made April 16, 2012, Master MacLeod ordered that a 10-week trial of the Ottawa Proceedings commence September 3, 2013, and he issued detailed and comprehensive pre-trial management directions to ensure that the parties would meet that trial date. On December 4, 2012, Master MacLeod confirmed that the Offeree Action and AVC Action would be tried together, and his order contemplated the conduct of discoveries in the Timmis proceeding in January, 2013. (The materials did not explain why, given that the Timmis Action pre-dated the commencement of the Ottawa Proceedings, AVC only got around to conducting substantive examinations of Timmis after most of the discoveries had been completed in the Ottawa Proceedings.)

40 As a result of its examination for discovery of Timmis in late December, 2012 and early January, 2013, AVC sought to make radical changes to its Statement of Claim in the AVC Action. I say radical because AVC increased its claim for damages from the $40 million Indemnification Escrow Amount to $650 million, essentially asking for the return of the purchase price under the SPA. AVC alleged that the former management of Med-Eng had known, before the closing, that one of the company's largest customers intended to test a Med-Eng product against that of a competitor, yet deliberately withheld that information in order to ensure AVC completed the share purchase transaction. Although its initial claims had included one for indemnification based on fraudulent misrepresentation, AVC moved to add a second fraudulent misrepresentation claim.

41 On February 19, 2013, Master MacLeod granted AVC leave to issue its proposed amended statement of claim. The Offeree Shareholders appealed. By reasons dated May 22, 2013, RSJ Hackland dismissed their appeal. The amended statement of claim was issued on June 11, 2013. Inexorably the September 3, 2013 trial date went out the window, as Master MacLeod directed in his May 30, 2013 endorsement. As Master MacLeod pointed out, in an understated fashion: "I see no option but to adjourn the matter if it is the intention of the parties to try all of the issues".

42 It is worth considering parts of the analysis undertaken by RSJ Hackland in his reasons dismissing the appeal. He described the significance of the proposed amendments:

> The Master was well aware of the fact that the amendment if granted would expose the Med-Eng shareholders to potential liability for the full purchase price of the business and not simply for their respective interests in the $40 million holdback fund created on closing in order to secure any possible claims for misrepresentation and breach of warranty, as provided for in an escrow agreement. *The amendment in issue is indeed potentially "game changing"*, as the Master observed. [1]

He then commented on the essential nature of the amended claim:

> On the facts of this case, it is common ground that *all of the critical representations and warranties were given by Med-Eng management on behalf of the corporation being acquired and not by the vendors, the offeree shareholders...*
>
> It would appear to be common ground in this case that *any liability on the part of the vendor shareholders could only be based on an obligation arising from the Share Purchase Agreement in the context of fraud.* As the Master accurately observed, the effect of this amendment to the pleading will be totally dependent on proving fraud... [2]

RSJ Hackland agreed with the analysis conducted by Master MacLeod:

> I respectfully agree with the Master's analysis, which is captured in paragraph 22 of his careful reasons:
>
> > Since there is no fraud asserted against any defendant offeree shareholder, the defendants contend that this provision in article 7.02 (5) is a complete defence to a claim beyond the $40 million in the escrow fund. *They may be right.* Mr. Conway puts this argument persuasively and it is consistent with the intent of the agreement to limit the exposure of the vendors. Nevertheless I am not able to say with certainty that this is the only possible interpretation of the agreement. Mr. Lederman argues that no court can condone an interpretation which would unjustly enrich the former shareholders at the expense of the plaintiff if it was a victim of fraudulent misrepresentation. *There is sufficient ambiguity in these interrelated provisions that I am unable to find only one possible interpretation of the contract. I cannot say that on the face of the agreement the plaintiff could never succeed.* [3]
>
> . . .

> Like the Master, *I cannot say that the proposed amendment was untenable in the sense that it could never succeed.* And I specifically do not accept the appellants' submission that it was an error of law for the Master to fail to articulate the specific ambiguity in the Share Purchase Agreement on which the respondent's amendment could succeed. [4]

43 It is also worth noting several of the observations made by Master MacLeod in his May 30, 2013 endorsement adjourning the trial of the Ottawa Proceedings:

> [6] ...[T]he amendment effects a fundamental change to the exposure of the offeree shareholders and it also adds issues that were either not before the court previously or which now attract enhanced significance.
>
> [7] For example, it is now pleaded that the misrepresentations of Med-Eng and the completion of the purchase based on those misrepresentations caused Allen-Vanguard to spiral into insolvency...
>
> [8] On the other hand there was some discussion at the hearing concerning the possibility of bifurcating the trial and [counsel for the Offeree Shareholders] wishes to bring a summary judgment motion. *I have ruled that it is not possible based on the wording of the SPA alone to determine that there are no circumstances that would permit recovery of more than $40 million from the offeree shareholders. RSJ Hackland has come to the same conclusion. In his decision he notes that it may be necessary to consider parol evidence.* Of course the admission of parol evidence requires that the court first find that the exceptions to the "parol evidence rule" apply and the nature and extent of the evidence that will then be admitted is itself open to argument. I am included to agree with the submissions of Mr. Slaght that it is quite unlikely that a judge will make that kind of decision on a summary judgment motion.
>
> [9] *On the other hand it might be possible to try that question. The question is whether or not the SPA caps the liability of the offeree shareholders even if there was fraud providing it is not fraud on the part of those shareholders. Counsel could agree to try that issue.*
>
> [10] There are other threshold questions. Allen Vanguard must prove that there were misrepresentations. They must prove that the misrepresentations were relied upon and that it was reasonable to do so in the face of Allen-Vanguard's own due diligence. In order to have any possibility of a claim above the amount in the escrow fund they must prove that the misrepresentations were fraudulent. Losing on any one of those issues is either fatal or would confine the remedy to the escrow fund.

44 Luxton, in his October 28, 2013 affidavit, clarified the nature of AVC's amended claim against Growthworks:

> Allen-Vanguard has not alleged that Growthworks made any fraudulent misrepresentations, but rather that it is liable (along with the other Offeree Shareholders) *under the terms of the Share Purchase Agreement* for the fraudulent misrepresentations committed by [Med-Eng] and its former management...
>
> (emphasis added)

45 The Offeree Shareholders filed an Amended Statement of Defence (June 28, 2013) and AVC delivered a Reply (August 22, 2013). Five weeks later Growthworks obtained the *CCAA* Initial Order.

46 On October 2, 2013, Master MacLeod set December 10 as the date for a privilege motion in the Ottawa Proceedings and advised that RSJ Hackland would hear a summary judgment motion by the Offeree Shareholders. Evidently the existence of the Initial Order was not disclosed at that case conference, and it appears that none of the counsel present at that case conference knew about it.

47 In subsequent correspondence with Master MacLeod, counsel for the Offeree Shareholders, including Growthworks, took the position that his clients would not be delivering any motion materials in light of the stay of proceedings in the Initial Order until issues with Growthworks were sorted out in the *CCAA* proceeding.

48 Paul Echenberg, the President of a firm advising the Offeree Shareholders in the Ottawa Proceedings, expressed the view in his November 24, 2013 affidavit that those proceedings were "nowhere ready for trial", an assessment that I accept as reasonably accurate. The evidence filed on these motions disclosed that production, discovery, refusals and privilege issues remain outstanding in the Ottawa Proceedings. That state of affairs was confirmed by the information provided by Master MacLeod in his March 17, 2014 email report to me, which I circulated to counsel:

> Ordinarily if such a trial is then adjourned because the timetable goes awry we will not provide a new fixed date until at least one of the parties is in a position to set the matter down. We have not reached that point. In fact there are motions contemplated which would make that unlikely and our current timetable has been put on hold due to the allegation in Toronto that everything about the Ottawa action is currently stayed.
>
> All that said, it remains theoretically possible in the view of the regional manager to accommodate a 10 week trial in 2014 particularly, if as I suspect, another long civil trial currently on the list has settled in whole or in part. *I would be very surprised however if either counsel for the offeree shareholders or counsel for Allen-Vanguard is prepared (or able) to set the Ottawa action down and certify that they are ready for trial at this time.* It

would be possible to accommodate a trial of 10 weeks in early 2015 or in the fall of that year. (emphasis added)

My inquiries to RSJ Hackland about the availability of trial dates yielded similar information. Realistically, then, the Ottawa Proceedings will not proceed to trial until sometime in 2015 and continued litigation skirmishing between the parties might well push that date back further if past history is any indicator of future conduct.

V. Positions of the parties

49 Growthworks, supported by the other Offeree Shareholders, seeks the holding of a "mini-trial" on the two Proposed Claims Issues in the context of its *CCAA* proceeding. It offered some details on how such a "mini-trial" would operate. Growthworks would file affidavit evidence on the process of negotiating the SPA. Specifically, it would tender evidence from:

(i) Robert Chapman, a lawyer at McCarthy Tetrault involved in negotiating and drafting the SPA;

(ii) Cécile Ducharme, an advisor to Schroder Venture Managers (Canada) Ltd. who provided instructions to Chapman on behalf of some Offeree Shareholders during the negotations; and,

(iii) Paul Echenberg, who would discuss some of the positions taken by Offeree Shareholders during the SPA negotiations. [5]

In addition, the Fund would file documentary evidence on two issues: (i) the history of AVC's amalgamations; and, (ii) evidence that during its own 2009 - 2010 *CCAA* proceeding AVC did not suggest that it had a potential claim of $650 million against the Offeree Shareholders;

50 On its part, AVC opposed the continuation of the stay as against the Ottawa Proceedings arguing that that litigation would not affect the Fund's ability to continue its business or to restructure and that Growthworks would have "very limited involvement in the litigation with" AVC. That said, AVC did not back down from its pleaded position that the Fund's maximum exposure in the AVC Action would be joint and several liability for the full $650 million damage claim.

51 As to the "mini-trial" proposed by Growthworks, AVC argued that it (i) would not finally dispose of the dispute between the parties, (ii) would result in additional litigation costs, perhaps in the range of hundreds of thousands of dollars, (iii) could not be completed within one week, but would require three weeks, (iv) would require an examination of AVC's allegations of fraud in order to interpret provisions of the SPA, albeit AVC couched this part of its argument in terms of the "factual matrix" necessary for contractual interpretation, and (v) would unfairly restrict AVC's rights of appeal. AVC did not describe the type of evidence it might call on a "mini-trial", which I

must confess was quite unhelpful given that the issue was four-square on the table in these motions. Instead, AVC proposed that the most efficient way of proceeding was to bifurcate the liability and damages issues in the Ottawa Proceedings and "secure an early trial date for the liability trial". Luxton deposed:

> The bottom line is that this case is ready to proceed to trial on all of the liability issues and there is no practical reason why it should not proceed.

I do not accept Luxton's assessment; it is belied by the evidence of the history of the Ottawa Proceedings to date.

VI. Analysis

A. What the parties really are seeking on their motions

A.1 AVC really is asking to lift the stay of proceedings in respect of the Ottawa Proceedings

52 AVC submitted that it was not moving to lift the *CCAA* stay of proceedings, but "rather to confirm that the stay imposed by the Initial Order will not be extended to apply to the Allen-Vanguard Proceedings". The simple response to that submission is that the Initial Order, by its terms, applied to the Ottawa Proceedings, at least to the extent of the Fund's involvement in them. Paragraph 14 of the Initial Order could not be clearer:

> [A]ny and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

Growthworks is a party to the Offeree Action and the AVC Action. Both are proceedings "in respect of the Applicant or affecting the Business or the Property". Both therefore are stayed in respect of the participation of Growthworks in those proceedings. Master MacLeod accurately summarized the effect of the stay of proceedings in paragraphs 3 through 5 of his November 12, 2013 endorsement.

53 Although the stay does not extend, by its terms, to a person other than Growthworks — and no request was made to extend the Initial Order to non-parties — the practical consequence of the pleading of joint and several liability underpinning AVC's claim against Growthworks is that it is most difficult for the Ottawa Proceedings to move forward without the Fund's involvement, and AVC is not abandoning its joint and several liability claim against the Fund.

54 Accordingly, although AVC sought, as its primary relief, an order that the stay of proceedings in the Initial Order did not apply to the continuation of the Ottawa Proceedings, I regard its request as one, in substance, to lift the stay of proceedings in respect of Growthworks' involvement in the Ottawa Proceedings — i.e. the Fund's potential liability in those proceedings.

55 AVC sought, by way of alternative relief, an order confirming that the stay had no effect on the Ottawa Proceedings in respect of any party other than Growthworks. The Initial Order did not purport to stay any proceeding except one "against or in respect of" the Fund or "affecting the Business or the Property". So, AVC's articulation of its alternative relief does nothing more than describe the actual scope of the stay in the Initial Order. Yet, based on the evidence filed by AVC, it really is not seeking the alternative relief because it wants to proceed to a full, traditional, expensive, conventional trial against all Offeree Shareholders, including Growthworks, and it wants any finding of liability and damages to bind Growthworks. As a practical matter, then, one must treat AVC's motion as a request to lift the stay of proceedings against Growthworks.

