Court File No. CV-20-00642256-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

BETWEEN:

KW CAPITAL PARTNERS LIMITED

Applicant

- AND -

VERT INFRASTRUCTURE LTD.

Respondent

BOOK OF AUTHORITIES OF THE RECEIVER
(Factum of KSV Restructuring Inc.)

June 1, 2021

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6.	*Re Target Canada Co.*, 2015 ONSC 303.
7.	*Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508.
8.	*Arrangement relatif a Nemaska Lithium inc.*, 2020 QCCS 3218 [unofficial translation].
9.	*Royal Bank of Canada v Casselman PHBC Ltd.*, 2017 ONSC 4107.

See para. 23

Original

2010 BCSC 1972
British Columbia Supreme Court [In Chambers]

269893 Alberta Ltd. v. Otter Bay Developments Ltd.

2010 CarswellBC 3883, 2010 BCSC 1972, 203 A.C.W.S. (3d) 543, 82 C.B.R. (5th) 93

269893 Alberta Ltd. (Plaintiff) and Otter Bay Developments Ltd., 670543 B.C. Ltd, 673097 B.C. Ltd., Stipek Financial Services, LLC Defined Benefit Pension Plan, Emerson Homes, a partnership of PGW Holdings Ltd., R. Malcolm Holdings Ltd., and D. Bird Holdings Ltd., Glenda Treleavan, Dan Treleavan, Forsite Developments Inc., Forsite Construction Inc., Towne Millwork Ltd., K.D. Cabinet Components Ltd., 555870 B.C. Ltd., Edwards Electric Ltd., 604674 B.C. Ltd., Slegg Construction Materials Ltd., Four Flower Enterprises Ltd., Gulf Excavating Ltd., Red Line Custom Plumbing & Heating Ltd., Otter Bay Investments Ltd., McCutcheon Design Group Ltd., Jawl Industries Ltd., Shanahan's Limited Wellmaster Pump & Water Systems Ltd., David Bromley Engineering Ltd., Polar Electric Inc. (Defendants)

In Bankruptcy and Insolvency

In the Matter of the Proposal of Otter Bay Developments Ltd.

B.J. Brown J.

Heard: March 15, 2010
Oral reasons: March 15, 2010
Written reasons: April 26, 2010
Docket: Vancouver H070322, B061635

Proceedings: affirmed *269893 Alberta Ltd. v. Otter Bay Developments Ltd.* (2011), 16 B.C.L.R. (5th) 298, 75 C.B.R. (5th) 1, 302 B.C.A.C. 21, 511 W.A.C. 21, 2011 BCCA 90 (B.C. C.A.)

Counsel: K.R. Doyle for 269893 Alberta Ltd.
P.J. Reardon, H. Ferris for Raiwal Developments Ltd.

Headnote

Real property --- Mortgages — Priorities — General principles — Determination of priority
Receiver was appointed regarding development — As units began to sell, receiver was required to provide clear title — As receiver required proceeds from sales to continue with project, parties worked out arrangement whereby 50 per cent of net proceeds would be paid to interim receiver, and 50 percent would be held in counsel's trust account — Parties agreed to consent order that funds accumulated in trust would be loaned to receiver to complete project — Receiver sought to deal with priority of payment of funds received from sales of remaining units — Receiver sought payment of $157,000 to strata corporation for unpaid strata fees — Receiver also sought payment of $845,000 borrowed from lender and used to complete project, which included $56,000 property tax payment and $20,000 renewal fee, and in addition, $20,000 in costs — Mortgagee took issue with receiver's proposed schedule of distribution, stating that secured creditor lien claimant trust had priority for $556,000 borrowed by receiver pursuant to court order — Receiver brought application for orders for payment — Application granted —

Strata fees enjoyed priority and there was no objection to paying them — Receiver had to pay taxes when it did to avoid forfeiture, for benefit of all creditors, and it was entitled to priority for this payment, even without approval of secured creditor — Parties did not argue issue of $20,000 loan renewal fee, nor lender's costs, but were entitled to make submissions on point if they wished — While there was some ambiguity in some orders approving sale and arguably on some orders, monies ought to be treated as trust funds and implicitly held solely for benefit of lien claimants and mortgagee — However, ambiguity was removed by consent order which provided that funds stood in place of land — Receiver's charge in order appointing receiver would take priority over land, and over cash held in lieu — Accordingly, receiver's charge would take priority over funds over claims of mortgagee and lien claimants — When lands and premises were sold, they were subject to receiver's charge granted in order appointing receiver — If sale proceeds were not to be impressed with that charge, one would expect orders to say so expressly, but they did not — Therefore receiver's charge applied to those funds.

