Court File No.

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 LOYALTYONE, CO.

(the "**Applicant**")

FACTUM OF THE APPLICANT

March 10, 2023

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Ryan C. Jacobs LSO #: 59510J
Tel: 416.860.6465
rjacobs@cassels.com

Jane O. Dietrich LSO #: 49302U
Tel: 416.860.5223
jdietrich@cassels.com

Natalie E. Levine LSO #: 64908K
Tel: 416.860.6568
nlevine@cassels.com

Lawyers for the Applicant

TO: SERVICE LIST

Court File No.

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 LOYALTYONE, CO.

APPLICANT

TABLE OF CONTENTS

Page No.

Court File No.

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 LOYALTYONE, CO.

(the "**Applicant**")

FACTUM OF THE APPLICANT

PART I - NATURE OF THIS APPLICATION

1. This factum is filed in support of the Applicant's request for an Initial Order[1] under the CCAA. The Applicant and its wholly owned, non-applicant subsidiary, Travel Services operate the AIR MILES® Reward Program. For over three decades, the AIR MILES® Reward Program has influenced customer behaviour, driven profitability, and built long-term relationships with its Partner clients and the millions of Canadian Collectors enrolled in the program.[2]

2. The Applicant operates in a competitive environment and is burdened by significant funded debt imposed on it by its former U.S. parent company. This CCAA Proceeding follows the pre-filing efforts of the Applicant and its current parent company, LVI (a U.S. public company), to address these challenges and preserve the AIR MILES® business for the benefit of stakeholders. As part of those efforts, the Applicant engaged in extensive discussions with the Credit Agreement Lenders (defined below) and the Applicant's largest Partner, BMO.[3]

3. Those discussions have resulted in a proposed path forward for the Applicant that will allow AIR MILES® to continue to operate, ensure stability for the Collectors and Partners, and

[1] Terms not otherwise defined herein have the meaning given to them in the Affidavit of Shawn Stewart, sworn March 10, 2023 (the "**Stewart Affidavit**").
[2] Stewart Affidavit at para. 5.
[3] Stewart Affidavit at paras. 8, 108.

maximize value for all stakeholders while at the same time permitting LVI and certain other affiliates of the Applicant (the "**U.S. Debtors**") to establish a liquidating trust for the benefit of their stakeholders (including the Credit Facility Lenders). That path forward includes implementation of the Global Transactions, being, among other things: (i) the provision of the DIP Financing Facility by BMO as DIP Lender to fund the continued operation of the AIR MILES® business during this CCAA Proceeding; (ii) a proposed SISP with a Stalking Horse Purchase Agreement whereby the Stalking Horse Purchaser (a party related to BMO), will, if successful, acquire substantially all of AIR MILES®'s operating assets; and (iii) the U.S. Debtors filing the U.S. Proceedings.[4]

4. To enable the Applicant and its stakeholders to pursue this path forward, the relief requested in the Initial Order is limited to what is necessary for the Initial Stay Period and includes:

(a) a Stay of Proceedings, including as against the Applicant, the Directors and Officers and the Applicant's non-applicant subsidiary, Travel Services;

(b) appointing KSV Restructuring Inc. as Monitor;

(c) authorizing for the Applicant to continue to honour its obligations to Collectors, fund the Reserve Account, and, with the consent of the Monitor, pay certain critical suppliers pre-filing amounts;

(d) granting the Administration Charge and the Directors' Charge (each in interim amounts appropriate for the Initial Stay Period); and

(e) permitting the Monitor to maintain confidential the list of Collectors with claims in excess of $1,000 (the "**Specified Collectors**") and granting related relief in connection with notice of this CCAA proceeding.

[4] Stewart Affidavit at para. 9.

5. If the relief sought is granted, at the Comeback Hearing, the Applicant intends to request:

(a) an order amending the relief in the Initial Order to (i) approve the DIP Term Sheet, with BMO as DIP Lender; (ii) authorize the Applicant to make the Intercompany DIP Loan to LVI to facilitate the U.S. Proceedings; and (iii) increase the amounts of the borrowings and Charges referred to above and to approve the DIP Lender's Charge, the Employee Retention Plans Charge and the FA Charge; and

(b) an order approving the SISP and the Stalking Horse Purchase Agreement for use therein.[5]

6. At this time, it is expected that all proceeds from a transaction – whether pursuant to the Stalking Horse Purchase Agreement or another transaction identified in the SISP – will, after satisfaction of priority amounts, flow to the benefit of the Credit Agreement Lenders given the significant secured obligations owed to them and the likelihood that they will suffer a significant shortfall.

PART II - FACTS

A. CORPORATE STRUCTURE

7. The Applicant operates the AIR MILES® Reward Program. It is a Nova Scotia unlimited liability company whose sole member is LVI Lux Financing S.ar.l, a Luxembourg-based entity. Its headquarters and primary place of business are in Toronto.[6]

8. Travel Services, as agent for the Applicant, arranges travel services for Collectors in exchange for the redemption of Reward Miles, for cash, or for a combination of both. It is regulated by, among other things, Ontario's *Travel Industry Act, 2002*, Quebec's *Travel Agents Act*, and

[5] Stewart Affidavit at para. 4.
[6] Its registered head office is the office of its Nova Scotia counsel, located at 600 – 1741 Lower Water Street, Halifax, Nova Scotia: Stewart Affidavit at paras. 14 – 15, Exhibit "A".

British Columbia's *Business Practices and Consumer Protection Act* (collectively, the "**Travel Acts**"). Travel Services is a Nova Scotia unlimited liability company whose sole member is the Applicant.[7] Travel Services is not an applicant in these proceedings, although a stay and related relief is sought in respect of Travel Services, as discussed below.

9. LVI is the Applicant's ultimate parent company. It is a public, Delaware corporation and its stock is currently listed on the NASDAQ.[8]

10. Contemporaneously, the U.S. Debtors commenced the U.S. Proceedings to, among other things, address the U.S. Debtors' obligations under the Credit Agreement and to establish a liquidation trust. Neither the Applicant nor Travel Services is a debtor in the U.S. Proceedings.

B. THE LOYALTYONE BUSINESS

(i) The AIR MILES® Reward Program

11. The AIR MILES® Reward Program is a full-service, outsourced loyalty program that assists its Partners in acquiring and retaining loyal and continuing customers *via* the issuance and redemption of Reward Miles. The economic driver of the business is focused on a small group of Partners, who pay the Applicant a fee per Reward Mile issued. In return, the Applicant provides services to Partners and Collectors, including marketing, analytics, customer services, and redemption management. The Applicant uses the information gathered through the AIR MILES® Reward Program to help Partners design and implement effective marketing programs.[9]

12. As the AIR MILES® business has evolved, the Applicant has added new types of partnerships to expand opportunities for the AIR MILES® Reward Program's over 10 million active Collectors to earn and redeem Reward Miles, including, among other things: (i) "Card-Linked

[7] Stewart Affidavit at para. 16, Exhibit "B".
[8] Stewart Affidavit at para. 17, Exhibit "C".
[9] Stewart Affidavit at para. 26.

Offers", where Collectors can link their Mastercard credit card to their AIR MILES® account to earn Reward Miles; (ii) "AirMilesShops.ca", which allows Partners and Reward Suppliers to market products to Collectors through an online marketplace; and (iii) time-limited partnerships where Collectors can earn Reward Miles through a Partner business during a promotional campaign. In return, the Applicant offers the Partners the benefit of analytics regarding the results of their marketing campaigns.[10]

(ii) The Applicant's Operations

13. The Applicant employs approximately 750 people across Canada, the vast majority of whom work remotely. Approximately 700 of the employees are in Ontario, while the others work remotely in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, and Nova Scotia. The Applicant leases four office locations in Toronto, Montreal, Calgary, and Vancouver, but the Montreal and Calgary locations are sublet in their entirety.[11]

14. Reward Miles are divided into two categories based on the type of rewards for which Collectors can redeem them: (i) miles that can be instantly redeemed toward in-store purchases at participating Partners ("**AIR MILES® Cash Miles**"); and (ii) miles that can be redeemed for travel, merchandise, donations, or other rewards ("**AIR MILES® Dream Miles**").[12]

15. Collectors can redeem AIR MILES® Dream Miles when booking travel-related services (such as flights, hotels, car rentals, or cruises) through Travel Services. The Applicant's largest travel Reward Suppliers include Air Canada, West Jet, and various tour operators. The Applicant has contracts with certain travel providers to access flights and other travel services which provide

[10] Stewart Affidavit at paras. 6, 40.
[11] Stewart Affidavit at paras. 52 – 53, 62 – 66.
[12] Stewart Affidavit at para. 27.

incentives (such as volume discounts and preferential pricing) for bookings. The Applicant, through Travel Services, also earns commissions on certain travel bookings.[13]

16. Collectors can also redeem AIR MILES® Dream Miles for electronics and other consumer goods offered in the AIR MILES® catalogue. The Applicant contracts with third-party vendors and logistics providers to purchase, warehouse, and ship most of these items to Collectors. However, it also owns a limited amount of merchandise for high-volume items, which is purchased directly from the Reward Suppliers, then stored and shipped by the same third-party logistics providers.[14]

(iii) Confidence of Collectors in the AIR MILES® Reward Program

17. Some Collectors redeem for once in a lifetime experiences or luxury goods. Collectors who redeem their AIR MILES® Dream Miles typically do so within 38 months of issuance (and approximately 7 months for AIR MILES® Cash Miles). Approximately 473,000 Specified Collectors currently hold Reward Miles entitling them to redeem for rewards valued in excess of $1,000.[15]

18. In 2001, to assure the Collectors and Partners that funds would be available to satisfy its obligations to Collectors, the Applicant's corporate predecessor established the Reserve Account, which holds a significant portion of the consideration received by the Applicant from its Partners.[16] As at March 2, 2023, the Reserve Account had a balance of approximately US$566 million.[17]

19. The Reserve Security grants the Reserve Trustee a pledge of the Reserve Account as security for: (i) the Applicant's obligations to Collectors in respect of "Immediately Redeemable" Reward Miles; and (ii) the performance by the Applicant of its obligations under the Reserve Agreement and Reserve Security, including by funding any deficiency in the Reserve Account.