A.2 Growthworks really is asking for a two-stage claims process under the CCAA

56 Looked at one from one perspective, one could regard the Fund's request for a "mini-trial" within the *CCAA* proceeding as nothing more than an attempt to re-schedule its proposed summary judgment motion in the Ottawa Proceedings from a judge in Ottawa to a judge on the Toronto Region Commercial List. Indeed, Echenberg contended that the proposed mini-trial would deal with the same issues as those in the intended summary judgment motion which RSJ Hackland is scheduled to hear. If the request was based on nothing more than that, it would be a misuse of the *CCAA* process. But, the record disclosed that more was at play on the Fund's motion.

57 Growthworks did secure protection from this Court under the *CCAA* and this Court has made a Claims Procedure Order. That order referred the issue of the process to determine the AVC Claim to a later consideration by this Court. Section 20(1)(a)(iii) of the *CCAA* provides that the amount represented by a claim of any unsecured creditor is the amount "proof of which might be made under the *Bankruptcy and Insolvency Act*". Section 121(2) of the *BIA* requires that the determination whether any contingent claim is a provable claim and the valuation of such a claim must be made in accordance with *BIA* s. 135. Section 135(1.1) of the *BIA* requires a trustee to determine whether any contingent claim is a provable claim and, if it is, to value it. *CCAA* s. 20(1)(a)(iii) modifies that process because it states that if the amount of a provable contingent claim "is not admitted by the company, the amount is to be determined by the court on *summary application* by the company or by the creditor".

58 Against that statutory background, I regard the motion brought by Growthworks, in essence, as one seeking to establish, under paragraph 46 of the Claims Procedure Order, a procedure for determining the Allen-Vanguard Claim.[6] Growthworks, in effect, proposes a two-stage claims process. First, the court would determine the two Proposed Claims Issues. Then, second...well, the second stage is difficult to discern from the Fund's materials; it is somewhat shrouded in the mists of the future. But, as I understand the position of Growthworks, if a court determines the two Proposed Claims Issues, the parties would have a clearer picture of what issues remained in

play regarding the Allen-Vanguard Claim against Growthworks and, presumably, in light of that clearer picture, could make a concrete proposal about the second step in the claims procedure.

59 In any event, in light of the deeming provisions in paragraphs 42 and 43 of the Claims Procedure Order, there now exists in the Growthworks *CCAA* proceeding a contingent claim advanced by AVC which "is not admitted by the company", so *CCAA* s. 20(1)(a)(iii) directs the court to determine the amount "on summary application". What that summary application process should look like is at the heart of the Fund's motion.

B. What to do

60 A stay of proceedings is a key element of any *CCAA* process. It affects the positions of a company's secured and unsecured creditors, as well as others who could potentially jeopardize the success of the restructuring plan and the continuance of the company. A stay affords a company breathing room in which to re-organize its affairs and compromise its obligations, or to divest assets to enable the business to operate under different ownership while generating funds to pay obligations or, in complex situations, to effect an orderly liquidation of the business enterprise. As stated by Farley J. in *Lehndorff General Partner Ltd., Re*:

> 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....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. [7]

A party seeking to lift a stay bears a heavy onus of persuading a court to do so. [8]

61 Although many of AVC's submissions focused on opposing any extension of the stay of proceedings, the reality of this *CCAA* proceeding is that a stay remains in place until April 10, 2014. Growthworks will have to apply to this Court before that time for a further extension if it wishes to continue to benefit from the protection of the *CCAA*. Given the proximity of the forthcoming stay extension motion, I see no point in considering, at this point of time, whether to lift the stay of proceedings in respect of the Fund's involvement in the Ottawa Proceedings.

62 Instead, I am seizing myself of the motion to extend the stay of proceedings which expires on April 10, 2014, and I will put over to that date my formal consideration of the two competing motions now before me.

63 On the return of that stay extension motion, not only must Growthworks file evidence to address the requirements for an extension specified in *CCAA* s. 11.02(3), but both it and AVC must also adduce evidence to address certain factors identified by this Court in *Canwest Global Communications Corp., Re*[9] relating to a request to lift a stay of proceedings.

64 The first factor involves whether the plan is likely to fail or, whether after the passage of almost half a year, the *CCAA* applicant, Growthworks, is no closer to a proposal than at the commencement of the stay period. The ground has shifted significantly since the argument of these motions on February 11, 2014. The SISP did not succeed. No merger transaction materialized. Growthworks remains in discussions with its only secured creditor, Roseway, about where to go from here. And although the Monitor ran a claims process, in its Sixth Report it stated that it did not "anticipate responding to or adjudicating disputed claims until such time as Roseway is paid in full and there are, or are likely to be, remaining funds for distribution to unsecured creditors of the Fund". In light of that state of affairs, Growthworks must explain certain matters to the Court:'

> (i) Why does a need continue to exist to develop a *CCAA* claims process for the AVC Claim? Ross, in his November 20, 2013 affidavit, cast the need for some determination of the extent of AVC's Claim in terms of establishing the necessary groundwork for a possible merger transaction. In his view, if a court were to determine the issue of whether the Offeree Shareholders' exposure under the SPA was limited to the $40 million Indemnification Escrow Amount and AVC's Claim in excess of that amount was dismissed, then "the continuation of the [AVC] Action would not impede the completion of a merger transaction or the completion of any other restructuring transaction that may arise from the implementation of the SISP". In light of the failure of the SISP process, why does a continued, practical need exist for the determination of the AVC Claim in a summary fashion? Why is the determination of the AVC Claim in the *CCAA* proceeding needed to maintain the integrity of the *CCAA* process in light of the failure of the SISP?[10]
>
> (ii) What tangible benefits, including dollars and cents benefits, would a *CCAA* claims process offer to the restructuring objectives underlying this particular *CCAA* proceeding at this point of time?
>
> (iii) How would Growthworks' proposed two-stage claims process, involving an initial determination of the two Proposed Claims Issues, advance the ultimate determination of AVC's Claim and offer tangible dollars and cents benefits to the company in its efforts to re-organize?
>
> (iv) On the latter point, the record was devoid of any evidence about the amount of litigation costs Growthworks has incurred and is incurring in the Ottawa Proceedings. That kind of evidence is most relevant to crafting a proportionate *CCAA* summary claims process.

> Proportionality is a hard-nosed, concrete concept, not an airy, theoretical one. Stripped down to its basics, proportionality requires parties to demonstrate, with respect to any proposed litigation step, what litigation bang will be achieved for the expenditure of each litigation buck. Translated to the present motions:
>
> (a) What has been the Fund's legal fees "burn rate" to date in the Ottawa Proceedings?
>
> (b) How much does the Fund expect it will have to spend on the proposed one-week "mini-trial"?
>
> (c) What litigation cost savings would result from proceeding with a "mini-trial" on the two Proposed Claims Issues in contrast to lifting the stay of proceedings and allowing the Ottawa Proceedings to continue in the fashion which they have to date?
>
> In other words, what would be the effect on the Fund's restructuring process of spending money on legal fees in a mini-trial type of summary claims process as compared to the Fund's litigation costs of continued Ottawa Proceedings?

I would appreciate the Monitor weighing in on these issues, especially given that it did not file a report on the initial return of the motions.

65 The second factor is how AVC, an unsecured contingent creditor, would be significantly prejudiced by a refusal to lift the stay and instead be required to prove its claim against Growthworks in a summary *CCAA* claims process. As mentioned, the record disclosed little prospect of the Ottawa Proceedings going to trial until sometime in 2015, if then. A 10-week trial of all issues sometime in 2015 hardly qualifies as a "summary application" of a claim for purposes of *CCAA* s. 20(1)(a)(iii). In my lexicon "summary application" equates to "quick and lean".[11] A one-week hearing using primarily written evidence, with only limited, focused *viva voce* cross-examination, strikes me not only as "quick and lean", but also reasonable should I direct a Stage One claims hearing on the two Proposed Claims Issues, a decision I have not yet made. In its motion materials AVC did not address the type of evidence it would file at such a summary hearing. That was not helpful. I expect it to do so on the return of the extension motion.

66 Indeed, I expect a higher degree of co-operation amongst counsel in these *CCAA* proceedings than that revealed in the record of the Ottawa Proceedings. On the return of the stay motion I expect all parties to have co-operated in order to place before me a clear picture of what a *motionless*, one-week hearing of the Proposed Claims Issues would look like, employing the assumption that (i) written openings would be filed in advance, (ii) all evidence-in-chief would be adduced by way of affidavit, (iii) *viva voce* cross-examinations would not exceed 3.5 days of hearing time, and (iv) closing arguments would be a combination of one day of oral arguments supplemented by written submissions. If, in the light of the additional evidence which I have directed be filed, I conclude

that such a summary *CCAA* claims hearing should be held, I would be inclined to schedule it for early July, with reasons to be released just after Labour Day.

VII. Summary

67 By way of summary, in light of the material events which have transpired in the Fund's *CCAA* proceeding since the hearing of these motions last month and in light of the material evidentiary gaps in the records filed on those motions, I defer my disposition of those motions until consideration of the forthcoming motion to extend the stay period, of which I seize myself, and I direct the filing of the additional evidence described above.

68 I would conclude by observing that there is a certain "tail wagging the dog" aspect to these motions, if such a metaphor remains culturally acceptable. Growthworks was a 12.5% shareholder in Med-Eng, with its litigation exposure initially capped at foregoing 12.5% of $40 million, or $5 million. For business reasons which were accepted by this Court, Growthworks secured protection under the *CCAA*, a reality which all parties must accept. As I mused at the hearing, it is always open to the parties to find some way that the tail stops wagging the dog.

Order accordingly.

Footnotes

1 2013 ONSC 2950 (Ont. S.C.J.), para. 2 (emphasis added).

2 *Ibid.*, paras. 4 and 5 (emphasis added).

3 *Ibid.*, para. 7 (emphasis added).

4 *Ibid.*, para. 9 (emphasis added).

5 I make no comment on the admissibility of any part of that proposed evidence.

6 I see no merit in the bifurcation argument advanced by AVC in paras. 66 *et seq.* of its February 5, 2014 Factum. The Fund's proposal for a "mini-trial" was made in the context of developing a summary claims process in a *CCAA* proceeding. If AVC does not wish to proceed with a claim against Growthworks in the *CCAA* proceeding, it can so advise the Monitor and be bound by the consequences of a final order in the *CCAA* proceeding. If it does wish to continue with a claim against Growthworks, then it must face the reality that a *CCAA* proceeding is underway.

7 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), p. 32.

8 *Timminco Ltd., Re*, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]), para. 16.

9 2009 CarswellOnt 7882 (Ont. S.C.J. [Commercial List]), para. 33.

10 *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.), para. 25.

11 As to the summary nature of *CCAA* claims procedures, see *Stelco Inc., Re* [2006 CarswellOnt 3050 (Ont. C.A.)], 2006 CanLII 16526, para. 9.

Tab 4

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 * 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
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

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.

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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*

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s. 142

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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.

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s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

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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 lendor 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 discre tionary 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 Petroleums 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.) .
>
> . . . . .

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 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 5

Indexed as:

Pacific National Lease Holding Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. c-36
AND IN THE MATTER OF the Company Act, R.S.B.C. 1979, c. 59
AND IN THE MATTER OF Pacific National Lease Holding Corporation, Pacific National Financial Corporation, Pacific National Leasing Corporation, Pacific National Vehicle Leasing Corporation, Southborough Holdings Ltd. and PAC NAT Equities Corporation, petitioners

[1992] B.C.J. No. 3070

Vancouver Registry No. A922870

British Columbia Supreme Court
Vancouver, British Columbia

Brenner J.

Oral judgment: August 17, 1992.

(53 paras.)

Counsel:

M.L. Palleson, for the petitioner.
G.E.H. Cadman, Q.C. appeared.
W.E.J. Skelly, for Sun Life Trust Co.
R.A. Attisha, for National Bank of Canada.
L.A. Lothian, for National Trust.
P.A. Cote, for Investors.
P.C. Lee, for Mutual Life.
M.J. Peerson, for Barclays Bank.

1 **BRENNER J.** (orally):-- On this application, the Petitioners move for sanction by the Court of a trust fund established on an interim basis on July 23, 1992, for the purpose of satisfying the liabilities of the directors and officers of the Petitioners, Pacific National Financial Corporation for payment of wages under the Employment Standards Act, S.B.C. 1980, c. 10, and associated remittances pursuant to the Income Tax Act, S.C. 1970, c. 63 as amended, the Canada Pension Plan Act, R.S.C. 1985 c. C-8 as amended, and the Unemployment Insurance Act, R.S.C. 1985 c. V-1 as amended.