Table of Authorities

Cases considered by *B.J. Brown J.*:

Bank of Montreal v. McCully (March 25, 1999), Doc. Victoria 97 3245 (B.C. Master) — considered

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123, 9 O.R. (2d) 84 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

***B.J. Brown J.*:**

1 These applications deal with the priority of payment of funds received by the interim receiver from the sales of the remaining units in this development. The interim receiver seeks orders for payment with respect to the following amounts:

1. $157,000 odd to the strata corporation for unpaid strata fees.

2. What I will call debtor-in-possession funding, but which is technically the receiver's borrowings which were used to complete the project, or in part to complete the project, provided by Raiwal Developments, totalling some $845,000.

3. 269893 Alberta Ltd. takes issue with the interim receiver's proposed schedule of distribution. It says that the secured creditor lien claimant trust has priority for 556,000 which was borrowed by the interim receiver pursuant to the order of the Chief Justice of July 18th, 2007.

4. The DIP lender, Raiwal, seeks clarification that it is entitled to be paid its costs, and I am told that these are approximately $20,000.

2 I will deal first with the strata fees. As I understand that, Alberta accepts that strata fees enjoy priority and does not object to the payment proposed by the interim receiver, so long as this is for fees only and not for fines, et cetera. Ms. Ferris has confirmed that to be the case and the interim receiver can make that payment without objection.

3 Turning now to the amounts due to Raiwal. The following amounts are in dispute:

4 First, a property tax payment advanced by Raiwal for $51,000 which, with interest, is now approximately 56,000 and is included in the 845,000. Second, a renewal fee charged by Raiwal of $20,000 and is also included in the $845,000. And third, 20,000 in costs for Raiwal which is not included in the $845,000.

5 With respect to the property tax payment, Alberta objects to the interim receiver paying this amount to Raiwal and priority to payments to Alberta and other secured creditors. Alberta argues that the permitted DIP financing was $500,000 and was fully advanced by July 1, 2007. The loan renewal fee of $20,000 and property tax payment

of $56,000 odd were advanced by Raiwal on December 1, 2007 and November 23, 2009 respectively. Alberta says that the interim receiver could, and should, have obtained a court order permitting these borrowings. Alberta relies on *Bank of Montreal v. McCully*, [1999] B.C.J. No. 888 (B.C. Master).

6 In November 2009 the interim receiver received six final notices of tax forfeiture, indicating that the properties would forfeit to the Crown on December 1, 2009 unless the delinquent taxes were paid. On November 12, 2009 counsel for Alberta e-mailed counsel for the interim receiver bringing the issue to her attention, and seeking confirmation that the interim receiver was taking steps on behalf of all creditors to prevent forfeiture. Counsel for the interim receiver confirmed that it was.

7 In my view the property taxes were properly paid for the protection of all creditors. This is a classic situation in which payments made by a receiver are entitled to priority or secured creditors. The principles are set out in the Ontario Court of Appeal decision of *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (Ont. C.A.) where the court says:

> The third exception which should be noted is this: If the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. The boundaries of what constitute "necessary costs of preservation" have not been clearly defined in English and Canadian jurisprudence. In *Re Oriental Hotels Co.*; *Perry v. Oriental Hotels Co.* (1871), L.R. 12 Eq. 126, a receiver was given priority for "costs of preservation", but the report of the case does not set out what was included in those words. In the subsequent decision in *Re Regent's Canal Ironworks Co.*, Ex p. Grissell (1875), 3 Ch. D. 411, James, L.J., in dealing with a liquidator's claim for priority over debenture holders for moneys paid for preservation of properties said (at p. 427):
>
> > The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.
>
> In *Clark On Receivers* ... the law on the point is stated in this way:
>
> > By the great weight of authority the claims against, and the indebtedness incurred by a receiver as a result of his administering the affairs, and even conducting the business of an insolvent concern of a private nature, except where absolutely essential to the preservation of its property, cannot be given priority over the claims of mortgagees or lienholders to the corpus of the property in the absence of consent or estoppel affecting said lienees.
> >
> > However, preservation costs may be absolutely necessary and be allowed against the lienholders. Preservation of the property from destruction, waste or loss, with or without the mortgagee's consent may include putting a person in charge of the property, as a watchman or otherwise, paying necessary repairs on the property and taxes which would prevent a forfeiture, and necessary insurance.