[13] Stewart Affidavit at para. 37.
[14] Stewart Affidavit at para. 38.
[15] Stewart Affidavit at para. 35.
[16] Stewart Affidavit at para. 41.
[17] Stewart Affidavit at para. 46.

The amount in the Reserve Account fluctuates based on, among other things, interest rates and the performance of the Applicant's investments.[18]

C. THE FINANCIAL POSITION OF THE LOYALTYONE ENTITIES

20. The Applicant is insolvent. Absent the funding to be made available under the DIP Financing Facility following the Initial Stay Period, it will not have adequate liquidity to operate its business in the ordinary course.

(i) Secured Obligations

(a) The Credit Facilities

21. Under the Credit Agreement, the Applicant, and certain other of LVI's subsidiaries have guaranteed the obligations of the LVI, and the other Borrowers to the Credit Agreement Lenders. As of March 9, 2023, the principal amount of loans outstanding under the Credit Facilities is approximately US$656 million (plus approximately US$8 million in letters of credit).[19]

22. The obligations under the Credit Agreement are secured by, among other things, a first priority security interest in the Credit Agreement Collateral, being all personal property of the Borrowers and the Guarantors, including the Applicant (including shares and other equity interests owned by them), subject to certain exceptions set out in such security agreements. The Credit Agreement Collateral excludes the Reserve Account and monies deposited therein.[20]

23. The Credit Agreement is in default as a result of the U.S. Proceedings and this proceeding, and the Applicant cannot repay the amounts owing under the Credit Agreement.[21]

---

[18] Stewart Affidavit at paras. 46, 47.
[19] Stewart Affidavit at paras. 74 – 75, Exhibit "J".
[20] Stewart Affidavit at para. 76.
[21] Stewart Affidavit at para. 75.

(b) ***Collectors***

24. The Applicant has obligations to provide rewards to Collectors when they redeem Reward Miles. As noted above, the Applicant has granted the Reserve Trustee security over the Reserve Account to secure the obligations of the Applicant to the Collectors.[22]

(ii) Unsecured Obligations

25. The Applicant also has significant unsecured obligations, including:

(a) Employee Liabilities. The Applicant's gross bi-weekly payroll obligation is approximately $3 million. As of March 9, 2023, the Applicant estimates it will also have approximately $2 million in accrued vacation pay liability;

(b) Taxes. As of February 28, 2023, the Applicant owed approximately $2.2 million in federal and provincial goods and services taxes. The Applicant may also owe further amounts in income taxes as its 2022 tax returns are due on June 30, 2023 and have not yet been prepared;

(c) Reward Suppliers. As of March 8, 2023, the Applicant owed approximately $7.7 million to Reward Suppliers for redemptions by Collectors (which amount includes services booked by Travel Services);

(d) Related Companies. On a monthly basis, the Applicant remits approximately US$500,000 to LVI for Intercompany Services, historically inclusive of amounts paid to Bread, by LVI, under the TSA. The amount to be paid to LVI will not include the amounts for TSA services going forward;

(e) Corporate Vendors. As of March 8, 2023, the Applicant has been invoiced by Corporate Vendors for the aggregate amount of approximately $18.1 million for the

[22] Stewart Affidavit at paras. 42, 47, Exhibits "G", "H".

provision of services by same. Additional amounts have been accrued but are not yet invoiced;

(f) Landlords. The Applicant owes approximately $960,000 in rent obligations for March, 2023 in respect of the Toronto Lease; and

(g) Litigation. The Applicant is named as a defendant in five class action lawsuits as well as certain small claims actions.[23]

D. FINANCIAL DIFFICULTIES

26. The AIR MILES® Reward Program operates in a competitive industry. In recent years, it has faced increasing market challenges, including from, among other things, greater competition from other providers and in-house loyalty programs.[24]

27. In 2021, instead of investing in the business to adapt to these emerging market trends, the Applicant's former parent company, Bread, undertook the Spinoff Transaction that moved its loyalty programs businesses, including AIR MILES®, to a newly created public parent company, LVI. To effect the Spinoff Transaction, Bread required LVI to borrow and the Applicant, among others, to guarantee US$675 million pursuant to the Credit Agreement, and to transfer the proceeds (after payment of transaction costs) to Bread. Bread also extracted US$100 million of cash from the balance sheets of the Applicant and other LVI subsidiaries.[25]

28. As part of the Spinoff Transaction, in addition to causing LVI and its subsidiaries to enter into the Credit Facilities, Bread caused LVI to enter into certain operational agreements, including:

[23] Stewart Affidavit at paras. 77, 80 – 93.
[24] Stewart Affidavit at paras. 8, 20.
[25] Stewart Affidavit at paras. 21 – 22.

(a) Tax Matters Agreement. Under the TMA, Bread caused LVI (purportedly on behalf of the Applicant) to agree to pay over to Bread a tax refund of approximately $100 million to which the Applicant may become entitled.

(b) Transition Services Agreement. The TSA provides that Bread and LVI would continue to provide each other with certain services in substantially the same form as they did during the previous year and LVI would make a monthly payment to Bread for such services. The Applicant was a beneficiary of a number of the services provided by Bread under the TSA and cannot operate without such services. Prior to the filing date, pursuant to the TSA, LVI assigned a portion of the services under the TSA to the Applicant such that the Applicant is a direct beneficiary under the TSA at this time.[26]

29. The overhang of the obligations imposed by Bread has created challenges for LVI and its subsidiaries. On January 20, 2023, LVI notified the Applicant that it lacked sufficient funds to make a required payment on account of the Swing Line Loans in the amount of US$3 million. LVI sent similar notices to the Applicant on January 25, 2023 and January 27, 2023, in respect to additional amounts owing under the Credit Agreement, including: (i) a total of approximately US$5 million of interest in respect of the Credit Facilities; and (ii) an additional payment of US$2 million on account of the Swing Line Loans. The Applicant paid all such amounts directly to the Credit Facility Agent pursuant to the guarantee provisions of the Credit Agreement.[27]

30. LVI's cash constraints created serious risks for the Applicant. The Applicant required, among other things, support from LVI including IT, legal, tax, human resources, accounting, and treasury services, separate and apart from the services under the TSA. If LVI had ceased to pay its liabilities, LVI could not have continued to provide key functions. Any disruption would have

[26] Stewart Affidavit at para. 23, Exhibits "D" – "F".
[27] Stewart Affidavit at para. 96.

had a deleterious impact on the Applicant's ability to operate the AIR MILES® business and to explore a going-concern solution.[28]

31. Consequently, on February 28, 2023, the Applicant made an intercompany loan to LVI in the amount of $18 million to permit LVI to pay fees, costs, and expenses, including professional fees and employee expenses, LVI incurred or will incur in connection with its efforts to develop and implement the Global Transactions described more fully in the Stewart Affidavit.[29]

A. Cash Flow Statement

32. The Cash Flow Statement was prepared with the assistance of the Restructuring Advisor in consultation with the Proposed Monitor and is accompanied by the prescribed representations in accordance with the CCAA. It shows the Applicant has sufficient liquidity to fund its obligations during the Initial Stay Period but will require access to funds under the DIP Financing Facility to satisfy obligations after that time. The Cash Flow Statement was prepared on the basis that:

(a) the Applicant will continue to honour all obligations to Collectors;

(b) all Partners will continue to make payments under the applicable Partner contracts;

(c) the Applicant will continue to make payments into the Reserve Account as required under the Reserve Agreement;

(d) the Applicant will continue to pay all Reward Suppliers and critical Corporate Vendors in the ordinary course to avoid disruption of the business prior to the SISP; and

[28] Stewart Affidavit at para. 97.
[29] Stewart Affidavit at para. 97.