2 On July 23, the Petitioners were granted an ex parte order under the Companies' Creditors Arrangement Act, under which the trust fund in the amount of $1.5 million dollars was established. On July 31, 1992, this order was amended by consent of the Petitioners and the principal creditors, so that the issue of the establishment, maintenance and application of this trust fund could be argued on the merits.

3 The earlier orders also prohibited the Petitioners from making any payments to any of its employees payable as a result of employment termination until the Court could hear full argument on the merits of these payments.

4 Since the sole purpose of the trust fund is to indemnify the directors and officers for personal liability arising out of employment termination, the issue that the Court must decide is whether the Petitioner, Pacific National Financial Corporation is entitled to make statutory payments to its employees while the company and its affiliates are under C.C.A.A. order. If I find that these payments are appropriate, and prior to any such payments being made I must decide whether any of the monies currently held by the Petitioners and which are owed to creditors, described as funders are impressed with a trust in favour of those funders. This trust issue is schedule for argument on August 19th and 20th, 1992.

5 I turn now to outline the nature of the Petitioners business.

6 The Petitioners are group of interrelated companies that operate a leasing business under the financial and corporate administration of Pacific National Financial Corporation (PNFC) the parent company. The origin of the company dates back to 1977. All employees of the Petitioners or the "PNL Group", some 230 at the time of the C.C.A.A. order, are hired and paid by PNFC. PNFC is listed on the Toronto Stock Exchange and its common and Class "A" non-voting shares are held by the principal of the PNL Group, Arnold Jeffrey and his family through their holding company, Southborough Holdings Ltd., and by other shareholders directly.

7 Pacific National Equities Corporation (PAC NAT) is a holding company of which the shares are held ninety percent by PNFC and ten percent by the Jeffrey family. PAC NAT holds certain non-financial assets of the group, such as Zippy Printing Enterprises Ltd., and real estate in

Vancouver and Whistler, British Columbia.

8 PNFC's financial or lease assets in Canada are held by three wholly owned subsidiaries, Pacific National Leasing Corporation (PNLC), Pacific National Lease Holding Corporation (PNLHC), and Pacific National Vehicle Leasing Corporation (PNVLC). Historically, PNLC was the primary generator of lease business for the group. In the normal cause, PNLC entered into leases with third party lessees for office and computer equipment. These leases were then packaged into portfolios. Title to the equipment and the lease revenue stream was assigned to third party financial institutions called "Funders", with the ongoing administration of the leases including collection of monthly lease payments remaining with PNLC.

9 Profit from these transactions was generated by the increase in the sale price PNLC charged to the funders over and above the amount paid to the equipment vendor and above the amount paid to the equipment vendor and the residual revenues paid to PNLC as a result of the lease customer keeping the leased equipment beyond the initial term of the lease. These latter revenues are referred to as "residuals".

10 PNLHC was used to hold equipment leases that were written by PNLC but which the PN Group chose not to sell to third party funders. These leases were held by PNLHC and financing was provided to PNLC by the National Bank through an operating facility for the purpose of purchasing equipment and issuing new leases. This credit line was $17 million dollars and was fully utilized on July 23, 1992.

11 PNVLC was incorporated in 1986 to operate a lease business relating to motor vehicles only. In 1991 the PN Group decided to stop writing new vehicle leases and at that time sold its existing lease portfolio to several third party funders who hold these lease receivables. As with the PNLC funder leases, PNVLC continued to administer these motor vehicle leases on behalf of the funders by providing all accounting, invoice and collection services with regard to this portfolio. The residual equity remained the property of the PN Group in the same manner as the funder leases held by PNLC.

12 According to the first report of the Monitor, dated August 13, 1992, as at July 31, there were a total of 27 funders on whose behalf the PN Group was managing lease portfolios. The total of the net present values of the future payments owed to the funders as of that date is approximately $246 million dollars. By reason of the C.C.A.A. stay, approximately $8.3 million dollars in payments due in July have not been paid. The payments due in August total some $11 million dollars. Those funds are currently being used by the company for operating purposes under C.C.A.A. stay order.

13 In addition, the PN Group had outstanding bank loans of $17 million dollars to the National Bank as described above, together with approximately $6 million dollars and $8.8 million dollars owed to Royal Trust and Canada Trust respectively.

14 I turn now to the financial difficulties of the Group.

15 The Petitioners lease portfolios grew rapidly starting in 1990. In 1991 the PN Group lease portfolio had a gross value of approximately $224 million dollars. By June, 1992, this figure had increased to an estimated $362 million dollars. To finance this expansion PNLC negotiated the $17 million National Bank credit line which was guaranteed by the operating company, PNFC, and secured by a floating charge which recognized that leases could be sold to funders in the ordinary course with the residual interest remaining in PNLC. Additional financing was provided for PNLHC, again guaranteed by PNFC, by way of trust indenture and the sale of secured notes to Royal Trust and Canada Trust.

16 As stated above, these lenders are currently owed some $15 million dollars. Further working capital was generated through the issuance of subordinated convertible debentures of which there were some $42 million dollars outstanding at June 30, 1992.

17 Notwithstanding this additional financing, the PN Group experienced a strain on its financial resources due to increased costs and expenses. In addition, the recession of 1991-92 caused an increase in lease bad debts, which the Group was also required to bear, at least on an interim basis of some thirty to ninety days, depending on the terms of its agreements with its funders, as well as for a longer period potentially in respect of its keeper leases.

18 In May, 1992, following the departure of the in-cumbent Chief Financial Officer, Terry Thompson, a new Chief Financial Officer, Larry Papernick, was appointed by PNFC who commenced a detailed review of the PN Group's operation. While reviewing the budgeted cash flows, Larry Papernick noticed some irregularities regarding the debt and security position of the PN Group and investigated further with the accounting staff of PNFC.

19 By July 3, 1992, it was determined that leases entered into by PNLC to the value of approximately $10 million dollars had first been pledged to its secured creditor National Bank, then assigned to PNLHC and pledged again as security to Royal Trust and Canada Trustco.

20 It also appears from the Monitor's Report that funds normally allocated for payments due under funder leases were used for the purpose of equipment resulting in unfunded or keeper leases.

21 The PN Group advised their larger creditors of this discovery and because of the Petitioners' view that negotiations to conclude a standstill agreement with its creditors were not proceeding satisfactorily, they sought and obtained the ex parte order on July 23, 1992. On that application, the PN Group's stated intention to the Court was to try to maintain the confidence of its creditors to allow it to carry on its lease purchase business or alternatively to find new sources of financing. In the event that both of these failed the Petitioners disclosed that they would have to take very rigid steps to reduce overhead, at least on a temporary basis while crafting a reorganization plan to be filed with the Court by September 30, 1992.

22 The issue on this application is whether or not the C.C.A.A. order should be varied to allow severance payments to terminated employees.

23 On this application the Petitioners say that the ability to make severance payments is essential to continued operation of the company during the stay period. The Petitioners say that if employees learn that they will not receive severance pay then will refuse to continue working and the efforts of the Petitioners to continue in business long enough to prepare and present a reorganization plan will fail. This argument is also advanced in support of the creation of a trust fund to indemnify the directors and officers. These arguments are supported by the unsecured creditors who join in urging this Court to exercise its judicial discretion to allow severance payments or director and officer indemnification to allow the Petitioners to continue in business so that it can reorganize, which would be to the undoubted benefit of the unsecured creditors, shareholders and employees of the Petitioners.

24 On the other hand, the funders and/or secured creditors take the position that to allow severance payments or to continue the trust fund for that purpose would devalue the creditors security and alter the status quo in place at the time of the making of the C.C.A.A. order. They say that if severance is not paid, the terminated employees will simply join the creditor ranks of the Petitioners and that by virtue of the indemnity provisions of the Articles of the PIE Group companies, the directors and officers will also become creditors should they come under a personal liability in respect of outstanding employee termination payments.

25 In earlier judgments in this case I have reviewed the purpose of the C.C.A.A. See: Meridian Developments Inc. v. Toronto Dominion Bank et al, (1984) 52 C.B.R. p. 109; Northland Properties Limited et al v. Excelsior Life Insurance Company of Canada et al, (1989) 73 C.B.R. p. 195; Chef Ready Foods Ltd. et al v. Hongkong Bank of Canada, (1990) 51 B.C.L.R. (2d) 84, and In the Matter of Alberta-Pacific Terminals Ltd. et al, [1991] B.C.J. No. 1065.

26 From these decisions I derive the following principles:

(1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.

(2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.

(3) During the stay period the Act is intended to prevent maneuvers for positioning amongst the creditors of the company.

(4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve,

preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The Court has a broad discretion to apply these principles to the facts of a particular case.

27 As an example I refer to this Court's earlier decision to authorize a U.S. $400,000.00 payment not in the usual course of business to the Petitioners U.S. subsidiary, which was done on the basis that it would enhance the value of those assets. I would also refer to the decision of MacDonald J. in the Westar case, [1992] B.C.J. No. 1816, B.C.S.C., to create a preferential charge on the assets of Westar so that the company's suppliers would continue to supply the company during the stay period.

28 The specific issue of severance pay was dealt with by MacDonald, J. of this Court in Westar Mining Ltd. (Reasons for Judgment August 11, 1992). In Westar the company applied for approval to indemnify its officers and directors under S. 152 of The Company Act, (not sought in this case) and for the creation of a charge on its eight percent joint venture interest in the Greenhills Mine to secure that indemnity. The Bank of Montreal also applied to prevent any employee severance payments.

29 In Westar the Court approved the S. 152 indemnity but refused to sanction the charge to secure it and declared that the stay order prohibited the payment of severance pay.

30 The facts in Westar were that one of its mines, the Balmer Mine, had been closed some two weeks prior to the stay order and those employees placed on temporary layoff. The C.C.A.A. order was granted to allow Westar to continue its plan of reorganization. It was assumed that the only costs related to Balmer that would be incurred would be to preserve the asset in its non-operating condition. The application by Westar was brought in the face of the impending expiry of the thirteen week period under S. 44 of the Employment Standards Act, under which a temporary layoff is deemed to be a termination. This would have rendered Westar liable for statutory severance payments with the attendant personal exposure to the directors and officers if these payments were not made.

31 MacDonald, J. refused Westar's application to make severance payments by using the credit line continued by the Bank of Montreal under the stay order since that was not contemplated by either the bank or the Court at the time the order was granted. The Court held on page three, that:

> "...neither the Bank nor this Court contemplated that the credit available through the operating account would be used for any purpose except the continued operation of Greenhills and the preparation of a plan of reorganization."

The Court then turned to Westar's application to create security for the severance payments. In refusing the application, MacDonald, J. said this at page five:

> "To do so (that is to create the security) would effectively change the priorities for substantial amounts of severance pay, a significant alteration of the status quo which existed at the time the petition was issued. Such claims otherwise would, for the most part, be unsecured, ordinary claims on the bankruptcy of the Company. They would rank after secured and preferred claims, and pro rata with the unsecured claims of trade creditors, most notably the Bank, which is the largest unsecured creditor by far. Should a plan of reorganization fail, severance and termination pay claims will be secured largely at the expense of the Bank."

32 The Court rejected the order sought because of the change in the status quo that such an order would create. In the Court's words at page six, the effect of the order sought:

> "...would be to secure a group of contingent claims which existed at the date of the petition and which would otherwise be unsecured."

33 In this case, counsel for the Petitioners sought to distinguish Westar on the basis that the layoffs at Balmer proceeded the stay order and that the amount of Westar's severance liability was of such a magnitude that the Court was not prepared to authorize severance payments or severance security because of the impact on the status quo amongst the parties.

34 I reject the Petitioner's argument that Westar can be distinguished on the first proposed ground, that is on the basis that the Blamer Mines layoff proceeded the stay order. The liability for severance at the time the stay orders were granted in both Westar and this case was anticipatory. In Westar, liability arose thirteen weeks after the May 1st layoff date, when by statute the temporary layoff would be deemed a termination. In this case the liability will arise either thirteen weeks after PNFL employees are placed on temporary layoff and not recalled or earlier, if they are permanently terminated. In either case, it does not affect the principle which I take from MacDonald, J.'s decision that severance payments or an indemnity for same will not be permitted while a company is under C.C.A.A. protection where such payments would substantially affect the status quo between creditors of the company whose funds are being used for the continued operation of the company during the stay period, and the employees, including directors and officers who may well become creditors because of changes in the company's operations during the stay period.

35 The Petitioners' second basis for distinguishing Westar has more validity. I do not understand Mr. Justice MacDonald to be saying in Westar, that in no case should a Court ever authorize severance payments when a company is operating under C.C.A.A. In Westar the Court considered both the nature and the amount of the proposed severance payments and concluded on the basis of both factors that such payments would be an unacceptable alteration of the status quo. I believe the Court's consideration was both qualitative and quantitative, which given the broad discretion that the Court has in its supervisory role under C.C.A.A. is both necessary and appropriate.