8 The interim receiver had to pay the taxes when it did to avoid forfeiture, for the benefit of all creditors. It is entitled to priority for this payment, even without the approval of the secured creditor.

9 Parenthetically, in this case, the e-mail from Alberta's solicitor would suggest that Alberta was asking the interim receiver to pay the taxes on November 2009 and may, in any event, constitute an estoppel.

10 *Bank of Montreal v. McCully* is a foreclosure case where the order *nisi* gave leave to the bank to apply for a further summary accounting with respect to various items, including cost charges and expenses. The bank added these amounts to its payment without seeking an order of the court. Master McCallum said at paragraph 19:

> The Bank ought to have completed the transaction on the basis of the offer which was approved by the court. If the purchaser refused to close, then the Bank, who had conduct of the sale, could have made a new agreement with the purchaser if it desired to do so provided the other parties to the proceedings agreed or the court was further involved. There is nothing in the order which justified the Bank in taking the unilateral course of action it did.
>
> There is similarly nothing in the order which would justify the Bank in unilaterally deducting amounts which were in fact costs, including protective disbursements, in the way it did. The Bank ought to have negotiated the amount of costs with counsel for Fouracre (since her interests were directly affected) or taken out an appointment to assess the costs if no agreement was possible.

And over at paragraph 24:

> The proceeds of sale ought to have been [a specific amount]. The amount owing to the Bank as at October 16th, 1998 was [another specific amount], leaving a balance of [x]. As no greater amount had been found owing to the Bank, the balance should, at a minimum, have been held by the law firm pending agreement or assessment of costs or paid into court.

11 In my view this case has limited application because it was not a receivership. However, even in that case, Master McCallum contemplated the bank obtaining a further order as indicated in paragraph 24.

12 Turning now to the $20,000 loan renewal fee.

13 Alberta is opposed to this payment in priority, also on the basis that the $500,000 receiver's borrowings were fully advanced before this expense was incurred.

14 The order appointing the interim receiver provided at paragraph 18 that:

> The interim receiver may borrow monies from time to time as it considers necessary or desirable not exceeding the principal sum of $500,000 for the purpose of protecting and preserving the Otter Bay property.

15 It also provided in paragraph 20 that the receiver's remuneration and its own expenses, including costs on a solicitor-and-own-client basis, shall form a charge on the Otter Bay property and priority to all other charges save and except those imposed by statute, and cannot be postponed by charge thus created.

16 The issue, it appears to me, is whether the $20,000 loan renewal fee comes within paragraph 20 of the order. If so, it is entitled to priority, apart from paragraph 18.

17 Paragraph 11(d) gives the interim receiver the power to take such steps as the interim receiver may consider necessary or advantageous for the preservation and protection of the Otter Bay property. Presumably the interim receiver considered the $20,000 renewal fee such a step. If so, that may come in within the receiver's expenses. If that expense was properly incurred by the interim receiver, then the interim receiver may be entitled to recover that expenditure in priority pursuant to paragraph 20 of the order.

18 However, the parties did not argue this issue before me so they will have liberty to make submissions on this point should they wish to do so

19 Turning now to Raiwal's costs. The interim receiver signed a commitment letter from Raiwal which provided that it would pay Raiwal's costs. Again, this may be an expense incurred by the interim receiver which the interim receiver would be entitled to recover in priority pursuant to paragraph 20 of the order. The amount of those expenses, and whether they were properly incurred, could be argued when the interim receiver passes its accounts. Again, the parties did not argue the point before me, and they may set a time to do so should they wish to do so.

20 Finally, turning to the priority of claims to the $556,000. The background to this project is described in my reasons of May 9, 2007. The parties itself are familiar with the history, and I will not repeat it here.