(e) the Applicant will use up to US$30 million from the DIP Financing Facility to make a secured loan to LVI in order to facilitate the U.S. Proceedings (as described in more detail below).[30]

B. Response to Financial Difficulties

33. Since the spring of 2022, the Applicant undertook significant efforts to strengthen the business. The Applicant's new executive team expanded the focus of the AIR MILES® business and sought ways to strengthen Collector engagement, including by broadening the scope of travel related services given the existing number of Canadians who rely on AIR MILES® for travel bookings, expanding media offerings, and exploring new partnerships, while managing the Applicant's exposure to increased costs.[31]

34. Notwithstanding these efforts, the Applicant continues to face strong headwinds. The Applicant and LVI realized, in the summer of 2022, that absent improvement in performance in all aspects of the business, they would be unable to comply with the covenants set out in the Credit Agreement. As a result, LVI and the Applicant, with the assistance of advisors, entered into negotiations with certain *ad hoc* groups of Credit Agreement Lenders.[32]

35. In addition to discussions with the Credit Agreement Lenders, the Applicant approached BMO to discuss its liquidity challenges and a potential recapitalization transaction. Following negotiations, the Applicant determined that a CCAA proceeding, with BMO acting as Stalking Horse Purchaser, providing the Stalking Horse Bid, and as the DIP Lender, providing the DIP Financing Facility, provides the best path forward by allowing the Applicant to test the market

[30] Stewart Affidavit at para 100.
[31] Stewart Affidavit at para. 103.
[32] Stewart Affidavit at paras. 104 – 105.

while also being able to assure its stakeholders, including millions of Collectors, that a transaction for a going concern sale will be completed and their Reward Miles will remain secure.[33]

36. At the same time, LVI worked with the Credit Agreement Lenders to develop a plan for the U.S. Proceedings. The liquidation trust is expected to be the only source of recovery for the Credit Agreement Lenders in the United States.

37. The Applicant and LVI have been engaged with certain of the Credit Agreement Lenders for the past several months over the terms of one or more potential restructuring and/or sale alternatives for LVI, the Applicant, certain affiliates and their business lines. These discussions resulted in substantial consensus around, and support for, the Global Transactions.[34]

38. The Credit Agreement Lenders are owed approximately US$656 million, plus interest, fees and other amounts (including in respect of the US$8 million in outstanding letters of credit), and it is expected that the proceeds from any transaction in the SISP, after satisfaction of priority amounts, will flow to their benefit.[35]

PART III - ISSUES AND THE LAW

39. The principal issues on this Application are whether:

(i) the Applicant meets the criteria to obtain relief under the CCAA;

(ii) this Court should grant the Stay of Proceedings, including to Travel Services as an integral part of the Applicant's business;

(iii) this Court should authorize the Applicant to continue to honour Collector obligations in connection with the AIR MILES® Reward Program and

[33] Stewart Affidavit at para. 108.
[34] Stewart Affidavit at para. 11.
[35] Stewart Affidavit at para. 12.

continue to pay prefiling obligations necessary to continue the operation of the AIR MILES® Reward Program;

(iv) this Court should appoint the Proposed Monitor as Monitor and relieve the Monitor of certain notice obligations under section 23 of the CCAA; and

(v) this Court should grant the Administration Charge and the Directors' Charge.

A. THE APPLICANT MEETS THE CCAA STATUTORY REQUIREMENTS

(i) The CCAA Applies to the Applicant

40. The CCAA applies to a "debtor company" if the total claims against it exceed $5 million.[36] The Applicant is incorporated under Nova Scotia's *Companies Act*, RSNS 1989, c. 81. The Applicant is insolvent and the claims against it, including its secured guarantee obligations in excess of US$656 million, far exceed the $5 million statutory requirement.[37] Accordingly, the Applicant is a "debtor company" for the purposes of the CCAA.

(ii) This Court is the Appropriate Forum for these Proceedings

41. A debtor company may bring an application under the CCAA in the province within which its head office or chief place of business is located.[38] The Applicant maintains its head office and the substantial majority of its employees in Ontario.[39] Accordingly, this Court is the appropriate forum.

---

[36] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 2(1) "company", "debtor company", 3(1) [CCAA]; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2 "insolvent person" [BIA]; *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299, 2004 CanLII 24933 at paras. 21 – 26 (ONSC).
[37] Stewart Affidavit at paras. 75, 94 – 97.
[38] CCAA, s. 9(1).
[39] Stewart Affidavit at paras. 15, 53.

B. THE STAY OF PROCEEDINGS IS APPROPRIATE

(i) The Stay of Proceedings for the Applicant is Necessary

42. This Court may grant a stay of proceedings of up to 10 days on an initial application, provided it is satisfied that: (i) such a stay is appropriate; and (ii) the Applicant has acted in good faith and with due diligence.[40] The threshold for a stay is low and a debtor company only has to satisfy this Court that a stay of proceedings would "usefully further" its efforts to reorganize.[41] Jurisprudence from the Supreme Court of Canada and this Court is clear that a sale under the CCAA is an appropriate use of the CCAA.[42]

43. The Stay of Proceedings sought by the Applicant is necessary for the Applicant to pursue a going-concern transaction for the benefit of its stakeholders.

(ii) The Court Should Exercise its Jurisdiction to Grant a Stay for Travel Services

44. This Court's inherent jurisdiction also empowers it to extend a stay to a non-applicant.[43] Courts will often do so where the debtor company's business is so intertwined with another entity that not extending it to the other entity would significantly impair the effectiveness of the stay for the debtor company.[44]

45. Travel Services is a necessary part of the AIR MILES® business. Travel Services meets the statutory and insurance requirements to arrange travel services for the Collectors, including under the Travel Acts. The Applicant could not offer the travel rewards expected by Collectors

---

[40] CCAA, ss. 11.02(1), (3).
[41] *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 at para. 70 [*Century Services*]; *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36 at para. 21.
[42] *9354-9186 Quebec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 42, 43 [*Callidus*]; *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 at para. 32. See also *North American Tungsten Corporation Ltd., Re*, 2015 BCSC 1376 at paras. 27, 30.
[43] *Air Canada, Re* (2003), 28 C.B.R. (5th) 52, 2003 CarswellOnt 9109 at para. 17.
[44] See *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422 at paras. 30 – 32. *4519922 Canada Inc., Re*, 2015 ONSC 124 at para. 37; see also *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 at para. 21.

without it because the Applicant does not meet the regulatory requirements. Moreover, Travel Services' shares are pledged as security for the obligations under the Credit Agreement. If actions are taken against Travel Services either to enforce obligations related to Reward Suppliers or otherwise, the AIR MILES® business will be impaired. For the Stay of Proceedings to be effective, it must be extended to Travel Services.

C. THE AIR MILES® REWARD PROGRAM SHOULD CONTINUE AND PRE-FILING PAYMENTS SHOULD BE PERMITTED

46. The purpose of the CCAA is "to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[45] To meet this purpose, this Court has allowed debtor companies to pay pre-filing obligations where appropriate, particularly where failure to do so could frustrate the debtor company's ongoing operations.[46]

47. In the Applicant's case, the continued operation of the AIR MILES® Reward Program is predicated on the continued active participation of Collectors, Partners, and Reward Suppliers. Any disruption in Collectors' abilities to redeem the Reward Miles, including those earned prior to the commencement of this CCAA Proceeding, creates a significant risk that Collectors will lose confidence and cease participating in the AIR MILES® Reward Program to the detriment of the Applicant's business and its stakeholders.[47]

48. As part of this relief, the Applicant is requesting the authority to continue to comply with the terms of the Reserve Agreement, including funding any deficit amounts. The Applicant believes that such funding is necessary to assure Collectors that their Reward Miles are available and that they will continue to enjoy the benefits of the AIR MILES® Reward Program.

---

[45] *Century Services* at paras. 15, 59.
[46] See *Cinram International Inc, Re*, 2012 ONSC 3767 at para. 37 [*Cinram*], where this Court accepted the submission that it had "ample authority" to authorize such payments and set out a number of factors in deciding whether to exercise its jurisdiction to grant same. See also *McEwan Enterprises Inc.*, 2021 ONSC 6453 at paras. 32 – 33; *Clover Leaf Holdings Company, Re*, 2019 ONSC 6966 at para. 25.
[47] Stewart Affidavit at paras. 113.

49. Similarly, the Applicant has identified Corporate Vendors who are critical to maintaining Collector confidence and who cannot be easily replaced with other providers. Any limitations on the Applicant's ability to respond to Collectors' needs because of operational disruption could harm the AIR MILES® business.[48]

50. Accordingly, the Applicant is seeking: (i) authorization to honour its obligations to make pre-filing payments in respect of the AIR MILES® Reward Program (including honouring Reward Miles and Reward Supplier obligations); and (ii) authorization (but not a requirement) to make additional pre-filing payments with the oversight and consent of the Monitor (collectively, the "**Pre-Filing Payment Relief**").

51. The Proposed Monitor supports the Pre-Filing Payment Relief.[49] The Pre-Filing Payment Relief is also consistent with the relief granted by this Court to other companies in recent CCAA proceedings.[50]

D. THE MONITOR SHOULD BE APPOINTED AND ITS OBLIGATIONS UNDER SECTION 23 SHOULD BE MODIFIED

52. The Proposed Monitor is a licensed trustee within the meaning of section 2 of the BIA and has signed a consent to act as the Monitor of the Applicant.[51] The Proposed Monitor is qualified to act as Monitor under section 11.7 of the CCAA.