36 In this case PNLC has significantly reduced its work force following the July 23rd order. Its work force has been reduced from approximately 230 to sixty. It is not known what the company's

ultimate liability will be for statutory severance pay but it will be significant based on the company's application to maintain a $1.5 million dollar trust fund.

37 There is no evidence before me that the Petitioners operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. There is equally no evidence that the directors and officers will resign and become unavailable to assist the company in its reorganization plans. The Chief Financial Officer, Mr. Papernick, who appears to have resigned, is continuing to work actively for the Petitioners in a consulting-capacity. Even if there was such evidence, the fact of the matter is that when the C.C.A.A. order was granted on July 23, 1992, the employees were employed by a company that was insolvent, by its own admittion, and the directors and officers had the corresponding liability or potential liability that attaches to corporate officers of insolvent companies.

38 In my view, to allow the Petitioners to make statutory severance payments or to authorize a fund out of the company's operating revenues for that purpose would be an unacceptable alteration of the status quo in effect when the order was granted.

39 Accordingly, the application by the Petitioners to make statutory severance payments or to maintain a trust fund to indemnify its directors and officers for same is dismissed.

40 In view of this decision I do not have to deal with the trust issue concerning the funds held by the Petit-ioners which will come before the Court for argument later this week.

41 The Petitioners asked that if the Court rejected its application to pay severance that it order a stay of any proceedings that may be brought by employees to compel the payments. I would make this order under S. 11(c) of the Act, subject, of course, to the right of any affected party to apply to the Court to have the order set aside or varied.

42 MR. SKELLY: If I could just speak to one point of clarification - this is the same question that was asked in Westar after Mr. Justice MacDonald made his order, and that question is whether the order would relate as well to vacation pay for those employees who have been terminated - in Westar, Mr. Justice MacDonald indicated that it would - it doesn't apply to vacation pay for those employees who are being kept on and who would have vacation pay entitlement, but for those employees who were terminated in the Westar case, I believe his decision was that no payments of that type would be made - or could be made as well.

43 THE COURT:-- Alright. I will follow the Westar decision on that point as well, Mr. Skelly.

44 MR. SKELLY: Thank you, My Lord.

45 THE COURT:-- Alright. We will adjourn to Wednesday.

46 MR. SKELLY: My Lord, I notice that there was one application brought on, I think it was on

Friday by the Bank of Tokyo which had set its matter down for Tuesday and I --

47 THE COURT:-- I haven't seen it.

48 MR. SKELLY: And you are not available, I don't believe on Tuesday --

49 THE COURT:-- No, I'm not.

50 MR. SKELLY: Then I will call counsel.

51 THE COURT:-- I would be grateful if you would call counsel and perhaps we could deal with it on Wednesday morning, at which time I guess we will have to do some scheduling, apparently.

52 MR. SKELLY: Yes.

53 THE COURT:-- Alright, we will adjourn.

qp/s/qlrds/qlbrl

Indexed as:

Pacific National Lease Holding Corp. (Re)

IN THE MATTER OF the Companies Creditors Arrangement Act R.S.C. 1985, C. C-36, and IN THE MATTER OF the Company Act, R.S.B.C. 1979, C. 59, and IN THE MATTER OF the Pacific National Lease Holding Corporation, Pacific National Financial Corporation, Pacific National Leasing Corp., Pacific National Vehicle Leasing Corp., Southborough Holdings Inc. and Pac Nat Equities Corp.

[1992] B.C.J. No. 2309

19 B.C.A.C. 134

72 B.C.L.R. (2d) 368

15 C.B.R. (3d) 265

36 A.C.W.S. (3d) 389

Vancouver Registry: CA016047

British Columbia Court of Appeal
(In Chambers)

MacFarlane J.A.

Heard: October 22, 1992
Judgment: October 28, 1992

(13 pp.)

Debtor and creditor -- Insolvency -- Creditors arrangements -- Stay of all proceedings against insolvent debtor -- Statutory severance payments -- Creation of trust fund to secure making of severance payments.

Application for leave to appeal an order made under the Companies' Creditors Arrangement Act.

The petitioner applied to establish a trust fund to indemnify its directors and officers with respect to statutory severance payments. In the alternative, it wished to use available funds to meet those payments. There was no evidence that the operations of the petitioner would be impaired if the payments were not made. Its applications were refused. It argued that the trial judge erred in ordering the debtor not to abide by relevant mandatory statutory provisions.

HELD: Application dismissed. The Act preserved the status quo and protected all creditors while a re-organization was being attempted. The steps sought to be taken by the petitioner in this case would amount to an unacceptable alteration of that status quo. In exercising its powers under this statute, the court sought to serve creditors which included shareholders and employees. If in doing so, a decision of the court conflicted with provincial legislation, the pursuit of the purposes of the Act must prevail.

STATUTES, REGULATIONS AND RULES CITED:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. Employment Standards Act, S.B.C. 1979, c. 10.

Counsel for the Petitioners (Appellants): H.C. Ritchie Clark and D.D. Nugent.
Counsel for Sun Life Trust Co.: W.E.J. Skelly.
Counsel for the Mutual Life Assurance Co. of Canada: M.P. Carroll.
Counsel for the Commcorp Financial Services Inc. and National Trust: W.C. Kaplan.
National Bank of Canada: H.W. Veenstra.

MACFARLANE J.A. (refusing leave to appeal):-- This is an application for leave to appeal an order of Mr. Justice Brenner pronounced the 17th day of August, 1992, pursuant to the Companies Creditors Arrangement Act R.S.C. 1985, c. C-36 (the "C.C.A.A.").

1 The petitioners had become insolvent prior to July 22, 1992, when they made an application under the C.C.A.A. for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the C.C.A.A..

2 Mr. Justice Brenner made an ex parte order on July 23, 1992. The effect of the order was to stay all proceedings against the petitioners.

3 The order permitted the petitioners to maintain in trust a sum not exceeding $1,500,000.00, to satisfy the potential liabilities of directors and officers of the petitioner companies with respect to the payment of wages under provincial legislation and remittances in connection therewith pursuant to federal legislation. The petitioners had previously established that fund to protect its directors and

officers from potential personal liability under the Employment Standards Act S.B.C. 1979, c. 10 for failing to make the payments mandated by that statute.

4 On July 31, 1992, Mr. Justice Brenner heard a number of applications brought by various interested parties seeking to set aside the ex parte stay order or, if the stay order was not set aside, to vary its terms. Mr. Justice Brenner amended and replaced the stay order with an order on terms proposed by the parties. That order has not yet been entered and has gone through a number of amendments. The order provided that on an interim basis, pending the hearing and determination of an application on the merits of the issues, the petitioners should not, without further order of the Court, make any payment to any employee or employees of the petitioners in respect of unpaid wages, severance, termination, lay-off, vacation pay or other benefits arising or otherwise payable as a result of the termination of an employee or employees.

5 The merits were argued in August and on August 17 Mr. Justice Brenner delivered the reasons for judgment and made the order which is the subject of this application.

6 The operative portions of the order read as follows:

> THIS COURT ORDERS that the application by the Petitioners to make statutory severance payments or to maintain a trust fund to indemnify its directors and officers with respect to statutory severance payments is dismissed;
>
> THIS COURT FURTHER ORDERS that any proceedings that may be brought by employees of the Petitioners to compel payment of statutory severance payments are stayed.

7 The appeal concerns the order made under the first paragraph of the order, not against the stay granted in the second paragraph.

8 The reasons for judgment of Mr. Justice Brenner are careful and detailed and are contained in 17 pages. The reasons contain a review of the essential facts, including the circumstances which gave rise to the financial difficulties of the petitioners, the competing arguments with respect to the need and the ability to make severance payments to employees whose services had been terminated, a consideration of the purposes of the C.C.A.A., the principle derived from the judgment of Mr. Justice Macdonald in Westar Mining Ltd., unreported reasons for judgment, August 11, 1992 (which dealt with a similar issue), and the application of that principle to the facts of this case.

9 The essential facts are that the petitioners are a group of inter-related companies that have carried on a leasing business for some years. Just prior to the commencement of the C.C.A.A. proceedings the petitioners had over $246,000,000.00 in lease portfolios under administration. They had a workforce of approximately 230 which, by the time Mr. Justice Brenner gave his reasons on

August 17, 1992, had been reduced to 60. The provisions of the Employment Standards Act had not, by August 17, 1992, given rise to any actual liability with respect to the severance of the employees who had left the company. The potential liability was not known but the company said that it could be as much as $1,500,000.

10 Mr. Skelly informed me, upon the hearing of the application, that the latest information indicated a liability for severance pay in an amount of approximately $850,000.00 and for vacation pay in an amount of approximately $150,000.00 for a total potential liability of $1,000,000.00. I understand from counsel that once the Funders are repaid there may be as much as $61,000,000.00 available to meet other liabilities.

11 Mr. Clark, for the petitioners, was not prepared to concede that the potential liability had been reduced, and submits that a trust fund of about $1,300,000.00 is required.

12 The petitioners were in the business of purchasing equipment or vehicles and entering into leases with third parties. The initial purchases were financed with security on such leases granted in favour of National Bank of Canada and by way of a trust deed in favour of Canada Trust Company and Royal Trust Company. Additional financial advances were obtained from the other respondents, who are 27 other financial institutions, referred to in the material as the "Funders". The Funders advanced monies and took security, in part by way of assignment of the lease revenue stream. The monies advanced by the Funders exceeded the amount which the petitioners had paid for the equipment or vehicles. The difference, together with other revenue, was the petitioners' profit.

13 The arrangements with the Funders provided that the petitioners would continue the ongoing administration of the leases, including collection of the monthly lease payments, which would be forwarded to the Funders.

14 The petitioners got into financial difficulties, which they revealed to the Funders. The Funders and the petitioners were not able to agree to a plan to deal with this crisis. As a result the petitioners sought protection under the C.C.A.A..

15 The appellants seek an order of this Court setting aside the order made August 17, 1992, and authorizing the petitioners to comply with the statutes governing their operations (and in particular the Employment Standards Act) and permitting them to continue to maintain the Trust Funds with respect to possible claims against directors and officers arising out of the various federal and provincial statutes.

[para16] The petitioners assert that Mr. Justice Brenner erred:-

1. In ordering the appellants not to abide by the relevant mandatory statutory provisions including those under the Employment Standards

Act, requiring the appellants to pay all the statutory payments in full, and thereby order the appellants to breach a mandatory statute regarding statutory payments.

2. In ruling that he had the inherent jurisdiction under the Companies Creditors Arrangement Act or otherwise to order the appellants to breach the Employment Standards Act regarding statutory payments and thereby order the petitioners to commit offences under such statute.
3. In failing to properly apply the relevant legal principles applicable to a decision regarding the payment of statutory payments including such payments to former employees.
4. In ruling that the payment of unpaid wages and holiday and vacation pay accruing to the appellants' employees was to be treated in the same manner as severance pay.
5. In suspending the provisions of the July 23, 1992 order authorizing the Trust Fund.
6. In failing to provide any protection to the directors and officers of the appellants by way of the Trust Fund when ordering the petitioners to breach the Employment Standards Act, thereby exposing the directors and officers of the petitioners to liabilities under that statute and to prosecution for offences thereunder.

17 I understand the submission of the respondents to be that the real issue is whether a judge, acting pursuant to the powers given by the C.C.A.A., may make an order the purpose of which is to hold all creditors at bay pending an attempted reorganization of the affairs of a company, and which is intended to prevent a creditor obtaining a preference which it would not have if the attempted re-organization fails, and bankruptcy occurs.

18 I think that the answer is given in Chef Ready Foods Ltd. v. Hong Kong Bank of Canada (1990), B.C.L.R. (2d) 84. In that case Mr. Justice Gibbs, at pp. 88-89, said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the Court is called upon to play a kind of supervisory role to preserve the status quo to move the process along to the

> point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the Court under Section 11.

19 In the same case, at p. 92, Mr. Justice Gibbs considered whether security given under the Bank Act gave preference to the Bank over other creditors, despite the provisions of the C.C.A.A.. He said:

> It is apparent from these excerpts and from the wording of the statute, that in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's right in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

20 Mr. Justice Brenner, after reviewing that and other authorities, said:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court. (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees. (3) During the stay period the Act is intended to prevent maneuvers (sic) for positioning amongst the creditors of the company. (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process

> along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions. (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

Counsel do not suggest that statement of principles is incorrect.

21 Mr. Justice Brenner then referred to the judgment of Mr. Justice Macdonald in Westar, and concluded:

> In my view, to allow the Petitioners to make statutory severance payments or to authorize a fund out of the company's operating revenues for that purpose would be an unacceptable alteration of the status quo in effect when the order was granted.