21 As units in the project began to sell, the interim receiver was required to provide clear title. There were a number of charges registered against the title. The interim receiver required proceeds from the sales to continue with the project. The parties worked out an arrangement whereby 50 percent of the net proceeds would be paid to the interim receiver, and 50 percent would be held in counsel's trust account. The wording of the orders varies somewhat. In some cases it provides — and I should say that as these sales came from time to time an order would be granted approving sale, and providing a vesting order.

22 In some cases the order provides that the balance will be held in trust in an interest bearing trust account for the lien claimants of Otter Bay Developments Ltd. and for 269893 Alberta Ltd. as mortgagee pending further court order. In other cases it provides that the fund shall be held in lieu of the subject lands and premises as security for the amount claimed under the mortgages of 269893 Alberta Ltd., and for amounts claimed under the builders liens of lien claimants. All of the orders were made after the order appointing the interim receiver.

23 By July 18, 2007, the interim receiver required additional funds to complete the project. The parties were participating in a settlement conference before the Chief Justice. They agreed that the funds accumulated in trust would be loaned to the interim receiver. That order made by consent provides — starting at paragraph 2 of the order:

> The trust fund set aside by court orders to secure the claims of the mortgagees, Alberta and the Builder's Lien claimants are deemed to constitute a trust and the secured lien creditor trust is deemed to exist from the date that the net proceeds were paid to and held by Lawson Lundell LLP, counsel for the interim receiver, from court approved sales, and such trust funds are deemed to be held in lieu of the subject lands and premises as security for the amount claimed in the mortgages of Alberta and for the amounts claimed under the Builders Liens of lien claimants, and all rights, remedies and claims of interested parties affected shall continue against the trust funds as if they were land.

Paragraph 3 of the order provides:

> Lawson Lundell LLP, counsel for the interim receiver, is hereby authorized to advance the balance of funds held in the secured lien creditor trust, inclusive of the amounts referred to in paragraph 1 above, as a non-interest bearing loan, and to apply such funds to payment of all proper interim receivership costs and to the completion of the project, in accordance with the orders of this Honourable Court.

Paragraph 4 provides:

> The funds so advanced will be repaid in full to the secured lien creditor trust from the net proceeds of sales of the strata lots comprising this project, and the net proceeds so repaid will be received as trust funds and deemed for all purposes to have been received *nunc pro tunc* based on the initial timing and source of payment of net proceeds from prior court approved sales.

Paragraph 5 provides:

> Until such time as the costs of the interim receiver in completing construction are paid or secured, at least 50 percent of net proceeds on all future court approved sales of strata lots will be allocated to a payment in full to the secured lien creditor trust of the funds advanced to the interim receiver to fully secure the claims of the secured creditor and lien claimants as provided in the amended proposal, which claims are estimated to be [approximately $3.5 million], including approximately 1.3 for Alberta as set out in schedule A of the amended proposal.

Paragraph 6 provides:

> Orders approving future sales of strata lots will continue to provide as a term that the trust funds allocated to secure the claims of Alberta and the lien claimants shall be held in lieu of the subject lands and premises as security for the amount claimed in the mortgages and lien claims, and all rights, remedies and claims of interested parties affected shall continue against the trust funds as if they were land.

24 The issue here is whether these funds are subject to the interim receiver's charge, or whether they are held in trust solely for the benefit of Alberta and the lien claimants.

25 Alberta argues, that such trust funds were and are to be held for the specific and exclusive benefit of the valid claims of pre-filing, secured creditors, in accordance with the terms of the court approved proposal of Otter Bay Developments Ltd. as segregated trust funds subject to an express implied or constructive trust in their favour, and such funds are not property of Otter Bay Developments for the purpose of the *Bankruptcy and Insolvency Act* or the order of Master Bolton made November 2, 2006. The court approved proposal and prior court orders approving sales, allocated 50 percent of net proceeds to such trust.

26 There is some ambiguity in some of the orders approving sale and arguably, on some of the orders, the monies ought to be treated as trust funds and implicitly held solely for the benefit of the lien claimants and Alberta. However, it appears to me that this ambiguity is removed by the order of the Chief Justice (made by consent) which provides that the funds stand in place of the land.

27 The interim receiver's charge in paragraph 20 of the order appointing the interim receiver would take priority over the land, and over cash held in lieu. Accordingly, the interim receiver's charge would take priority over the funds over the claims of Alberta and the lien claimants.