53. Section 23 of the CCAA requires the Monitor to, among other things, within 5 days of the initial order (i) provide notice to all creditors holding claims over $1,000 in the prescribed form and

---

[48] Stewart Affidavit at paras. 114.
[49] Pre-Filing Report of the Proposed Monitor KSV Restructuring Inc. (March 10, 2023) [Proposed Monitor's Pre-Filing Report].
[50] *Golf Town Canada Inc. et al., Re*, (September 14, 2016), ONSC (Commercial List), Court File No. CV-16-11627-00CL at para. 7 (Ont. Sup. Ct. J. [Commercial List]) (Initial Order); *Target Canada Co., Re*, 2015 ONSC 303 at paras. 62-65 [*Target*] (authorizing pre-filing payments to certain categories of suppliers, including: "(i) logistics and supply chain providers; (ii) providers of credit, debt, and gift card processing related services; and (iii) "other suppliers" up to a maximum aggregate amount of $10 million…".)
[51] Proposed Monitor's Pre-Filing Report.

(ii) prepare a list showing the names and addresses of those creditors and the estimated amount of those claims and make it publicly available, "except as otherwise ordered by the court".[52] Where disclosure of individual creditors' names and addresses may be prejudicial, this Court has modified the section 23 requirements and granted orders providing that, "the Monitor shall not make the names and addresses of individuals who are creditors publicly available."[53] This Court's jurisdiction to grant such an order is supported by section 11 of the CCAA, which authorizes it to make any order it considers appropriate in the circumstance.[54]

54. In this case, a creditors' list that includes identifying information about the Specified Creditors would result in the publication of the names and addresses of approximately 460,000 individuals across Canada, compromising their privacy. Accordingly, the Applicant is seeking an order that the identifiable information of individual creditors be withheld from the publicly available creditor list, consistent with this Court's orders in *Target* and *Re BBB Canada LTD*.

55. Given that the Applicant has the capability to efficiently email the Specified Collectors, the proposed Initial Order provides that the Applicant will send a notice containing the prescribed information to the Specified Collectors. In addition, because approximately 60,000 of the Specified Collectors have not provided an email address, the Applicant is requesting that the Monitor be relieved of the obligation to mail the prescribed notice to such Collectors. The Applicant submits that publication notice as required by Section 23 of the CCAA and a notice published on the Applicant's website will more efficiently communicate notice of the CCAA Proceeding in a timely manner.

---

[52] CCAA, s. 23.
[53] See, e.g., *Target (Re)*, (January 15, 2015), ONSC (Commercial List), Court File No. CV-15-10832-00CL (Initial Order) at para 69; see also *BBB Canada LTD. (Re)*, (February 10, 2023), ONSC (Commercial List), Court File No. CV-23-00694493-00CL (Initial Order) at para. 39.
[54] CCAA, s. 11.

E. THE CHARGES ARE APPROPRIATE

56. The Applicant is seeking charges that are usual and customary for a proceeding of this nature. At the Initial Order stage, the proposed Charges are not proposed to rank in priority to any secured creditor who was not provided with notice of this proceeding; at this time the Applicant is seeking only to prime the security granted to the Credit Facility Agent.[55]

(i) Administration Charge

57. The CCAA authorizes this Court to grant a priority charge over a debtor company's assets for professional fees and disbursements on notice to affected secured creditors.[56] This Court has recognized that, unless professional advisor fees are protected with the benefit of an administration charge, the objectives of the CCAA would be frustrated.[57] The factors to be considered are well established in the caselaw.[58]

58. The Applicant seeks the Administration Charge against the Property in the maximum amount of $2 million to secure the fees and disbursements incurred both before and after the commencement of these proceedings by legal counsel for the Applicant, the Proposed Monitor, and legal counsel for the Proposed Monitor.

59. The Administration Charge is fair and reasonable given the number of beneficiaries, the size and complexity of the Applicant's business, and the complexity of the restructuring proposed in this CCAA Proceeding. The amount of the Administration Charge has been determined with

---

[55] Stewart Affidavit at para. 123.
[56] CCAA, s. 11.52.
[57] *Timminco Limited (Re)*, 2012 ONSC 506 at para. 66.
[58] Court have considered: (i) the size and complexity of the business being restructured; (ii) the proposed role of the beneficiaries of the charge; (iii) whether there is an unwarranted duplication of roles; (iv) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the Monitor: *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54

guidance from the Proposed Monitor and is limited to what is necessary for the Initial Stay Period. The DIP Lender and the Proposed Monitor support the Administration Charge.[59]

(ii) Directors' Charge

60. The CCAA also authorizes this Court to grant a priority charge to indemnify a debtor company's directors and officers on notice to its secured creditors.[60] Directors' charges encourage directors and officers to remain in place, providing a potential stabilizing force for the company.[61] In deciding whether to grant a director's charge, Courts must be satisfied that: (i) notice has been given to the likely affected secured creditors; (ii) the amount is appropriate; (iii) the Applicant could not obtain adequate indemnification insurance for the directors and officers at a reasonable cost; and (iv) the charge does not apply to obligations incurred by a director or officer as a result of their gross negligence or wilful misconduct.[62]

61. The Applicant seeks the Directors' Charge against the Applicant's Property in favour of the Directors and Officers in the amount of $10.521 million to protect the Directors and Officers from the risk of significant personal exposure. The only director of Travel Services is Mr. Stewart, who is also the president of the Applicant. As discussed above, Travel Services is integral to the operation of the Applicant and its Directors and Officers should be protected for their continued service.

62. The Applicant has worked with the Restructuring Advisor to calculate the quantum of the Directors' Charge. The DIP Lender and the Proposed Monitor support the Directors' Charge.[63]

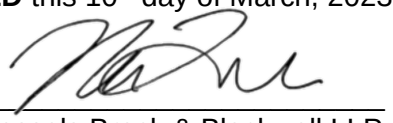
---

[59] Stewart Affidavit at paras. 120 – 122; Proposed Monitor's Pre-Filing Report.
[60] CCAA, s. 11.51.
[61] *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72, 2009 CanLII 55114 at para. 48 (ONSC).
[62] *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para. 45.
[63] Stewart Affidavit at para. 131; Proposed Monitor's Pre-Filing Report.

PART IV - ORDER REQUESTED

63. For all of the reasons above, the Applicant submits that this Court should grant the relief requested and issue an order substantially in the form of the draft Initial Order included in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March, 2023.



Cassels Brock & Blackwell LLP
Lawyers for the LoyaltyOne Entities

Ryan Jacobs LSO #: 59510J
Tel: 416.860.6465
Email: rjacobs@cassels.com

Jane Dietrich LSO #: 49302U
Tel: 416.860.5223
Email: jdietrich@cassels.com

Natalie E. Levine LSO #: 64908K
Tel: 416.860.6568
Email: nlevine@cassels.com

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Air Canada, Re* (2003), 28 C.B.R. (5th) 52, 2003 CarswellOnt 9109 (ONSC)
2. *BBB Canada LTD. (Re)*, (February 10, 2023), ONSC (Commercial List), Court File No. CV-23-00694493-00CL (Initial Order)
3. *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72, 2009 CanLII 55114 (ONSC)
4. *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222
5. *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60
6. *Cinram International Inc, Re*, 2012 ONSC 3767
7. *Clover Leaf Holdings Company, Re*, 2019 ONSC 6966
8. *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299
9. *Golf Town Canada Inc. et al., Re* (September 14, 2016), ONSC (Commercial List), Court File No. CV-16-11627-00CL at para. 7 (Ont. Sup. Ct. J. [Commercial List]) (Initial Order)
10. *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36
11. *Jaguar Mining Inc., Re*, 2014 ONSC 494
12. *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont Ct J (Gen Div))
13. *McEwan Enterprises Inc.*, 2021 ONSC 6453
14. *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422
15. *North American Tungsten Corporation Ltd., Re*, 2015 BCSC 1376
16. *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299*,* 2004 CanLII 24933 (ONSC)
17. *Target Canada Co., Re*, 2015 ONSC 303
18. *Target (Re)*, (January 15, 2015), ONSC (Commercial List), Court File No. CV-15-10832-00CL (Initial Order)
19. *Timminco Limited (Re)*, 2012 ONSC 948
20. *9354-9186 Quebec inc. v. Callidus Capital Corp.*, 2020 SCC 10
21. *4519922 Canada Inc., Re*, 2015 ONSC 124

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

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

Definitions

2. In this Act, …

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

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

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

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

…

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

Definitions

2 (1) In this Act, …

debtor company means any company that

(a) is bankrupt or insolvent,

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

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

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

…

Application

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

…

Jurisdiction of court to receive applications

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

…

General Power of Court

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

Stays, etc. – initial application

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

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

…

Burden of proof on application

(3) The court shall not make the order unless

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

…

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

Duties and functions

23 (1) The monitor shall

> (a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,
>
> > (i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and
> >
> > (ii) within five days after the day on which the order is made,
> >
> > > (A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

SCHEDULE “C”

AUTHORITIES NOT AVAILABLE ON CANLII

2003 CarswellOnt 9109
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2003 CarswellOnt 9109, 28 C.B.R. (5th) 52

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

In the Matter of Section 191 of the Canada Business Corporations Act, R.S.C. 1985, C. C-44, as Amended

In the Matter of a Plan of Compromise or Arrangement of Air Canada and those Subsidiaries Listed on Schedule "A"

Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

Farley J.