22 He said earlier that he did not understand Mr. Justice Macdonald to be saying in Westar that in no case should a court ever authorize severance payments when a company is operating under the C.C.A.A.

23 He held, in effect, that it was a proper exercise of the discretion given to a judge under the C.C.A.A. to order that no preference be given to any creditor while a reorganization was being attempted under the C.C.A.A.

24 It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the C.C.A.A. is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a re-organization is being attempted.

25 So far as the directors and officers are concerned, they were personally liable for potential claims under the Employment Standards Act before July 22. Nothing has changed. No authority has been cited to show that the directors and officers have a preferred right over other potential creditors.

26 This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in Chef Ready Foods Ltd. Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

27 In this case Mr. Justice Brenner reviewed the evidence and made certain findings of fact. He concluded that it would be an unacceptable alteration of the status quo for the petitioners to make statutory severance payments or to authorize a fund out of the companies' operating revenues for that purpose. He also found that there was no evidence before him that the petitioners' operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. He said that there was no evidence that the directors and officers will resign and be unavailable to assist the company in its organization plans.

28 Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

29 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.

30 Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

31 In all the circumstances I would refuse leave to appeal.

MACFARLANE J.A.

Tab 6

Case Name:

Redekop Properties Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Company Act, R.S.B.C. 1966, c. 62
AND IN THE MATTER OF Redekop Properties Inc., 535401 B.C. Ltd., and 546837 B.C. Ltd.

[2001] B.C.J. No. 3090

2001 BCSC 1892

40 C.B.R. (5th) 62

2001 CarswellBC 3560

165 A.C.W.S. (3d) 598

Docket: L003294

Registry: Vancouver

British Columbia Supreme Court

J.S. Sigurdson J.
(In Chambers)

Oral judgment: March 2, 2001.

(80 paras.)

Counsel:

Counsel for Co-creditors: D.K. Fitzpatrick.

Counsel for SunLife: G. Thompson.

Counsel for VanCity: J.Z. Ahmad.

Counsel for the Monitor: M.I.A. Buttery.

Counsel for Global: M.L. Palleson.

Reasons for Judgment

1 **J.S. SIGURDSON J.** (orally):-- The question before me is whether *ex parte* orders that I made granting a stay of proceedings under the ***Companies' Creditors Arrangement Act*** (the ***C.C.A.A.***) should continue. These orders were made in favour of three companies: 535401 B.C. Ltd. (the "numbered Middlegate company"); Redekop Properties Inc. ("R.P.I."); and 546837 B.C. Ltd. That last company, as to 80 percent, and R.P.I., as to 20 percent, are the shareholders in the numbered Middlegate company.

2 R.P.I. is a real estate developer. It, alone or with other companies, owns the shares in seven companies that are involved in property development and the sale of commercial real estate. R.P.I. is a public company trading on the Toronto Stock Exchange.

History of the Applications

3 I will start with a brief history of the orders that I have made. On December 4, 2000, I made an *ex parte* order on the application of the numbered Middlegate company for a stay of proceedings under the ***C.C.A.A.*** That company was the sole petitioner and the owner of the Middlegate Mall in Burnaby, which was subject to three mortgages totalling almost $20 million. Foreclosure proceedings had been threatened by the secured lenders, VanCity and SunLife. A comeback hearing, as it is called, was set to consider whether to continue that order after notice was set. After some adjournments, the application to continue the original order made under the ***C.C.A.A.*** was set for early February 2001.

4 Counsel for the numbered Middlegate company apparently came to the realization, while evaluating Middlegate's assets and considering the elements of a possible plan of arrangement, that the Middlegate numbered company could not be considered in isolation. There were, it appears, 103 condominiums in 4 developments held by separate numbered companies owned in whole or in part by R.P.I. By the time of the original comeback hearing, the first and second debenture holders of R.P.I. had given notice of default.

5 An application was made by R.P.I. and 546837 B.C. Ltd. for an order that a stay of proceedings against them also be granted. Although I heard some argument on whether to set aside or continue the original order, I made an order to join those two new petitioners and extend ***C.C.A.A.*** protection to them as well. I considered that order to be essentially *ex parte*.

6 After I made an initial order joining those parties, I adjourned until February 22 the applications whether to continue the ***C.C.A.A.*** protection in connection with the three companies. Therefore, the applications before me on February 22 and 23 were the comeback hearings to determine whether any or all of the orders should continue after hearing submissions from interested parties.

Background

7 Under the initial *ex parte* order and the subsequent *ex parte* orders, Ernst & Young Inc. were appointed monitor of the three companies. They have reported to me on the circumstances affecting all three companies. Through different entities, Peter Redekop has been a successful real estate developer in British Columbia. R.P.I. is the parent of seven companies in the Redekop Group, which are involved in the rental and sale of commercial real estate. The Middlegate numbered company is owned 20 percent by the petitioner, R.P.I., and 80 percent by the other petitioner, a numbered company beneficially owned by Peter Redekop.

8 The Middlegate numbered company initially bought the property known as the Middlegate Shopping Centre in 1997, intending to redevelop the site. The company, the monitor points out, has of late been under-capitalized and is unable to complete its rezoning phase. However, it operates the shopping centre as landlord through an agent. The largest creditors of the Middlegate numbered company total $19.9 million and hold mortgage security. VanCity has a first and third mortgage and Sun Life has a second mortgage. Sun Life made its demand under the mortgage on November 22, 2000, shortly before the first order. R.P.I. has provided financial support to the numbered Middlegate company to help it meet the interest payments on the first, second, and third mortgages to the extent that the revenue from the shopping centre was deficient.

9 I will briefly list the other companies in the Redekop Group and the name of the project that they are involved in: 549884 B.C. Ltd. (Blenheim Terrace); 543714 B.C. Ltd. (the Madison); 529901 B.C. Ltd. (the Citadel); 406751 B.C. Ltd. (Abbotsford Lane); Redekop Properties Hampton Place 3 Inc. (the Regency).

10 Historically, R.P.I. has provided support to its subsidiaries on an ongoing basis amounting to about $64,000 per month. Recently and presently the majority of the funding has been going to Middlegate to meet its interest payments. As of January 31, 2001, R.P.I.'s cash balance was about $1.5 million, the main source being an advance on the equity that R.P.I. expects to receive in the Regency project.

11 I will describe R.P.I.'s projects through its subsidiaries. The Madison is a 63-unit residential building with 10 strata retail units. It is located on 4th Avenue in Vancouver and it presently holds the remaining 34 residential suites and eight retail suites. It is managed by a management company and R.P.I. supplements its debt service by about $6,500 each month.

12 The Regency is a joint venture project in which R.P.I. has a 50 percent interest. It is a 123-unit condominium development near UBC with 19 units sold or subject to sale. R.P.I. does not receive

any proceeds from the sales as its equity in each unit is being used to pay off a loan totalling about $1.5 million from its joint venture partner.

13 The Middlegate Shopping Centre's only source of funding is the cash flow from the shopping centre. R.P.I. has been required to provide funding, estimated to average $44,000, to supplement the shopping centre's income to enable it to meet expenses and debt servicing.

14 Blenheim Terrace is a multi-level, mixed use building on Blenheim and 4th Avenue. The 50 residential units were sold en bloc and of the eight commercial units, two are occupied by R.P.I., one is leased, and the remaining five are unoccupied. R.P.I. has been providing funding to the extent of $3,000 for ongoing costs and $9,500 for debt service. The company expects an offer to lease on one unit and an offer for sale on three units shortly.

15 The Citadel is a 33-unit apartment building in Surrey that is managed by Colliers. All suites are rented. R.P.I. supplements the cash on a monthly basis to the extent of about $1,000 for expenses and debt servicing.

16 According to the Monitor, equity beyond the secured debt is assured in the Regency, Citadel, and Madison projects, but not in the Middlegate or Blenheim. In recent years, R.P.I.'s practice has been to incorporate a new entity for each project. Newer projects have yet to be launched.

17 There are first and second debenture holders charging the assets of R.P.I. The first debenture holders are owed about $5.7 million and the second debenture holders are owed $10.25 million. They charge the various assets of R.P.I.

The Plan

18 In the first Monitor's report of January 30, 2001, it described a plan. At that stage it was to salvage the numbered Middlegate company as that was the only company then seeking protection of the ***C.C.A.A.*** The plan was described as two strategies being pursued concurrently: (1) source a joint venture partner to finance the project and proceed with the development of the shopping centre, and; (2) sell the shopping centre in its present state.

19 By the recent hearing last week concerning the joinder of R.P.I. and the other numbered company, the plan had changed somewhat. It was described in the petitioner's brief that the company would sell each project in the ordinary course of business and pay its registered lenders in accordance with their priority. It would continue to seek a joint venture partner for Middlegate and develop same unless a sale was available. The company's "germ of a plan", as Mr. Fitzpatrick referred to it, was that it would pay a million dollars immediately upon approval of the plan, the company would appraise the value of its property on a liquidation basis and the company would issue shares. The shares would be the only prospect of recovery for the unsecured creditors and the common shareholders of R.P.I. would get nothing if there were no plan.

20 The petitioner sought an order to extend the stay under the ***C.C.A.A.*** until April 30, 2001, to put a plan in place and to obtain the requisite approval of the creditors.

21 The Monitor reported on the prospects of the plan by indicating that the primary stakeholders, in presenting any plan of arrangement to the creditors of R.P.I., would be the holders of the first and second debentures. Both sets of debentures hold security against all the assets of R.P.I. The Monitor's view was that if there was no recovery on the inter-company loan made by R.P.I. to Middlegate, in the liquidation proceeding the amounts owing to the first series debentures would not be paid in full. This inter-company loan from R.P.I. to the numbered Middlegate company appears to be in the range of $6.3 million.

22 There are a limited number of unsecured creditors. The Monitor thought that it appeared that there would only be partial recovery available to certain of the secured creditors and no recovery available to the unsecured creditors unless there was a successful restructuring plan. For the plan to be successful, the Monitor thought the proposal would have to be more attractive than any other alternative. This plan would also need to appeal to the unsecured creditors who, on the information currently available to the Monitor, would appear to be facing the prospect of receiving no recovery on their outstanding debt.

23 The Monitor's view was that for a real estate company such as R.P.I. to execute a successful restructuring, the following elements would need to be available and attractive to these creditors most affected by a plan:

1. some level of currency to provide short term appeal to induce creditors to await the longer term benefits being offered in the plan;
2. prospective new profitable projects;
3. sufficient capital available to undertake and execute those projects.

24 The Monitor pointed out that as a public company R.P.I. has available the currency of its publicly traded shares to offer to creditors as an inducement and a substantial cash position (it appears over one million or more) available as an initial payment available to secured creditors, but not subordinated creditors.

25 The Monitor also pointed out that the petitioners have provided information as to the projects it advises are presently under consideration and the basis on which such projects could be financed, even in light of R.P.I.'s present substantial shortage of capital. At the last hearing, when the stay of proceedings was extended to the additional companies, I suggested that the adjournment date for this hearing gave the company an opportunity to provide more cogent evidence about their plan.

26 The Monitor points out that the petitioners are contemplating a planned structure that would provide recovery to secured creditors of at least what would be realized in the event of the liquidation of the group. The Monitor gave this rather guarded assessment in his second written report as follows:

> Based on the foregoing, it would appear that R.P.I. has available to it the necessary elements with which to construct a plan of arrangement for presentation to its creditors. **What is not in evidence at this time, however, is whether each of these elements is available in sufficient amounts that such a plan of arrangement would be acceptable to creditors. Until the petitioners have quantified the financial benefits of those future projects, and secured commitments with respect to financing of those projects, the future appeal of R.P.I. as a going concern will be uncertain. As the going concern future of R.P.I. will have a significant bearing on the value of any shares which it may propose to offer creditors in partial settlement of present liabilities, that element of the petitioner's plan also cannot be quantified at this time.**
>
> [emphasis added]

27 In the concluding paragraph of the Monitor's report, it reported as follows:

> In the view of the Monitor, it is feasible that the petitioner can present to the creditors an appropriate plan of arrangement to effect a general restructuring of their affairs. The group has significant cash available, and the prospect of offering shares in the public company, to provide an early incentive for support by creditors. The group also has prospects for new development projects which would be a basis for continuing operations. **However, not all of the elements which, in the Monitor's view, would be required to formulate such a plan are known with sufficient certainty at this time to be able to assess whether that plan would be acceptable to the affected creditors.**
>
> [emphasis added]

Positions on the application

28 Mr. Fitzpatrick, counsel for the petitioner companies, sought the continuation of the protection of the ***C.C.A.A.*** until April 30, 2001, in order to put a plan together that might be successful. Mr. Thompson, representing SunLife, and Ms. Ahmad, representing VanCity, opposed the stay, or alternatively took the position that the Middlegate property should be excluded from the ***C.C.A.A.*** proceeding and I should exercise my discretion to allow them to proceed with their planned foreclosure proceedings.