28 When the lands and premises were sold, they were subject to the interim receiver's charge granted in the order appointing the receiver of November 2, 2006. If the sale proceeds were not to be impressed with that charge, one would expect the orders to say so expressly, but they do not.

29 So, in my view, the interim receiver's charge applies to those funds.

Application granted.

Original

2011 BCCA 90
British Columbia Court of Appeal

269893 Alberta Ltd. v. Otter Bay Developments Ltd.

2011 CarswellBC 370, 2011 BCCA 90, [2011] B.C.W.L.D. 2776, [2011] B.C.W.L.D. 2849, 16 B.C.L.R. (5th) 298, 302 B.C.A.C. 21, 511 W.A.C. 21, 75 C.B.R. (5th) 1

269893 Alberta Ltd. (Appellant / Petitioner) and Otter Bay Developments Ltd., 670543 B.C. Ltd., 673097 B.C. Ltd., Stipek Financial Services, LLC Defined Benefit Pension Plan, Emerson Homes, a partnership of PGW Holdings Ltd., R. Malcolm Holdings Ltd. and D. Bird Holdings Ltd., Glenda Treleavan, Dan Treleavan, ForSite Developments Inc., ForSite Construction Inc., Towne Millwork Ltd., K.D. Cabinet Components Ltd., 555870 B.C. Ltd., Edwards Electric Ltd., 604674 B.C. Ltd., Slegg Construction Materials Ltd., Four Flower Enterprises Ltd., Gulf Excavating Ltd., Red Line Custom Plumbing & Heating Ltd., Otter Bay Investments Ltd., McCutcheon Design Group Ltd., Jawl Industries Ltd., Shanahan's Limited, Wellmaster Pump & Water Systems Ltd., David Bromley Engineering Ltd., Polar Electric Inc. (Respondents / Respondents)

Saunders, Lowry, Frankel JJ.A.

Heard: January 21, 2011
Judgment: March 2, 2011
Docket: Vancouver CA038151

Proceedings: affirmed *269893 Alberta Ltd. v. Otter Bay Developments Ltd.* (2010), 2010 CarswellBC 3883 ((B.C.S.C. [In Chambers]))

Counsel: M.D. Andrews, Q.C. for Appellant
H.M.B. Ferris for Campbell Saunders Ltd., Receiver over assets and undertakings of Respondents, Otter Bay Developments Ltd. & 670543 B.C. Ltd.

Headnote

Real property --- Mortgages — Priorities — General principles — Determination of priority

Developer was involved in constructing cottages — Mortgagee issued demand which developer disputed — Financial difficulties led to proposal in bankruptcy by developer — Receiver appointed, who attempted to continue project and to secure funding — Substantial amount of sales from units were held in solicitor's trust account rather than being made available to receiver — On last sale, parties reached consent agreement that half of sale of unit would be held back from receiver, and that receiver could borrow funds held in trust — Receiver could not complete project and development was sold — Receiver wished to repay loan of $500,000 with remainder applied pro rata, and mortgagee claimed that consent order required 50 per cent to be repaid — Trial judge ordered that money be distributed as requested by receiver — Mortgagee appealed — Appeal dismissed — Agreement not intended to give secured creditors priority over funds derived from sales over receiver's charge — Consent order did not create trust, as claims were disputed and object of trust could not be ascertained — Funds were held in lieu of land, and rights of interested parties continued as if funds were land — At no time did mortgagee's

claims have priority over receiver's charge, and sale proceeds being held as security were protection against all proceeds being expended.

Estates and trusts --- Trusts — Express trust — Creation — Three certainties — Object

Developer was involved in constructing cottages — Mortgagee issued demand which developer disputed — Financial difficulties led to proposal in bankruptcy by developer — Receiver appointed, who attempted to continue project and to secure funding — Substantial amount of sales from units were held in solicitor's trust account rather than being made available to receiver — On last sale, parties reached consent agreement that half of sale of unit would be held back from receiver, and that receiver could borrow funds held in trust — Receiver could not complete project and development was sold — Receiver wished to repay loan of $500,000 with remainder applied pro rata, and mortgagee claimed that consent order required 50 per cent to be repaid — Trial judge ordered that money be distributed as requested by receiver — Mortgagee appealed — Appeal dismissed — Agreement not intended to give secured creditors priority over funds derived from sales over receiver's charge — Consent order did not create trust, as claims were disputed and object of trust could not be ascertained — Funds were held in lieu of land, and rights of interested parties continued as if funds were land — At no time did mortgagee's claims have priority over receiver's charge, and sale proceeds being held as security were protection against all proceeds being expended.