Heard: July 15, 18, 2003
Oral reasons: July 18, 2003
Written reasons: July 21, 2003
Docket: 03-CL-4932

Counsel: Katherine L. Kay, Danielle K. Royal, Ashley John Taylor for Air Canada
Ian Dick, Jacqueline Dais-Visca for Attorney General of Canada
Pascale Giguère for Commissioner of Official Languages
Dougald Brown for Privacy Commissioner of Canada
John R. Varley for Non-Union Retiree Representatives
B.P. Bellmore for Executive, Senior Management, Management and Administrative Technical Support Employees Representative
Heath L. Whiteley for Goodyear Tire & Rubber Company
Robert Thornton, Greg Azeff for GE Capital Aviation Services Inc. (GECAS)
Jeremy Dacks for GE Capital
Michael Kainer for Canadian Autoworkers
James C. Tory for Air Canada Directors
Stephen Wahl, Murray Gold for CUPE
Richard B. Jones for Air Canada Pilots Association
Elizabeth Shilton for IAMAW
Peter Griffin, Monique Jilesen for Monitor, Ernst & Young Inc.
Kevin McElcheran, Linc Rogers for CIBC
Joseph Bellissimo for Orix Corporation, Montrose & Company, Mitsubishi Corporation, Banca Intesca, Lambard Capital, Finova Capital Corp., Pegasus Aviation, et al.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Insolvent airline AC was preparing restructuring plan pursuant to Companies' Creditors Arrangement Act ("CCAA") which would involve proposal to its creditors and AC obtained stay of proceedings against it — Federal departments or commissions which regulated AC ("regulators") brought motions questioning court's jurisdiction to impose stay pursuant to CCAA and its inherent jurisdiction — Motions dismissed — Section 11(3) of CCAA provided court with specific jurisdiction to grant stay since jurisprudence indicated that "proceedings" ought not to be restricted to judicial proceedings for economic, financial, business or commercial matters — No statute or jurisprudence constrained or eliminated ability of court to grant stay pursuant to its inherent jurisdiction — No conflict existed between CCAA and federal legislation such as Canada Labour Code since stay was anticipated to be of nine-month temporary duration — AC was required to deal with every unresolved regulatory matter after it emerged from CCAA proceedings and if AC was not successful in CCAA proceedings then most regulatory matters would become moot — Receiving AC's internal counsel's affidavit as fresh evidence justifying stay was permitted since AC had onus of demonstrating that stay was justified — Stay was justified since legal resources of AC for dealing with regulatory matters were under strain and AC was in range of having regulatory maters impair its ability to deal with its business and restructuring activities on ongoing basis — Regulators were permitted to enforce regulatory order for particular situation if based on objective justifiable grounds and AC could bring application to determine reasonableness of regulator's action.

Table of Authorities

Cases considered by *Farley J.*:

Algoma Steel Inc., Re (2001), 25 C.B.R. (4th) 194, 147 O.A.C. 291, 2001 CarswellOnt 1742 (Ont. C.A.) — considered

Always Travel Inc. v. Air Canada (2003), 2003 FCT 707, 2003 CarswellNat 1763, 43 C.B.R. (4th) 163, 2003 CFPI 707, 235 F.T.R. 142, 2003 CarswellNat 4358 (Fed. T.D.) — considered

Anvil Range Mining Corp., Re (1998), 1998 CarswellOnt 1146, 3 C.B.R. (4th) 93 (Ont. Gen. Div. [Commercial List]) — referred to

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 85, 1975 CarswellMan 3, [1976] 2 S.C.R. 475 (S.C.C.) — considered

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.) — 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

Loxtave Buildings of Canada Ltd., Re (1943), 25 C.B.R. 22, 1943 CarswellSask 3 (Sask. K.B.) — considered

Meridian Development Inc. v. Toronto Dominion Bank (1984), [1984] 5 W.W.R. 215, 1984 CarswellAlta 259, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Alta. Q.B.) — considered

Minister of National Revenue v. Points North Freight Forwarding Inc. (2000), 2000 SKQB 504, 200 Sask. R. 283, [2001] 3 W.W.R. 304, [2001] G.S.T.C. 87, 24 C.B.R. (4th) 184, 2000 CarswellSask 641 (Sask. Q.B.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 92 A.R. 81, 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

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

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — considered

Québec (Commission du salaire minimum) c. Bell Telephone Co. (1966), 1966 CarswellQue 42, [1966] S.C.R. 767, 59 D.L.R. (2d) 145, 66 C.L.L.C. 14,154 (S.C.C.) — considered

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105, 1990 CarswellBC 384, 2 C.B.R. (3d) 303 (B.C. C.A.) — considered

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — considered

Sairex GmbH v. Prudential Steel Ltd. (1991), 1991 CarswellOnt 215, 8 C.B.R. (3d) 62 (Ont. Gen. Div.) — considered

Scaffold Connection Corp., Re (2000), 2000 CarswellAlta 60, 2000 ABQB 33, [2000] 7 W.W.R. 516, 2 C.L.R. (3d) 117, 79 Alta. L.R. (3d) 144, 15 C.B.R. (4th) 289 (Alta. Q.B.) — referred to

Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd. (2000), 7 B.L.R. (3d) 86, 2000 CarswellOnt 1770, 19 C.B.R. (4th) 299, 48 O.R. (3d) 746 (Ont. S.C.J. [Commercial List]) — considered

United Used Auto & Truck Parts Ltd., Re (2000), [2001] G.S.T.C. 27, 20 C.B.R. (4th) 289, 2000 BCSC 30, 77 B.C.L.R. (3d) 143, 2000 CarswellBC 1471, [2000] 3 C.T.C. 338 (B.C. S.C. [In Chambers]) — referred to

Versatech Group Inc., Re (2000), 2000 CarswellOnt 3730 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Generally — referred to

Pt. I — referred to

Pt. II — referred to

s. 123(1) — referred to

s. 134 — referred to

s. 156 — referred to

s. 168(1) — referred to

Canadian Payments Act, R.S.C. 1985, c. C-21

Generally — referred to

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

Generally — considered

s. 11(3) — considered

s. 11(3)(b) — considered

s. 11(3)(c) — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.11 [en. 2001, c. 9, s. 577] — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91(21) — referred to

MOTIONS by federal regulators of insolvent airline questioning court's jurisdiction to grant stay of proceedings pursuant to *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 These reasons deal with what has been termed the "Regulators' Motions". As argued, these motions by the Attorney General of Canada ("AG") and the Privacy Commissioner ("PC") were to the effect that this Court, the Superior Court of Justice, in dealing with the Air Canada applicants (collectively, "AC") in relation to the *Companies' Creditors Arrangement Act* ("CCAA") proceedings had no jurisdiction pursuant to the CCAA to impose a stay as to any of the federal departments or commissions ("Regulators") which regulate or otherwise deal with AC. They also argued that this court did not have any inherent jurisdiction to impose such a stay if this court lacked specific jurisdiction under the CCAA. Furthermore they asserted that the CCAA was in conflict with other federal legislation such as the *Canada Labour Code* (e.g. s. 123(1) and s. 168(1)), which contains language to the effect that the legislation is to be applied and acted upon notwithstanding the provisions of any other legislation. Please see my endorsement of July 18, 2003 (following my oral determination in court at the end of the hearing that day) that I had reached

the conclusion that this court did have jurisdiction to issue a stay *vis-à-vis* the Regulators and that there was no conflict with the legislation. I indicated that I would give reasons later. These are the promised reasons. In addition I will deal with the other elements of the motions as to onus and whether or not a stay is justified in the circumstances initially and on an ongoing basis (the Regulators asserting that stays concerning regulatory functions ought to be granted sparingly and only where it is demonstrated that to allow the regulatory functions to continue would be of catastrophic or devastating consequences to a CCAA applicant in its restructuring activities or at least that it would materially interfere with such applicant focusing on such activities).

2 As previously indicated the Commissioner of Official Languages ("COL") withdrew her motion on July 18, 2003; it appears that she has worked out a *modus vivendi* with AC as to her ongoing activities.

3 The various AC unions and AC have also reached a *modus vivendi* as indicated in the attached draft order which I have found appropriate in the circumstances. This contemplates that matters from June 1, 2003 forward will be dealt with on an ongoing basis.

4 I also note that these motions are without prejudice to the discussions which the Superintendent of Financial Institutions ("OSFI") is having with AC and with the AC unions and others. I understand that these discussions are being engaged in to see if there can be a *modus vivendi* with respect to pension related matters.