29 Mr. Palleson appeared for the first debenture holders and opposed the order sought. No one appeared for the second debenture holders, although they were duly served, nor did anyone appear for any unsecured creditors. Mr. Knowles appeared for the Monitor.

30 The relevant sections of the ***C.C.A.A.*** are as follows. Section 11(3) provides:

> (3) 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.

31 Section 11(4) provides that on an application that is not an initial application, a court may make the following types of orders 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.

32 The *Act* in s. 11(6) sets out the burden of proof on the applicant companies, and it provides:

> (6) 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.

33 To summarize, the statute makes it clear that the burden on the applicant on this application is to satisfy the court that the circumstances exist that make such an order appropriate and the applicant has acted and is acting in good faith and with due diligence.

34 The appropriateness of the order, I think, has to be considered with the purpose of the statute

in mind, and I turn to some authority in that respect.

35 In the leading case of ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 51 B.C.L.R. (2d) 84 (C.A.) at 88, the Court said:

> The purpose of the ***C.C.A.A.*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company or a loan company. When a company has recourse to the ***C.C.A.A.*** the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

36 In dealing with the broad policy objectives of the ***Act***, the Court said at p. 91:

Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the ***C.C.A.A.***, to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

37 In ***Re Pacific National Lease Holding Corp.***, [1992] B.C.J. No. 3070 (Q.L.); (17 August 1992), Vancouver Registry, A922870 (BCSC), the principles to consider on an application under the ***Act*** were set out by Mr. Justice Brenner (as he then was) in a case where leave to appeal was denied by the Court of Appeal. He said the following:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
> (3) During the stay period the Act is intended to prevent maneuvers for positioning amongst the creditors of the company.
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point

where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The Court has a broad discretion to apply these principles to the facts of a particular case.

38 I pause here to observe that I do not think that the burden is on the creditors opposing this order to prove that it is doomed to fail. The position the creditors are taking is not framed that way. They are simply opposing the order that is sought by the petitioners to continue the ***C.C.A.A.*** protection after notice to them. This is an application to confirm or continue an original *ex parte* order. I think the burden rests on the company to show not only that they have acted with due diligence and in good faith, but that the continued protection of the ***Act*** is appropriate. This is not a case like ***Re Philip's Manufacturing Ltd.*** (1992), 67 B.C.L.R. (2d) 84 (C.A.), which involved an application to set aside an order of another Chambers judge on the ground that the plan was doomed to fail.

39 On an application of this sort, I must weigh the interests of all affected parties. I pause also to note this observation in ***Re Lehndorff General Partner Ltd.*** (1993), 17 C.B.R. (3d) 24 (Ont.Gen.Div. [Commercial List]), at 32:

> 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* the creditors ...

40 The applicants argue that an application of those considerations requires a stay to determine whether, prior to April 30, a plan, which they now concede is just a germ of a plan, can be formulated that would be approved and in the interest of everyone. The respondents, i.e., the secured creditors including the first debenture holders, all argue that there is really no plan, simply a hope and a prayer, and that there is no broad constituency or wide public interest or ongoing business that requires the support of a court order staying proceedings under the ***C.C.A.A.***

The Middlegate Numbered Company

41 I will deal first with the Middlegate property. The secured creditors on this property argued that the order should not be extended or that this property at least should be exempted from the ***C.C.A.A.*** proceedings so that they can pursue their foreclosure remedy.

42 The Middlegate property was bought by the Middlegate numbered company in 1997. The shopping centre is 120,000 square feet and was built in 1960 on a 9.78 acre site. It is on Kingsway in South Burnaby. The owner's intention was to redevelop the site. Since 1997, the company has operated the shopping centre as landlord using the services of Colliers Macaulay Nicolls to collect rents and manage the property. As the owner is undercapitalized, other than initial planning and the completion of rezoning applications, the redevelopment of the site has not commenced. It requires $2.27 million to proceed with the rezoning. The registered charges against the Middlegate property are: VanCity's first mortgage of $10 million; Sun Life's mortgage of $7.915 million; and VanCity's third mortgage of $2 million, for a total of $19.915 million, together with some accumulated interest over the last while. Under the order I made on February 5, 2001, those parties as of that date are not receiving interest payments.

43 The Middlegate numbered company's arguments are as follows. They say that given time the Middlegate numbered company would find a joint venture partner or a sale sufficient to generate proceeds to pay out the mortgages and to pay money on its indebtedness to R.P.I. for the benefit of all R.P.I.'s creditors. They say that they have pursued the application for a stay in connection with Middlegate in good faith and with due diligence. The Middlegate numbered company submits there is sufficient equity in the property to satisfy the three mortgages and more.

44 The parties have filed appraisal evidence. R.P.I. filed an appraisal dated October 2000 from Duncan Elliott Appraisers, which stated the estimated current market value under the present zoning was $22,100,000 and under the proposed rezoning was $28,480,000. On December 15, 2000, Sun Life obtained an appraisal from CB Richard Ellis indicating the market value as of December 15, 2000, was $14,200,000.

45 The petitioner argues that the intended purpose of the Ellis appraisal, as I will refer to it, was a court ordered sale, whereas the Elliott appraisal was to estimate the proper value as a development site. The petitioner argues that the Ellis appraisal indicates the market has bottomed out. In a letter of January 31, 2001, Mr. Elliott indicated that the fundamental difference between the value conclusions was based on terms of reference, his being based on a conventional definition of market value, and that at this time, "we are still clearly in the lower part of the cycle although there are some signs that some sectors of the real estate market are or have been already recovered significantly." He says that at this time, in order to meet the criteria of a willing seller and buyer, a longer than normal market exposure period is required to effect a sale. He suggests that the Ellis appraisal appears to have been severely discounted to effect a forced sale. Mr. Elliott says in his opinion, "the conclusions drawn in the CB Richard Ellis valuation and expressed in a letter provided to us suggests that the value conclusions drawn are based on two different concepts of market value and that there are additional fundamental disagreements about methodology in arriving at a final conclusion." In a more recent letter, Mr. Elliott challenges the approach that was taken by Ellis and says that it significantly understates the value, ignores its substantial size, and in essence double discounts the land by using low unit rates on land sales he challenges and then again discounting to reflect a long holding period.

46 Mr. Luke Zych, a real estate investment officer for SunLife Assurance, deposed that based on his extensive experience in real estate and in reviewing the Ellis appraisal, he did not believe that the development of the shopping centre was feasible at this time and will not be for at least two years. He notes Ellis indicates as follows:

> Under current conditions it is highly questionable that redevelopment is viable. Housing starts in British Columbia have dropped from 25,210 in 1997 to 16,309 in 1999 reflecting the current recessionary housing environment. Specifically in Burnaby housing starts dropped from 1,058 units to 483 units during the same period. This situation has occurred due to the slow economic growth currently being experienced by British Columbia. As well, condominium sales have been negatively impacted by leaking condo' concerns ... current new projects have experiencing slow absorption. Typical sale rates arranging from 1 to 4 units per month per project and averaging around 2-1/2 units per month. (See Addendum "K"). The proposed redevelopment of the subject will provide approximately 750 to 800 residential units. At a sales rate of 2.5 units per month this represents an absorption period of approximately 300 months or 25 years. This goes well beyond any reasonable time horizon for development. Accordingly, new development is not considered to be viable at this time.
>
> With this in mind, the highest and best use for the property is considered to be a holding property until marketing conditions improve substantially in order to allow for redevelopment to occur. Once the market is healthy, it is expected that the whole project will take four to five years to absorb.

47 Mr. Zych contends that, taking into account poor market conditions, declining land values, and declining rental income, the Ellis appraisal of $14,200,000 is more appropriate. He said neither appraisal provides any discount for sale, but given the ***C.C.A.A.*** proceedings, he thinks that a discount is appropriate. He indicates that the Ellis appraisal indicates a 25-year absorption rate for development, whereas in a healthy market a four to five-year absorption period is expected. He also notes that the Ellis appraisal indicates that net income from the mall has declined from $1,025,000 in 1997 to around $800,000 today, and this downward trend, he says, will probably continue. He indicates that the Ellis appraisal notes that land sales have been extremely slow, and sales have indicated the substantial drop in value. He also indicates that the Middlegate Mall was sold in a very heated market compared to the current market. In his opinion, an appraised value less than the original price of $20,700,000 is necessary.

48 He contends it is difficult to accept the current value of the property as higher than it was in 1997 and that the sale of the property would not yield sufficient funds to satisfy VanCity's third mortgage.

49 I think that the view that Mr. Zych takes of the market is supported by the material attached to the affidavit of David Bowra. Mr. Bowra is a chartered accountant with PricewaterhouseCoopers and was retained to assist the debenture holders, the first debenture holders, in their consideration of the proposed restructuring plan and in reviewing the equity positions in the various properties. He deposed that he reviewed the appraisals with Neil Acheson, a vice-president of his firm who has extensive experience in Canadian real estate development. He says that, given the market may be three to five years away from absorbing a project of this size and type and both appraisers agree that it would take two to three years to successfully redevelop the Middlegate property, even if one accepts the scenario of recovery of $20 million, it will be insufficient to pay the amounts under the mortgages of $19.9 million, costs, interest and incidental charges such as property taxes. Given that, he says, there will be insufficient money to pay out the mortgagees.

50 The applicants argue in connection with the Middlegate property and the plan generally that it is too early to tell if the plan will come to fruition or not.

51 The secured creditors opposed the stay of the Middlegate foreclosure for a number of reasons. They say that it is not appropriate to continue the order. They say that there is no reasonable chance of success given that it is unlikely there will be sufficient monies to satisfy the secured creditors and delay to them in commencing and continuing foreclosure proceedings is to their prejudice. They argue that the authorities require that the interests of all creditors be considered and, given the circumstances surrounding the valuation, it is not reasonable to conclude there is any reasonable prospect of a plan succeeding, at least not one concerning Middlegate.

52 I find, on the evidence, the Middlegate numbered company's position to be somewhat illogical. They argued that the value of the shopping centre is greater or equal to what they paid for it in 1997 when, by the weight of the evidence, it was a hot market. The evidence filed by the companies suggests that the market may now have just bottomed out. The evidence of Mr. Redekop and his appraiser indicates that the market has fallen since that time and indicates that the purchase was made in a hot market. It appears to me that when Mr. Bowra agreed on cross-examination that in time a greater amount may be recovered from this property, he was referring to a significant time to pass to be able to generate such value.

53 The evidence of negotiations for the sale of Middlegate does not provide any cogent evidence that the market value within a reasonable time might exceed the debt and taxes against the property. There is no evidence of a possible sale, other than an offer of February 5, 2001, from a numbered Saskatchewan company where an offer of $17 million has been countered by the Middlegate company at $22,600,000 on February 9th. I was shown the documents and was told there was no response for that counteroffer as of yet, and while I have reserved on this matter over the last week I have heard nothing further on that sale and assume that no reasonable counterproposal has been made.

54 The secured creditors also argue that there is another factor that I should consider that is

material to whether I should continue the ***C.C.A.A.*** protection. The secured creditors argue that ***C.C.A.A.*** protection should not be continued in connection with the Middlegate numbered company because, in essence, there is no ongoing business that is the subject of these proceedings. In particular, they say that the company that is the subject of the Middlegate application is not a going concern with employees and unsecured creditors that are impacted by the possible demise of the company. They say it is different - it is simply a holding company, holding a shopping centre managed by an agency firm.

55 The respondents argue that the ***C.C.A.A.*** is essentially and generally designed for corporations involving a host of secured, preferred, and trade creditors, employees and shareholders. The evidence indicates that even when R.P.I. was brought under the umbrella of ***C.C.A.A.*** protection, there was essentially only a landholding and land sale operation run by management companies with few employees. The respondents argue that this is a factor that tends to indicate that this case is not an appropriate case for ***C.C.A.A.*** protection.

56 I think that the following passage suggests that the existence or possible continuation of an ongoing business is at least a factor to consider when determining whether it is appropriate to make an order. This was as much as what was said by Mr. Justice Tysoe in ***Re United Used Auto & Truck Parts Ltd.*** (1999), 12 C.B.R. (4th) 144 (BCSC) at 150, where he said the following in the context of what was more clearly an ongoing operation with potentially affected creditors and employees:

> In the present case, the Petitioners have substantial land holdings and an operating business. (They employed 75 people.) It is their intention to reorganize their affairs in order to save the auto wrecking business. They have a legitimate concern that an en bloc sale of the land in the foreclosure proceedings could bring an end to the operating business. In my view, it is not an act of bad faith to seek the protection of the CCAA in order to save the operating business. **The arguments of the secured lenders in this regard would have been more persuasive if the only business of the Petitioners was land holdings, but the Petitioners do have an active business which must be considered.**
>
> [emphasis added]

57 Finally, VanCity argues that it is the one most at risk concerning the Middlegate property. During the stay they are not receiving interest payments. They say there is no equity. The VanCity mortgage provides for an increase in interest upon default, which they claim is an enforceable provision.