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Pacific Destination Properties Inc. v. Granville West Capital Corp. (2009), 2009 BCSC 982, 2009 CarswellBC 1928, 62 B.L.R. (4th) 303, 51 E.T.R. (3d) 206 (B.C. S.C.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — referred to

269893 Alberta Ltd. v. Otter Bay Developments Ltd. (2009), 76 R.P.R. (4th) 66, 449 W.A.C. 98, 266 B.C.A.C. 98, 2009 CarswellBC 190, 2009 BCCA 37 (B.C. C.A.) — referred to

***Lowry J.A.*:**

1 The question on this appeal is whether, in these insolvency proceedings, the priority to proceeds of the sale of the land in a failed property development, afforded to an interim receiver under the order by which it was appointed, was altered by a subsequent consent order pertaining to certain of the proceeds that were to be held in a solicitors' trust account as security for the claims of a mortgagee of the property. Madam Justice Brown, who has had conduct of the proceedings, held the receiver's charge took priority to the funds. The mortgagee appeals, with leave, contending it is entitled to that money.

The Consent Order

2 While the proceedings have been protracted, the circumstances that led to the consent order, and that are material to answering the question, can be shortly summarized.

3 Otter Bay Developments Ltd. was constructing cottages on a three-acre parcel of land in the Gulf Islands. It was a multi-million dollar project. In October 2006, financial difficulties led to Otter Bay filing notice of its intention to make a proposal in bankruptcy.

4 The mortgagee, 269893 Alberta Ltd., had issued a demand exceeding $1.0 million under its mortgage the previous month. The validity of the mortgage was disputed.

5 The interim receiver, Campbell Saunders Ltd., was appointed in November 2006 under what may be referred to as the "receivership order". Under the terms of the order, the receiver was authorized to do what in its discretion was necessary or desirable to receive, preserve, or protect all of the personal and real property, assets and undertaking of Otter Bay (the "property") including borrowing amounts that did not at any given time exceed $500,000. The order provides that the receiver's remunerations, together with its own expenses, constitute a charge upon the property in priority to all other charges except those imposed by statute which could not be postponed. The order gave the mortgagee liberty to commence and prosecute a proceeding to obtain a declaration of validity and priority of its mortgage.

6 The receiver initially proposed to complete the construction of the development out of the proceeds of the sale of cottages without any borrowing. Its cash flow projections suggested all claims, secured and unsecured, could be satisfied out of the receivership. By February 2007, five sales had been approved by the court and completed. The net proceeds of each were then available to the receiver for construction. However, the secured creditors, being the mortgagee and various lien claimants, sought, and in respect of each sale obtained an order requiring a substantial part of the net amount of the proceeds be held in a solicitors' trust account for them pending further order. While the terms of the five orders made are not all the same, nothing is said to turn on the differences. Generally 50% of the net amount of the sales was held in trust. The last two orders contained the following term setting out the basis on which the proceeds were held:

> [T]he trust funds ... shall be held in lieu of the subject lands and premises as security for the amount claimed under the mortgages of 269893 Alberta Ltd. and for the amounts claimed under the builders liens of lien claimants of Otter Bay Developments Ltd. and all rights, remedies and claims of interested parties affected shall continue against the trust funds as if they were land;

7 By May 2007, a substantial amount was being held for the secured creditors. Given that only some of the proceeds of the sales were available to the receiver, and its projections had proven overly optimistic in any event, further construction required funding beyond what had been derived from the sale of cottages. The receiver's revised projections with respect to the success of the receivership for the benefit of the stakeholders remained positive. It arranged a commercial loan of $500,000 and, perhaps as a precaution, applied for a declaration that the loan would have priority over any other claims against the property. The mortgagee opposed the application. The judge took the view that the loan fell within the receiver's mandate to preserve and protect the property. It was apparently evident that the only alternative to the receiver borrowing the money was to assign Otter Bay into bankruptcy in which event all of the stakeholders would suffer. The order sought was granted; the money was borrowed.