5 Throughout these proceedings to date, including the end of the July 18th hearing, I have urged those concerned to engage in meaningful dialogue to see if matters of concern can be dealt with in an officient and effective manner, all with a view to seeing if there is a reasonable opportunity for AC to be restructured on an ongoing viable basis in a very competitive industry, an industry which faces many challenges (some of longstanding and others of recent impact such as SARS, the Iraqi War, the threat of terrorism and economic doldrums). Specifically on July 18th I requested AC and the Regulators to engage in *bona fide* objective discussions as to how to deal with regulatory activities on a streamlined effective and efficient basis that would minimize the use of AC resources but at the same time ensure that each case was reasonably dealt with to ensure justice. Unfortunately as was candidly acknowledged at the hearing, in essence over the past three months, there has been a "dialogue of the deaf" by both sides as AC has insisted that it need not respond to any Regulator at all (although in fact, it appears that elements of AC have continued dealing with some of the Regulators on a "business as (almost) usual" basis), while at the same time the Regulators have insisted that there was no jurisdiction for paragraph 3 of the (Amended and Restated) Initial Order which provides:

> **STAY OF PROCEEDINGS**
>
> **THIS COURT ORDERS** that, until and including June 30, 2003, or such later date as the Court may order (the "Stay Period"), (a) no suit, action, enforcement process, extra-judicial proceeding or other proceeding (including a proceeding in any court, statutory or otherwise) (a "Proceeding") against or in respect of an Applicant or any present of future property, right, assets or undertaking of an Applicant wheresoever located, and whether held by an Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise, and without limiting the generality of the foregoing, including the leasehold interests of the Applicants in any aircraft and engines leased by an Applicant, whether in the possession of an Applicant, or subleased to another entity (and for greater certainty excluding any other title or other interest in such aircraft and engines held by other parties), any and all real property, personal property and intellectual property of an Applicant, and any and all securities, instruments, debentures, notes or bonds issued to, or held by or on behalf of an Applicant (the "Applicants' Property"), shall be commenced and any and all Proceedings against or in respect of an Applicant or the Applicants' Property already commenced be and are hereby stayed and suspended, and (b) all persons are enjoined and restrained from realizing upon or enforcing by court proceedings, private seizure or otherwise, any security of any nature or description held by that person on the Applicants' Property or from otherwise seizing or retaining possession of the Applicants' Property, or from seizing, detaining or retaining aircraft operated by the Applicants.

6 While the stay is now operative to September 30, 2003, it has been indicated that under the foreseeable circumstances, the objective of AC is to emerge from CCAA protection by the end of the 2003 year with a restructured operation pursuant to a Reorganization Plan. Given the nature of the industry, it is of course desirable for AC to see if it can do that emergence at the

earliest reasonable date. Given the myriad of issues to be dealt with, it appears to me that year end is not unreasonable — but if it is possible to do it earlier, so much the better. Given the circumstances here, that is a reasonably brief period.

7 I am of the view that every one truly appreciates that the time spent preparing for litigation and in court is not as desirably or productively spent as using that same time to work out matters on a reasonable functional basis, if that is possible with goodwill flowing both ways. The efforts of those who have engaged in such activities are recognized and applauded.

8 As was made quite clear by the Regulators' counsel during the hearing, these Motions are not in any respect to be considered as requests by the Regulators to lift the stay.

9 AC has proposed that as a compromise the Regulators be allowed to engage in their activities as such engage what AC termed the four pillars of safety, security, health and airworthiness but that there be no enforcement of any decision by the Regulators as to these areas.

CCAA Stay

10 Section 11(3) and (b) and (c) of the CCAA provides:

> s. 11 (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,
>
> . . .
>
> (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.

11 The Regulators submitted that the term "proceedings" ought to be restricted to judicial proceedings involving creditors in the sense of economic, financial, business or commercial concerns being affected; however, they did acknowledge that quasi-judicial matters might also be dealt with and affected by a CCAA stay in the sense that a matter might be the subject of an (non-court) arbitration. The Regulators rely on the views expressed at p. 173 of Sullivan and Dreidger, *Construction of Statutes 4th Ed.* (Markham: Butterworths Canada Limited, 2002) at pp. 173-4 as to the associated words rule. With respect, the term proceedings is to my view a term which imparts with it a great deal more than "action" or "suit" in their judicial or quasi-judicial element.

12 The CCAA is remedial legislation in its purest sense. See *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) at p. 306 (Doherty, J.A. dissenting but not on this point). The term "proceeding" has been determined before as not referring solely to legal proceedings — or proceedings involving economic, financial, business or commercial rights. See *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.* (2000), 48 O.R. (3d) 746 (Ont. S.C.J. [Commercial List]) where Lane, J. was dealing with a regulatory hearing proposed by the Toronto Stock Exchange. See also *Versatech Group Inc., Re*, [2000] O.J. No. 3785 (Ont. S.C.J. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div. [Commercial List]). Although technically in *obiter*, Wachowich, J. had no hesitation in going beyond the narrow view of "proceedings" urged on me by the Regulators when he said at pp. 583-4 of *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 11 D.L.R. (4th) 576 (Alta. Q.B.):

> Meridian argues further on the basis of the *ejusdem generis* rule that the interpretation of "other proceeding" in s. 11 of the *Companies' Creditors Arrangement Act* is limited to proceedings which would fall within the genus indicated by the words "suit" and "action". This, too, indicates that the term as used in the Act ought to be restricted to proceedings which necessarily involve a court or court official.

> These arguments are persuasive. None the less, I am mindful of the wide scope of action which Parliament intended for this section of the Act. To narrow the interpretation of "proceeding" could lessen the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other creditors are being consulted. As I indicated earlier, it is necessary to give this section a wide interpretation in order to ensure its effectiveness. I hesitate therefore to restrict the term "proceedings" to those necessarily involving a court or court official because there are situations in which to do so would allow non-judicial proceedings to go against the creditor which would effectively prejudice other creditors and make effective arrangement impossible. The restriction could thus defeat the purpose of the Act. I must consider, for instance, the fact that it may still be possible to make distress without requiring a sheriff or his bailiff, as for example, on a chattel mortgage. It might well be necessary in terms of s. 11 in some future situations. As a result, in the absence of a clear indication from Parliament of an intention to restrict "proceedings" to "proceedings which involve either a court or court official", I cannot find that the term should be so restricted. Had Parliament intended to so restrict the term, it would have been easy to qualify it by saying for instance "proceedings before a court or tribunal".
>
> (emphasis added)

I agree with these views. Indeed there are no such restrictive words on proceedings nor are there any words which denote that the jurisdiction to grant a stay is only to deal with economic, financial, business or commercial matters. I would note that Parliament has had ample opportunity over the past two decades to amend section 11(3)(b) and (c) in the way urged on me by the Regulators if it felt that desirable; that could have been done in the 1992 or 1997 amendments pursuant to the five year review procedure. Amendments were made at those times in various areas; however, it appears that Parliament recognized that, with respect to the types of applicants which could apply for restructuring protection under the CCAA, it was undesirable to restrict the discretion of the court to deal with matters which involve delicate balancing of various interests with a view to ensuring that productive resources were utilized to the maximum degree for the overall benefit to Canada's social and economic values. Of course that discretion is not without restraint — rather that discretion is to be judicially exercised according to the circumstances applicable in any particular case.

13 That is not to say that s. 11(3) has not been affected by amendment. In 1997, s. 11.1(2) was added to underscore that any stay granted under the CCAA did not affect certain activities related to the *Canadian Payments Act*. In 2001, s. 11.1(2) was modified to read:

> 11.1(2) No order may be made under this Act staying or restraining the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association.

That same year, the CCAA was further amended by adding s. 11.11:

> 11.11 No order may be made under this Act staying or restraining
>
> > (a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;
> >
> > (b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or
> >
> > (c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

It is clear that the activities envisaged by these restricting changes are not in any way related to judicial or quasi-judicial proceedings. Nor can they be said to be of the nature of the economic, financial, business or commercial concerns pressed on

me by the Regulators. Indeed most of these activities could reasonably be said to be at a polar edge of the spectrum of activities well beyond the regulatory activities which the Regulators are engaged in. The Regulators suggested that these amendments were merely clarifications of what was already understood; however in my view, if it were already understood, then there would have been no need for clarification of that nature.

14 I am of the view that Section 11(3) provides this court with specific jurisdiction to grant the stay complained about by the Regulators.

15 I did observe during the hearing that the natural human tendency of legal counsel to add into "routine orders" additional language or provisions so as to "improve" the workability of the order (but within the four corners of the authority governing) sometimes backfires. It may well be that in expanding on the language of s. 11(3), inadvertently the draftspersons of these draft orders open up what might be perceived as loopholes and thus create false expectations amongst some of those affected. The Commercial List Users Committee is presently engaged in seeing if there can be a consensus on a "perfect order" for matters such as Initial CCAA orders; however, I recognize that legal counsel will undoubtedly be tempted to improve on that "perfection". It is perhaps the "overworking" of language in such orders that leads to misinterpretation which I respectfully am concerned may have been the case in *Always Travel Inc. v. Air Canada*, 2003 FCT 707 (Fed. T.D.) regarding the question of "court".