58 The secured creditors argue that there is no need, given the relief that the company is seeking, to continue under the protection of the ***C.C.A.A.*** The creditors argue that the relief that the Middlegate numbered company seeks can be provided by the court in the foreclosure proceeding

during the course of a redemption period. If the court finds the circumstances are appropriate, the redemption period might be extended on a number of occasions. The petitioner responds that foreclosure proceedings cast the company and the property in a poor light, but I have difficulty seeing how that is really much different from the *C.C.A.A.* protection proceedings.

59 In a moment I intend to consider the continuation of the *ex parte* order that is sought by the other two companies. I think that the Middlegate company can be isolated. The applicants are essentially looking for the generation of cash, hopefully by sale or joint venture from the Middlegate property, to pay towards the debt to R.P.I.

60 I think that in considering the fairness to all the parties, including the debtors and the creditors, I have discretion to make an order that the stay be lifted in order to allow the secured creditors to pursue their rights of foreclosure. I think that is the appropriate order in all the circumstances. The evidence persuades me that in all of the circumstances it is very unlikely that there is sufficient equity to satisfy the charge holders. Although I see some prejudice to the creditors in being delayed in realizing on their security, given that they are not receiving interest and given that the market conditions could turn against them, particularly in the case of VanCity, I think that it is appropriate to allow them to proceed to foreclose in the usual way.

61 I do that for a number of reasons. Firstly, I am satisfied that the protection the company wishes to obtain is equally available in practical terms in a foreclosure proceeding, and the foreclosure proceeding allows the secured creditors to begin to enforce their security. The options of seeking a joint venture partner or selling are just as available in a foreclosure as they are under the protection of a *C.C.A.A.* proceeding.

62 The other arguments to which I have referred also have merit. Logic suggests that the value of the project in the existing market conditions is unlikely to exceed the original 1997 price. To not allow the secured creditors to attempt to enforce their security would be to allow the company to speculate with the risk of prejudice weighing too heavily against the secured creditors, particularly VanCity.

63 It is also a factor that this type of company is not the classic ongoing business to which *C.C.A.A.* protection is often afforded. I do not say that protection might not, in appropriate circumstances, be extended to companies with few unsecured creditors and no real ongoing business, but I think that the relative absence of these things are factors to consider in determining whether to continue an order involving a company or to allow the secured creditors to foreclose.

64 Accordingly, I would exercise my discretion and exempt the Middlegate numbered company from the *C.C.A.A.* proceedings and not continue to stay the order in that respect.

65 I will now consider whether or not I will set aside or continue the order in connection with the other two companies. These other two companies argue that the order should be extended. Mr. Fitzpatrick argued that the burden on him was to show that the companies had acted in good faith

and were proceeding diligently, and that there is a germ of a plan, the elements of which were described by the Monitor that I have set out. The petitioners argue that that is sufficient in the circumstances for an order that the stay continue.

66 The petitioners stated in their brief that, "a stay will only be ordered where there is a reasonable chance the insolvent company can continue to operate its business as a going concern." The petitioners also referred to the ***Lehndorff*** passage and stressed this argument in their submissions that, "... it is otherwise too early for the court to determine whether the debtor company will succeed."

67 They argue that the elements of the plan described above exist and that the affairs of the company should be regularized in the next two months to permit this. They rely on possible funds coming from the sale or joint venture development of the Middlegate property.

68 They argue that the third mortgage is secured by a pledge of 500,000 shares of Wall Financial Corporation, currently trading at about $3.05 a share. The company says that the cash outlay, given the restriction on the payment of interest expenses on Middlegate, will, according to the Monitor's report, mean that they will only expend about $270,000 over the next two months. This is the period of time for which they seek the stay to continue. They argue that the proposal, if completed, will benefit the shareholders, second debenture holders, and unsecured creditors. Mr. Redekop says that if there is a receivership of the company, he expects that the cost will substantially exceed the costs under ***C.C.A.A.*** proceedings because the proceedings under the ***C.C.A.A.*** are unified.

69 The germ of the plan is that the company will pay a million dollars out of the available cash within 30 days and will pay the trustee on behalf of the debenture holders a distress amount, which is the estimate of the amount that the first debenture holders might recover anyway in a liquidation or bankruptcy, adjusted downward for the earlier cash payment and the value of the publicly traded securities they will receive. The second debenture holder, it will be proposed, would receive Class B non-voting common shares and some cash payment. The unsecured creditors would also receive some Class B non-voting participating shares.

70 The first debenture holders oppose the ***C.C.A.A.*** order continuing in connection with R.P.I. and the other numbered company. They argue there would be no additional costs from the appointment of a receiver as there would be one receiver. They argue that a receivership or the plan that the petitioners want to advance is essentially a liquidation as there will be no assets or real operating business at the end of it other than the hope of future projects. Mr. Palleson says that there has been an erosion in the confidence of his client in the management of these companies.

71 The debenture holders say the cash position of R.P.I. has eroded by a million dollars since the end of December. This was explained by the Monitor. The Monitor demonstrated that, after deducting the share of cash belonging to the joint venture, the consolidated cash on hand was $1.94 million as of December 31st, the cash position as of January 31st was $1.44 million, and that the balance of the cash flow, the petitioners say, will still be less than $300,000 that should be expended

over the next two months. (I received a further addendum to the Monitor's second report, which I read this morning.)

72 One of the factors that may be considered at this stage, in determining it is appropriate to continue an order, is whether the company has demonstrated the possibility of a reasonable plan. I think that often it is too early in the scheme of things to tell, but here the original order concerning the numbered Middlegate company was made almost three months ago.

73 Mr. Bowra is a person experienced in dealing with plans under the *C.C.A.A.* He said that R.P.I.'s intention to rely on joint venture partners and new public share offerings to survive as a going concern is simply not realistic. He was cross-examined, and his opinion which he based on these factors was not, in my view, seriously or successfully challenged. I found his evidence compelling. He said that the *C.C.A.A.* protection would be of little utility for several reasons: it has no prospect of restructuring its affairs to be profitable in the near future given current market conditions and the financial position of the properties; it has no current projects under development that appear to be profitable, and one potential development property is overburdened by debt and unlikely to provide any equity to RPI in the short term; and, the current real estate market is soft and there is no sign of improvement in the year ahead.

74 I agree with Mr. Bowra's assessment that this proposal is better described as a wing and a prayer. Mr. Fitzpatrick suggested that Skeena Cellulose presented an even more dire situation that came to fruition, but Mr. Bowra, who was involved in that proceeding, indicated that there was significant government support, including a guarantee and a payout of a secured charge and substantial long-term financing. Those elements are obviously not present here.

75 I think it is also a factor that there are no employees to speak of, there are few unsecured creditors because there is really no going concern business, and the company's projects are built and managed by management companies. Mr. Fitzpatrick says I should look at the prospectus and ascertain that R.P.I. is a going concern, but I do not think that really rebuts this point. I point out this passage in ***Royal Bank of Canada v. Fracmaster Ltd.*** (1999), 11 C.B.R. (4th) 230 (Alta. C.A.) at 238, that has some pertinence:

> Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the best interest of the creditors generally: ***Lehndorff General Partner Ltd., Re*** (1993), 17 C.B.R. (3d) 24 (Ont.Gen.Div. [Commercial List], at 31. There must be an ongoing business entity that will survive the asset sale. See, for example, ***Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re***, (1998), 5 C.B.R. (4th) 299 (Ont.Gen.Div. [Commercial List]); ***Solv-Ex Corporation and Solv-Ex Canada Limited***, (November 19, 1997) Doc. Calgary 9701-10022 (Alta. Q.B.).

76 Although on the one hand, the possible benefit to the companies, all of the creditors, and the

shareholders of R.P.I. are factors that must be given heavy consideration, as I do, I do not think it is appropriate for the stay under the ***C.C.A.A.*** to continue.

77 I reach that conclusion for these reasons. I think that given all the evidence before me, there is no reasonable prospect of success for this plan. I base that on a number of factors, including the apparent lack of equity in the Middlegate property and apparent absence of sufficient equity in the various projects to satisfy in full the debt to the first debenture holders. There are no monies for the second debenture holders. In the circumstances, I think that the companies are proposing a plan where they are seeking to liquidate their assets and hopefully interest the first debenture holders and others in taking shares in the development of presently unacquired and essentially unknown projects. I think that this plan, if not described as a wing and a prayer, might be accurately described as a gamble, particularly from the perspective of the first debenture holders. It appears extremely unlikely that they would approve it.

78 I also think that the plan is essentially a liquidation plan, but it is one that contains a significant risk to the first debenture holders. It is significant that it is several months from the first order in December 2000, but the plan is still so tentatively formulated. That is a factor that I can give some consideration to, given the passage of time.

79 I also think that I am entitled to give some consideration to the nature of the enterprise. I think that the more that the operation approaches a going concern, with employees potentially losing jobs and ongoing creditors losing customers, the more appropriate it may be to make orders for protection. Conversely, when those elements are absent, as is the case here, it seems less appropriate.

80 Therefore, balancing all of the interests of all relevant parties, as best I can on the evidence before me, I exercise my discretion not to continue the orders under the ***C.C.A.A.*** because to do so would not be appropriate. Accordingly, the petitions are dismissed.

J.S. SIGURDSON J.

cp/e/qlaxs/qlbas/qltxp/qlcxm

Tab 7

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, [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. Buttery, 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
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

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 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.

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, JJ., 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'était 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 présance 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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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 Metcalfe & 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 [1] 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 derogani*).

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,[2] 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 (i);

(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

2011 BCSC 1758
British Columbia Supreme Court

Worldspan Marine Inc., Re

2011 CarswellBC 3667, 2011 BCSC 1758, [2012] B.C.W.L.D. 2061, 211 A.C.W.S. (3d) 557, 86 C.B.R. (5th) 119

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 and the Business Corporations Act, S.B.C. 2002, c. 57

And In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products Ltd. (Petitioners)

Pearlman J.

Heard: December 16, 2011
Judgment: December 21, 2011
Docket: Vancouver S113550

Counsel: J.R. Sandrelli, J.D. Schultz for Petitioners, Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products
K. Jackson, V. Tickle for Wolrige Mahon (the "VCO"):
K.E. Siddall for Respondent, Harry Sargeant III
J. Leathley, Q.C. for Ontrack Systems Ltd.
D. Rossi for Mohammed Al-Saleh
G. Wharton, P. Mooney for Offshore Interiors Inc., Paynes Marine Group, Restaurant Design and Sales LLC, Arrow Transportation Systems and CCY Holdings Inc.
N. Beckie for Canada Revenue Agency
J. McLean, Q.C. for Comerica Bank
G. Dabbs for The Monitor

Subject: Insolvency; Corporate and Commercial

Table of Authorities

Cases considered by *Pearlman J.*:

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished

Encore Developments Ltd., Re (2009), 2009 BCSC 13, 2009 CarswellBC 84, 52 C.B.R. (5th) 30 (B.C. S.C.) — considered

Federal Gypsum Co., Re (2007), 2007 NSSC 347, 2007 CarswellNS 629, 261 N.S.R. (2d) 299, 40 C.B.R. (5th) 80, 835 A.P.R. 299 (N.S. S.C.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

Pacific National Lease Holding Corp., Re (August 17, 1992), Doc. A922870 (B.C. S.C.) — followed

San Francisco Gifts Ltd., Re (2005), 2005 ABQB 91, 2005 CarswellAlta 174, 10 C.B.R. (5th) 275, 42 Alta. L.R. (4th) 377, 378 A.R. 361 (Alta. Q.B.) — distinguished

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

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 36 — referred to

APPLICATION by debtor companies for extension of stay under *Companies' Creditors Arrangement Act.*

***Pearlman J.*:**

Introduction

1 On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

Positions of the Parties

2 The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel "QE014226C010" (the "Vessel") with Fraser Yachts, to explore potential Debtor In Possession ("DIP") financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

3 The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

4 The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

5 These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

6 The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately $4.9 million. In April or May 2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their

application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") in these proceedings.

7 Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals $20,945,924.05.

8 Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

9 Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

> Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have gone to the company. Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

10 Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

11 As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

Discussion and Analysis

12 On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

> (a) whether circumstances exist that make the order appropriate; and
>
> (b) whether the applicant has acted, and is acting, in good faith and with due diligence.

13 In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

14 In *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.) at para. 70, Deschamps J., for the Court, stated:

> ... 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.