8 The loan moneys were quickly expended and it became almost immediately apparent the receiver would require more funding to complete construction and sell all of the cottages planned for the development.

9 In late May, the receiver applied for approval of a sixth sale. Its projection for the success of the receivership remained positive but only if it could obtain more funding. It sought an order permitting it to use not only the net proceeds of the sixth sale to complete the project but also the fund that was held for the secured creditors. The mortgagee opposed the receiver's application. The judge approved the sale and directed that certain payments be made with the balance of the proceeds being held in trust. She subsequently directed a settlement conference be convened to afford the interested parties an opportunity to agree upon a basis on which the project could be completed, rather than having Otter Bay assigned into bankruptcy and the property sold 'as is where is'.

10 The settlement conference was convened in June before the Chief Justice. The participants reached an agreement that was then incorporated in a consent order settled in July. It was agreed that 50% of the funds held from the sixth sale were to be added to the funds being held for the secured creditors. That increased the amount being held to about $556,000.

11 The pre-amble to the consent order dated July 18, 2007, reflects the continued optimistic view held, at least by the receiver, with respect to the receivership being successful:

> AND UPON BEING ADVISED of the Interim Receiver's present opinion that the subject project can be completed based on the anticipated cash inflows and costs set out in the attached projected cash flow statement only with the benefit of funds held in trust being released for project purposes and the bankruptcy of Otter Bay Developments Ltd., and pursuit of a sale of an incomplete project at a discounted estimated price in the order of $2,000,000 is otherwise being contemplated;....

12 In broad terms, the order provided for the funds held in trust being borrowed by the receiver, used to complete the construction, and repaid by the receiver out of the net proceeds of the subsequent cottage sales. In material respects, the terms of the order are as follows:

> 2. the trust funds set aside by court orders to secure the claims under the mortgages of 269893 Alberta Ltd. and the builders liens of the lien claimants of Otter Bay Developments Ltd. are deemed to constitute a trust (the "Secured/Lien Creditor Trust") and the Secured/Lien Creditor Trust is deemed to exist for the date that the net proceeds were paid to and held by Lawson Lundell LLP, counsel for the Interim Receiver, from court approval sales and such trust funds are deemed to be held in lieu of the subject lands and premises as security for the amount claimed in the mortgage of 269893 Alberta Ltd. and for the amounts claimed under the builders liens of lien claimants of Otter Bay Developments Ltd. and all rights, remedies and claims of interested parties affected shall continue against the trust funds as if they were land;
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> 3. Lawson Lundell LLP, counsel for the Interim Receiver, is hereby authorized to advance the balance of funds held in the Secured/Lien Creditor Trust inclusive of the amounts referred to in paragraph 1 above [to] the Interim Receiver as a non interest bearing loan and to apply such funds to payment of all proper interim receivership costs and to the completion of the project in accordance with orders of this Honourable Court;
>
> 4 the funds so advanced will be repaid in full to the Secured/Lien Creditor Trust from the net proceeds of sales of the strata lots comprising this project and the net proceeds so repaid will be received as trust funds and deemed for all purposes to have been received nunc pro tunc based on the initial timing and source of payment of net proceeds from the prior court approved sales;
>
> 5. until such time as the costs of the Interim Receiver in completing construction [are] paid or secured, at least 50% of net proceeds on all future court approved sales of strata lots will be allocated to repayment in full to the Secured/Lien Creditor Trust of the funds advanced to the Interim Receiver hereunder and thereafter to fully secure the claims of the Secured Creditor and Lien Claimants as provided in the Amended Proposal of Otter Bay Developments Ltd. which claims are estimated by the Interim Receiver to total $3,500,000 (including approximately $1,300,000 in respect of the claims by 269893 Alberta Ltd.) as set out in Schedule A to the Amended Proposal;
>
> 6. orders approving future sales of strata lots will continue to provide as a term that the trust funds allocated to secure the claims under the mortgages of 269893 Alberta Ltd. and the builders lien of lien claimants of Otter Bay Developments Ltd. shall be held in lieu of the subject lands and premises as security for the amount claimed in the mortgages of 269893 Alberta Ltd. and for the amounts claimed under the builders liens of lien claimants of Otter Bay Developments Ltd. and all rights, remedies and claims of interested parties affected shall continue against the trust funds as if they were land;
>
> . . . . .
>
> 9. no applications will be made seeking security for costs from 269893 Alberta Ltd. in those [foreclosure] proceedings commenced [by 269893 Alberta Ltd.] in the Supreme Court of British Columbia, Vancouver Registry No. H070322 [provided] only that any person may apply to be relieved of this term if 269893 Alberta

Ltd. seeks to have an amount in excess of the agreed minimum of 50% of net proceeds from future court approved sales paid in the Secured/Lien Creditor Trust prior to such time as the costs of the Interim Receiver to complete construction are paid or secured.