Inherent Jurisdiction Stay

16 Even if I were to have reached the conclusion that this court had no jurisdiction under the CCAA to stay the activities of the Regulators, then I would be of the view that this court has the inherent jurisdiction to do so. See *Loxtave Buildings of Canada Ltd., Re* (1943), 25 C.B.R. 22 (Sask. K.B.):

> It is well established law that nothing shall be intended to be out of the jurisdiction of a Superior Court but what expressly appears to be so. The jurisdiction of the King's Superior Courts over matters cognizable by them can not be taken away but by express words or perhaps by necessary implication arising from the use of words absolutely inconsistent with the exercise of the jurisdiction, or to which effect can not be given except by exclusion of such jurisdiction. If a Court has jurisdiction of the principal matter it has also jurisdiction over all matters incident thereto and may try them according to the course of their law so that it be not contrary to the common law. I realize that the Bankruptcy law is statutory mainly and a Court should not go beyond the provisions of the statute applicable. But, if the subject matter is within the statute, the Court may draw on its inherent powers to give effect to the provisions of the statute applicable.
>
> (emphasis added)

See also *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) and *Scaffold Connection Corp., Re* (2000), 15 C.B.R. (4th) 289 (Alta. Q.B.) at p. 295. I am thoroughly familiar with the concept that inherent jurisdiction has no place to fill the gap if there is indeed no gap: see *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), wherein I followed the view of the Supreme Court of Canada in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), 57 D.L.R. (3d) 1 (S.C.C.) while noting:

> However, it is fair to say that the S.C.C. in *Baxter*, when faced with the choice between an unpractical but "legal" solution and a procedural one, opted for the unpractical one. Thus, one is constrained from distinguishing on the basis of the recognition of the CCAA over the past 15 years having a familial relationship with Necessity.

17 However, it does not appear to me that there is any statute (or binding decision) which constrains or eliminates the ability of this court to grant a stay pursuant to its inherent jurisdiction provided that that discretion is judicially exercised in the circumstances prevailing. As I ruled at pp. 296-7 of *Royal Oak Mines Inc.*, in order to accomplish the goal of facilitating the restructuring of a debtor company, the court has a fund of discretionary powers arising from its inherent jurisdiction to make orders not only to do justice between the parties or other affected person but also to do what practicality demands. See *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at p. 196 citing *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) as to the recognition that appellate courts are reluctant to interfere with ongoing

supervision of a CCAA matter, appreciating that the supervising judge is required of course to exercise his or her discretion judicially.

Question of Conflict with Other Legislation

18 The Regulators appeared to have approached these motions on the basis that the stay which has been granted is a permanent stay. Nothing could be further from the truth though since this stay is a temporal one only. Once AC emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved Regulator matter. As discussed above, it is contemplated that the time horizon for that will be the end of 2003. By that time, if so, then AC will have been in CCAA proceedings for some nine months. It would not seem to me that the adage of "justice delayed is justice denied" is truly applicable in these circumstances on a general basis (I do however recognize that there may be particular instances where that nine month period may cause some "justice delivery" difficulties; I would think that any such instances could be handled by reasonable discussion). See below for my view concerning the resource difficulty. Since the temporal stay is of an anticipated nine month temporary duration, then I do not see that there is any conflict with federal legislation such as the *Canada Labour Code* which has "notwithstanding any other legislation" language. See also *United Used Auto & Truck Parts Ltd., Re* (2000), 77 B.C.L.R. (3d) 143 (B.C. S.C. [In Chambers]) at p. 158, para. 38; *Minister of National Revenue v. Points North Freight Forwarding Inc.* (2000), 24 C.B.R. (4th) 184 (Sask. Q.B.) at p. 189 (Para. 14). Given my conclusion on there being no conflict, it is unnecessary to conclude whether or not federal jurisdiction to make laws respecting labour statutes is limited to its use as an ancillary power as to the regulation of federal undertakings as alluded to at p. 775 of *Québec (Commission du salaire minimum) c. Bell Telephone Co.*, [1966] S.C.R. 767 (S.C.C.). AC was asserting that the federal jurisdiction with respect to insolvency matters, in contrast, was a core area of jurisdiction enumerated in section 91(21) of the *Constitution Act*, 1967. I pause to note that if AC were not to successfully emerge from these CCAA proceedings, then most, if not all, of the accumulated regulatory matters would become moot. Since these proceedings were initiated, no one has come forward to indicate that they would be advantaged by a demise of AC; indeed when participants in these proceedings (including the Regulators) were asked that question, they all responded negatively. I take it as an unspoken given that the Regulators will do everything that is reasonably possible to avoid that possibility with its recognized very negative effects upon the stakeholders of AC, the great disruption that would entail for the public and the necessary loss of domestic economic activity and jobs. I am therefore confident that with the issue of principle as to whether or not this court has jurisdiction decided, AC and the Regulators will be able to work together to achieve a *modus vivendi* and not get bogged down.

19 Indeed it appears to me that if there is a bogging down, then there is the significant risk that momentum, the positive momentum which the AC proceedings have generated since their initiation will be halted. CCAA proceedings are somewhat like bicycles; if the rider loses momentum, the bicycle and the rider fall over. Neither should the parties get the Court bogged down as in a CCAA situation by bringing to it indefinitely and infinitely small item by small item as opposed to working out matters, if reasonably possible.

20 But I must not lose sight of the other issues which were argued and which of course affect the ultimate determination of these motions.

Onus

21 Firstly, allow me to deal with the question of onus. The onus is on an applicant in CCAA proceedings to demonstrate that it is appropriate to have a stay of proceedings. However, it must be recognized that insolvency situations are inherently chaotic. Perhaps the AC one is a prime example of that as events radically overtook which had been anticipated to be a consensual restructuring, forcing AC to run gasping to the Court for this CCAA proceeding. That was recognized at the initial order stage of April 1, 2003, with the indication that it was recognized that the order would have to undergo the critical eye of stakeholders as it had been drafted in great haste. As discussed part of AC's problems have been of longstanding and ought in fairness to have been functionally addressed well before now (an example of this would be the imperfect operational and functional merger of the old Air Canada and the old Canadian Airlines); I have indicated above the more recent impacts but did not there mention the pension deficit as to which OSFI took action in late March. It was appreciated by counsel during the hearing that on a practical and now routine basis, initial CCAA orders have broadly drafted stay provisions which may thereafter be tailored or whittled

down as circumstances require. The broad stay is required to give initial stability to a crisis situation. Certainly the condition of AC at the time of the application was perilous; it required the stabilization that a broad stay provision would give.

22 I would note that the initial application material did not provide any information specifically with respect to the stay necessity. It is only with the affidavit affirmed July 8, 2003 by Louise-Hélène Sénécal, internal counsel at AC that AC has specifically dealt with the need for such a stay (as modified as suggested above). Ms. Sénécal was not cross-examined on this affidavit but that may have been the result or a function of the Regulators growing (and reasonably so in my view) impatient with getting their motions finally on. I have no doubt that in a CCAA proceeding which has fewer fires to put out than this AC one, justification for the stay would be forthcoming on a more timely basis. However in my view it is not inappropriate for the court now to receive this type of "fresh evidence" and I note that the Regulators did not take much issue with its introduction.

Justification of the Stay Being Granted

23 The Sénécal Affidavit may be criticized as being too general. However it must be viewed in the context of the prevailing circumstances. AC is a large enterprise with at peak some forty thousand employees; it operates domestically and internationally; its facilities are widespread; it is involved in an industry which interacts with a very large number of regulatory authorities; its activities bring it into contact with an immense number of the travelling public, some of whom are veteran fliers and others who may be novices. From the material of the Regulators it appears that there are innumerable interfaces between these Regulators and AC as to various concerns. It would be relatively fruitless to specify each and every interface incident and advise in detail as to them.

24 As indicated above, AC has made progress in dealing with various of its problems. Perhaps the most important of these, at least to date, is the negotiation of revised collective agreements with its nine unions. That was accomplished in three weeks of intensive facilitation supervised by Winkler, J. (as to whom all concerned have expressed an immense debt of gratitude well deserved); that perhaps ought to be contrasted with the glacial pace of labour negotiations prior to the CCAA proceedings. These negotiations with the subsequent sanctioning of the amendments by the various memberships and the ongoing ancillary involvement with ongoing labour matters as a result have no doubt left AC's labour and legal departments breathless. The legal department (together with outside legal assistance) has also continued to be involved in negotiations relating to other areas and existing contracts. Based on a fair reading of the Sénécal Affidavit in these circumstances, I would conclude that the legal side resources of AC to deal with regulatory matters is under strain. If AC were not so heavily involved with regulatory matters as it appears that it is, then I would have expected better detail. However I am not of the view that the Sénécal Affidavit was a formalistic statement as referred to at paragraph 5 of *Versatech Group Inc.* It seems to me that with the arrangements that AC now has with the unions as to matters June 1, 2003 on and with its proposal as to the four pillars of safety, security, health and airworthiness (subject to my views below), AC is in the range of having regulatory matters impair its ability to deal with its business and its restructuring activities on an ongoing basis. I note that in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.), Gibbs J.A. for the British Columbia Court of Appeal stated at pp. 311-12:

> ...it would appear to be 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. The power is discretionary and therefore to be exercised judicially.

25 Blair, J. in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.) observed at p. 346 that the Court's power to grant a stay under section 11(3) of the CCAA extended "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". See also *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) where Forsyth, J. at page 16 stated:

> Surely a necessary part of promoting the continuance of a company is to give that company some time to stop and gather its faculties without interference from affected parties for a brief period of time. In my opinion, the distinction between

> creditors' contractual rights and the contractual rights of non-creditor third parties that Norcen asks me to draw is not a helpful one in these circumstances. Continuance of a company involves more than a consideration of creditor claims.