15 A frequently cited statement of the purpose of the *CCAA* is found in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, [1990] B.C.J. No. 2384 (B.C. C.A.), at p. 3 where the Court of Appeal held:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

16 In *Pacific National Lease Holding Corp., Re*, [1992] B.C.J. No. 3070 (B.C. S.C.) Brenner J. (as he then was) summarized the applicable principles at para. 26:

(1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.

(2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.

(3) During the stay period the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.

(4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The Court has a broad discretion to apply these principles to the facts of a particular case.

17 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.), the Court of Appeal set aside the extension of a stay granted to the debtor property development company. There, the Court held that the *CCAA* was not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise on which the creditors could vote. At para. 26, Tysoe J.A., for the Court said this:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

18 At para. 32, Tysoe J.A. queried whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan or arrangement intended to be made by the debtor company simply proposed that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

19 In *Cliffs Over Maple Bay Investments Ltd.* at para. 38, the court held:

> ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

20 As counsel for the petitioners submitted, *Cliffs Over Maple Bay Investments Ltd.* was decided before the current s. 36 of the *CCAA* came into force. That section permits the court to authorize the sale of a debtor's assets outside the ordinary course of business without a vote by the creditors.

21 Nonetheless, *Cliffs Over Maple Bay Investments Ltd.* is authority for the proposition that a stay, or an extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

22 Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co., Re*, 2007 NSSC 347, 40 C.B.R. (5th) 80 (N.S. S.C.) at paras. 24-29.

23 The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings, the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.) at paras. 14-17.

Whether circumstances exist that make an extension appropriate

24 The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

25 There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

> (a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.

(b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the determination of *in rem* claims against the Vessel. Because this Court has jurisdiction in the CCAA proceedings, and the Federal Court exercises its maritime law jurisdiction over the Vessel, there have been applications in both Courts with respect to the marketing of the Vessel.

(c) The Vessel, which is the principal asset of the petitioner Worldspan, is a partially completed custom built super yacht for which there is a limited market.

26 All of these factors have extended the time reasonably required for the petitioners to proceed with their restructuring, and to prepare a plan of arrangement.

27 On September 19, 2011, when this court confirmed and extended the Initial Order to December 16, 2011, it also authorized the petitioners to commence marketing the Vessel unless Mr. Sargeant paid $4 million into his solicitor's trust account on or before September 29, 2011.

28 Mr. Sargeant failed to pay the $4 million into trust with his solicitors, and subsequently made known his intention not to fund the completion of the Vessel by the petitioners.

29 On October 7, 2011, the Federal Court also made an order authorizing the petitioners to market the Vessel and to retain a leading international yacht broker, Fraser Yachts, to market the Vessel for an initial term of six months, expiring on April 7, 2012. Fraser Yachts has listed the Vessel for sale at $18.9 million, and is endeavouring to find a buyer. Although its efforts have attracted little interest to date, Fraser Yachts have expressed confidence that they will be able to find a buyer for the Vessel during the prime yacht buying season, which runs from February through July. Fraser Yachts and the Monitor have advised that process may take up to 9 months.

30 On November 10, 2011, this Court, on the application of the petitioners, made an order authorizing and approving the sale of their shipyard located at 27222 Lougheed Highway, with a leaseback of sufficient space to enable the petitioners to complete the construction of the Vessel, should they find a buyer who wishes to have the Vessel completed as a Crescent yacht at its current location. The sale and leaseback of the shipyard has now completed.

31 Both this Court and the Federal Court have made orders regarding the filing of claims by creditors against the petitioners and the filing of *in rem* claims in the Federal Court against the Vessel.

32 The determination of the *in rem* claims against the Vessel is proceeding in the Federal Court.

33 After dismissing the *in rem* claims of various creditors, the Federal Court has determined that the creditors having *in rem* claims against the Vessel are:

Sargeant	$20,945.924.05
Capri Insurance Services	$ 45,573.63
Cascade Raider	$ 64,460.02
Arrow Transportation and CCY	$ 50,000.00
Offshore Interiors Inc.	$659,011.85
Continental Hardwood Co.	$ 15,614.99
Paynes Marine Group	$ 35,833.17
Restaurant Design and Sales LLC	$254,383.28

34 The petitioner, Worldspan's, *in rem* claim in the amount of $6,643,082.59 was dismissed by the Federal Court and is currently subject to an appeal to be heard January 9, 2012.

35 In addition, Comerica Bank has asserted an *in rem* claim against the Vessel for $9,429,913.86, representing the amount it advanced toward the construction of the Vessel. Mr. Mohammed Al-Saleh, a judgment creditor of certain companies controlled by Mr. Sargeant has also asserted an *in rem* claim against the Vessel in the amount of $28,800,000.

36 The Federal Court will determine the validity of the outstanding *in rem* claims, and the priorities amongst the *in rem* claims against the Vessel.

37 The petitioners, in addition to seeking a buyer for the Vessel through Fraser Yachts are also currently in discussions with potential DIP lenders for a DIP facility for approximately $10 million that would be used to complete construction of the Vessel in the shipyard they now lease. Fraser Yachts has estimated that the value of the Vessel, if completed as a Crescent brand yacht at the petitioners' facility would be $28.5 million. If the petitioners are able to negotiate a DIP facility, resumption of construction of the Vessel would likely assist their marketing efforts, would permit the petitioners to resume operations, to generate cash flow and to re-hire workers. However, the petitioners anticipate that at least 90 days will be required to obtain a DIP facility, to review the cost of completing the Vessel, to assemble workers and trades, and to bring an application for DIP financing in both this Court and the Federal Court.

38 An extension of the stay will not materially prejudice any of the creditors or other stakeholders. This case is distinguishable from *Cliffs Over Maple Bay Investments Ltd.*, where the debtor was using the *CCAA* proceedings to freeze creditors' rights in order to prevent them from realizing against the property. Here, the petitioners are simultaneously pursuing both the marketing of the Vessel and efforts to obtain DIP financing that, if successful, would enable them to complete the construction of the Vessel at their rented facility. While they do so, a court supervised process for the sale of the Vessel is underway.

39 Mr. Sargeant also relies on *Encore Developments Ltd., Re*, 2009 BCSC 13 (B.C. S.C.), in support of his submission that the Court should refuse to extend the stay. There, two secure creditors applied successfully to set aside an Initial Order and stay granted *ex parte* to the debtor real estate development company. The debtor had obtained the Initial Order on the basis that it had sufficient equity in its real estate projects to fund the completion of the remaining projects. In reality, the debtor company had no equity in the projects, and at the time of the application the debtor company had no active business that required the protection of a *CCAA* stay. Here, when the petitioners applied for and obtained the Initial Order, they continued to employ a skeleton workforce at their facility. Their principal asset, aside from the shipyard, was the partially constructed Vessel. All parties recognized that the *CCAA* proceedings afforded an opportunity for the completion of the Vessel as a custom Crescent brand yacht, which represented the best way of maximizing the return on the Vessel. On the hearing of this application, all of the creditors, other than Mr. Sargeant share the view that the Vessel should be marketed and sold through and orderly process supervised by this Court and the Federal Court.

40 I share the view of the Monitor that in the particular circumstances of this case the petitioners cannot finalize a restructuring plan until the Vessel is sold and terms are negotiated for completing the Vessel either at Worldspan's rented facility, or elsewhere. In addition, before the creditors will be in a position to vote on a plan, the amounts and priorities of the creditors' claims, including the *in rem* claims against the Vessel, will need to be determined. The process for determining the *in rem* claims and their priorities is currently underway in the Federal Court.

41 The Monitor has recommended the Court grant the extension sought by the petitioners. The Monitor has raised one concern, which relates to the petitioners' current inability to fund ongoing operating costs, insurance, and professional fees incurred in the continuation of the *CCAA* proceedings. At this stage, the landlord has deferred rent for the shipyard for six months until May 2012. At present, the petitioners are not conducting any operations which generate cash flow. Since the last come back hearing in September, the petitioners were able to negotiate an arrangement whereby Mr. Sargeant paid for insurance coverage on the Vessel. It remains to be seen whether Mr. Sargeant, Comerica Bank, or some other party will pay the insurance for the Vessel which comes up for renewal in January, 2012.

42 Since the sale of the shipyard lands and premises, the petitioners have no assets other than the Vessel capable of protecting an Administration Charge. The Monitor has suggested that the petitioners apply to the Federal Court for an Administration Charge against the Vessel. Whether the petitioners do so is of course a matter for them to determine.

43 The petitioners will need to make arrangements for the continuing payment of their legal fees and the Monitor's fees and disbursements.

44 The *CCAA* proceedings cannot be extended indefinitely. However, at this stage, a *CCAA* restructuring still offers the best option for all of the stakeholders. Mr. Sargeant wants the stay lifted so that he may apply for the appointment of Receiver and exercise his remedies against the Vessel. Any application by Mr. Sargeant for the appointment of a Receiver would be resisted by the other creditors who want the Vessel to continue to be marketed under the Court supervised process now underway.

45 There is still the prospect that through the *CCAA* process the Vessel may be completed by the petitioners either as a result of their finding a buyer who wishes to have the Vessel completed at its present location, or by negotiating DIP financing that enables them to resume construction of the Vessel. Both the marine surveyor engaged by Comerica Bank and Fraser Yachts have opined that finishing construction of the Vessel elsewhere would likely significantly reduce its value.

46 I am satisfied that there is a reasonable possibility that the petitioners, working with Fraser Yachts, will be able to find a purchaser for the Vessel before April 13, 2012, or that alternatively they will be able to negotiate DIP financing and then proceed with construction. I find there remains a reasonable prospect that the petitioners will be able to present a plan of arrangement to their creditors. I am satisfied that it is their intention to do so. Accordingly, I find that circumstances do exist at this time that make the extension order appropriate.

Good faith and due diligence

47 Since the last extension order granted on September 19, 2011, the petitioners have acted diligently by completing the sale of the shipyard and thereby reducing their overheads; by proceeding with the marketing of the Vessel pursuant to orders of this Court and the Federal Court; and by embarking upon negotiations for possible DIP financing, all in furtherance of their restructuring.

48 Notwithstanding the dispute between Mr. Barnett and Mr. Blane, which resulted in the commencement of litigation in the State of Florida at or about the same time this Court made its Initial Order in the *CCAA* proceedings, the petitioners have been able to take significant steps in the restructuring process, including the sale of the shipyard and leaseback of a portion of that facility, and the applications in both this Court and the Federal Court for orders for the marketing of the Vessel. The dispute between Mr. Barnett and his former partner, Mr. Blane has not prevented the petitioners from acting diligently in these proceedings. Nor am I persuaded on the evidence adduced on this application that dispute would preclude the petitioners from carrying on their business of designing and constructing custom yachts, in the event of a successful restructuring.

49 While the allegations of misconduct, fraud and misappropriation of funds made by Mr. Barnett against Mr. Blane are serious, at this stage they are no more than allegations. They have not yet been adjudicated. The allegations, which are as yet unproven, do not involve dishonesty,

bad faith, of fraud by the debtor companies in their dealings with stakeholders in the course of the *CCAA* process.

50 In my view, the failure of the petitioners to disclose the dispute between Mr. Barnett and Mr. Blane does not constitute bad faith in the *CCAA* proceedings or warrant the exercise of the Court's discretion against an extension of the stay.

51 This case is distinguishable from *San Francisco Gifts Ltd.*, where the debtor company had pleaded guilty to 9 counts of copyright infringement, and had received a large fine for doing so.

52 In *San Francisco Gifts Ltd.*, at paras 30 to 32, the Alberta Court of Queen's Bench acknowledged that a debtor company's business practices may be so offensive as to warrant refusal of a stay extension on public policy grounds. However, the court declined to do so where the debtor company was acting in good faith and with due diligence in working toward presenting a plan of arrangement to its creditors.

53 The good faith requirement of s. 11.02(3) is concerned primarily with good faith by the debtor in the *CCAA* proceedings. I am satisfied that the petitioners have acted in good faith and with due diligence in these proceedings.

Conclusion

54 The petitioners have met the onus of establishing that circumstances exist that make the extension order appropriate and that they have acted and are acting in good faith and with due diligence. Accordingly, the extension of the Initial Order and stay to April 13, 2012 is granted on the terms pronounced on December 16, 2011.

Application granted.

Court File No. CV-15-10926-00CL

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 LABRADOR IRON MINES HOLDINGS LIMITED, LABRADOR IRON MINES LIMITED and SCHEFFERVILLE MINES INC. (the "Applicants")

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Court File No. CV-15-10926-00CL

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 LABRADOR IRON MINES HOLDINGS LIMITED, LABRADOR IRON MINES LIMITED and SCHEFFERVILLE MINES INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE APPLICANTS
(Stay Extension)
Returnable April 30, 2015

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