26 See also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77 where I observed:

> However, I must be cognizant of the fact that activity on Sairex's part would likely require activity on Algoma's part — thereby requiring the deployment of executive time in this manner which can be pursued after Algoma comes out from its C.C.A.A. shell, rather than such executives spending their time on the restructuring process or general operations of making and selling steel at a critical time. It would also result in legal expense and possible diversion of legal talent.

I would note that I mentioned "executive" time. To my view if regulatory matters can be reasonably dealt with on a managerial or lower level then that would not interfere with executive time. However that should not presuppose that such managerial or lower level resource might not be actively engaged in putting out more "immediate fires" than what might be considered "routine" regulatory matters. I would also observe that individually no one regulatory matter would likely be a "killer", but it is possible to die the "death of a thousand cuts" if one were to take on all of the matters in the aggregate.

27 The Regulators rely heavily on *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.*, *supra*. What Lane, J. said at page 752 was that he must weight the interests of affected parties. In that case he did so, but as he indicated at page 747: "I do not regard them [*in terrorem* examples] as useful because I do not regard my task as setting out a rule of general application. Rather, my task is to determine, on these particular facts and dealing with the specific legislation involved, whether to exercise my discretion to lift the CCAA stay". In the present case, I am similarly not setting out a rule of general application. Further, as opposed to the situation which Lane J. faced, I specifically am not dealing with a list stay request as the Regulators have indicated they have made no such request.

28 It seems to me that it is a reasonable conclusion that AC has made out a case for the continuance of the stay with the modifications noted above on a balancing of interests basis recognizing the focus feature. However with respect to the four pillars *vis-à-vis* the Regulators, I would adjust that proposal so that the Regulators, if they saw fit in any particular situation based on objective justifiable grounds, would be permitted to immediately enforce any regulatory order or equivalent. However, if AC were to be of the view that the enforcement were unnecessary in the circumstances, then AC could apply to this court to have the reasonability of the Regulator's action determined. If this court were of the opinion that the action taken was unreasonable in the circumstances, then an appropriate penalty would be levied against the Regulator. I cannot foresee that such an application would ever come to pass, given the goodwill which exists between a regulator and one regulated, especially when the one regulated is in such a delicate financial condition. I may be spoken to about the appropriate language to be embodied in the order if perchance the sides were unable to agree.

Modus Vivendi

29 Again I come back to the need for AC and the Regulators to sit down and come to a *modus vivendi*, hopefully with a streamlined system. It will not do AC any good to delay dealing with matters which it could otherwise usefully deal with prior to emergence from the CCAA proceedings without undue strain on available resources. To do otherwise bears the risk of being knocked over by a tidal wave of pent up issues; similarly if matters are delayed, then there is the further problem that any third party complainants become more frustrated than they were when they made the complaints. The three Cs of the Commercial List: communication, cooperation and common sense might be usefully employed by AC and its personnel. I would observe that if there is a failure to communicate on a meaningful timely basis with respect to even matters which are outside the control of AC — e.g., the weather, then travellers start to complain that AC is not doing enough to "control the weather". In other words, bad customer relationships spill over; but if they are attended to on a preventative basis (as opposed to a reactive basis), they can be more easily managed to the satisfaction of all concerned.

30 The PC advises that it has five active files, one of which is fully ready for the release of a prepared report. As I understand the legislation under which the PC operates, after an investigation the PC releases a non-binding report to the complainant and the company (here AC). The complainant can then choose to proceed further before the Federal Court. Based on that I can see

no objection to the PC releasing that report, with the *proviso* that the complainant would have to obtain a lift of the stay from this court in order to proceed with a further Federal Court proceeding. Given that apparently there is a designated manager of privacy compliance, I would think it advisable for AC and the PC in their dialogue to review whether or not that compliance manager could be allowed to deal with the other four and possibly future privacy matters if not otherwise reengaged in more pressing current matters.

Conclusion

31 In conclusion, I would dismiss the Motions of the regulators. That of course is without prejudice to any Regulator moving to lift the stay. However, I assume that before that will happen, that AC and the Regulators would have exhausted their *bona fide* discussions on necessity, timeliness, prioritization and related matters. Each should approach the matter in a businesslike and flexible way, recognizing that it is important for AC to have the basis for maintaining the confidence of the public and to be seen to have that confidence with it on a team basis putting consumer requirements first as an ongoing principle to maintain good will and loyalty. This will take, as I have previously expressed, respect and trust flowing both ways (originally I expressed this mostly as to relations between management and labour — but in addition I now express it between the labour-management team and the Regulators.

Motions dismissed.

Appendix — Appendix

NOTE: This order is without prejudice to all parties' positions on the union motions, or to the Regulators' Motions.

THIS COURT ORDERS that effective upon the ratification of new and/or modified collective agreements (the "*Modified Collective Agreements*") with respect to any of the Applicants' bargaining units consequent upon the agreements reached during the mediation before Justice Winkler pursuant to the order of this Court dated May 9, 2003,

> (a) Proceedings in respect of events, actions or circumstances which occur on or after June 1, 2003 which arise from such Modified Collective Agreements (including, without limitation, grievances or arbitration procedures); and
>
> (b) Proceedings pursuant to Part I or Part II of the *Canada Labour Code* which arise from events, actions or circumstances which occur on or after June 1, 2003,

shall not be deemed to be stayed notwithstanding the Amended and Restated Initial Order or any subsequent amendments thereof; provided however that (i) nothing prevents the Applicants from applying to this Court to stay any specific proceeding referred to in subparagraph (a) or (b) above, and/or the enforcement of any direction, decision or order of the Canada Industrial Relations Board made pursuant to Section 134 or 156 of the *Canada Labour Code*; and (ii) no proceeding may be taken in respect of any statutory offence provision under Part I or Part II of the *Canada Labour Code* without further order of this Court.

THIS COURT ORDERS that subparagraph 24(c) of the Amended and Restated Initial Order shall be deleted and replaced by the following:

> (c) terminate the employment of such of their unionized employees or temporarily lay off such of their unionized employees in accordance with the applicable Modified Collective Agreement; and terminate the employment of such of their non-unionized employees on such terms as may be agreed upon between the Applicant and each such employee, or failing such agreement, terminate such employment and deal with the consequences thereof in the Plan;

THIS COURT ORDERS that subparagraph 24(d) of the Amended and Restated Initial Order shall be deleted.

THIS COURT ORDERS that the unions and the Applicants meet forthwith to discuss a process for the resolution of pre-June 1, 2003 grievances, with the assistance of Mr. Justice Winkler if necessary.

THIS COURT ORDERS that the union motions be set down for hearing on August 7 and 8, 2003.

End of Document

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

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

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

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

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne * Inc., proposed monitor.
John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.i General principles
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

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

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

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

Held:

The application was allowed.

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

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

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

Table of Authorities

Cases considered:

Amirault Fish Co., Re, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — *referred to*

Associated Investors of Canada Ltd., Re, 67 C.B.R. (N.S.) 237 , Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, *(*sub nom. *Re First Investors Corp.)* 46 D.L.R. (4th) 669 (Q.B.) , reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — *referred to*

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — *referred to*

Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — *referred to*

Empire-Universal Films Ltd. v. Rank, [1947] O.R. 775 [H.C.] — *referred to*

Feifer v. Frame Manufacturing Corp., Re, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — *referred to*

Fine's Flowers Ltd. v. Fine's Flowers (Creditors of) (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — *referred to*

Gaz Métropolitain v. Wynden Canada Inc. (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — *referred to*

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

Inducon Development Corp. Re (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — *referred to*

International Donut Corp. v. 050863 N.B. Ltd. (1992), 127 N.B.R. (2d) 290, 319 A.P.R. 290 (Q.B.) — *considered*

Keppoch Development Ltd., Re (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) — *referred to*

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — *referred to*
McCordic v. Bosanquet (1974), 5 O.R. (2d) 53 (H.C.) — *referred to*
Meridian Developments Inc. v. Toronto Dominion Bank, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Q.B.) — *referred to*
Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 1 (Q.B.) — *referred to*
Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) — *referred to*
Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *referred to*
Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) , affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — *referred to*
Reference re Companies' Creditors Arrangement Act (Canada), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — *referred to*
Seven Mile Dam Contractors v. R. (1979), 13 B.C.L.R. 137, 104 D.L.R. (3d) 274 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) — *referred to*
Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — *referred to*
Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — *considered*
Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — *referred to*
Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon)* 1 O.R. (3d) 321 (Gen. Div.) — *referred to*
United Maritime Fishermen Co-operative, Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.) , varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.) , reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, 224 A.P.R. 253, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.)* 51 D.L.R. (4th) 618 (C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 85

s. 142

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

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

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

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

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

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

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

s. 75

Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

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

***Farley J.*:**

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

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured 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.

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 LOYALTYONE, CO.

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Ryan C. Jacobs LSO #: 59510J
Tel: 416.860.6465
rjacobs@cassels.com

Jane O. Dietrich LSO #: 49302U
Tel: 416.860.5223
jdietrich@cassels.com

Natalie E. Levine LSO #: 64908K
Tel: 416.860.6568
nlevine@cassels.com

Lawyers for the Applicant