13 The mortgagee took no steps to initiate proceedings with respect to the validity of its mortgage until June 2007, just before the settlement conference was convened. Sometime after the consent order was entered, the judge held the mortgage to be invalid but her order was reversed by this Court ([*269893 Alberta Ltd. v. Otter Bay Developments Ltd.*] 2009 BCCA 37 (B.C. C.A.)), which established its validity. The mortgagee maintains that priority as between the mortgage claim and the claims of the lien claimants remains an unresolved issue.

14 The receiver expended the entire fund but, contrary to its projections, the construction could not be completed. In September 2008 it sought and obtained an order permitting the remaining land to be sold 'as is where is'. It was ultimately sold *en bloc* for $1.5 million and the sale was approved in March 2010.

15 The receiver then applied for an order approving the repayment of the $500,000 loan (which with interest and administrative charges had become an $845,000 debt) with the balance of the net proceeds of the sale, $482,000, being paid out and applied *pro rata* against the charges and debts incurred by the receiver in endeavouring to complete the development. The mortgagee opposed the application as it pertained to the balance of the proceeds, maintaining the terms of the consent order required that 50% was to be repaid as stipulated to the Secured/Lien Creditor Trust referenced in the second term of the order such that the mortgagee had priority over the receiver in respect of the balance of the proceeds. The judge rejected the mortgagee's contention and made, in material respects, the order the receiver sought.

The Judgment

16 After outlining the background to the consent order, the judge focused on the provision in the second term of the order that all rights, remedies and claims of interested parties affected shall continue against the trust funds as if they were land. She said:

> [27] The interim receiver's charge in paragraph 20 of the order appointing the interim receiver would take priority over the land, and over cash held in lieu. Accordingly, the interim receiver's charge would take priority over the funds over the claims of Alberta and the lien claimants.
>
> [28] When the lands and premises were sold, they were subject to the interim receiver's charge granted in the order appointing the receiver of November 2, 2006. If the sale proceeds were not to be impressed with that charge, one would expect the orders to say so expressly, but they do not.
>
> [29] So, in my view, the interim receiver's charge applies to those funds.

The Parties' Positions

17 The mortgagee contends the consent order of July 18, 2007, incorporated an agreement that must be seen as a compromise. The benefit it derived from giving up its opposition to the receiver using the trust funds held to secure its claim, and the claims of the lien claimants, was to gain the advantage of having both security and priority to 50% of the net proceeds of all subsequent sales. The only purpose of the material aspects of the consent order is to require the receiver to place 50% of the net proceeds of such sales in trust for those who claimed to be the secure creditors of Otter Bay. There would be no purpose to that being done if the receiver had, in any event, a priority charge over all the net proceeds of the sales.

18 It is accepted that neither the consent order, nor any of the preceding orders, contains any reference to priorities. There is no express amendment of the receivership order in respect of priorities, but the mortgagee

maintains that is of no consequence. The second term of the consent order provides for the funds constituting a deemed trust — the "Secured/Lien Creditor Trust" — to secure the claims of the mortgagee and the lien claimants.

19 The mortgagee maintains the judge's reliance on the provision that "claims ... shall continue against the trust funds as if they were land" is misplaced. The provision is said to simply address the availability of the funds, to be paid out in priority as if they were land, in the event the validity of the mortgage, or some or all of the lien claims, was not established, such that not all of the funds held in trust were to be paid out for the purpose for which they are held. It is said that to hold otherwise, as the judge did, is to render the terms of the consent order, intended to ensure the protection of the mortgagee and the lien claimants, entirely nugatory.

20 In much the same vein, the mortgagee maintains the provisions of the fifth and ninth terms of the consent order would be rendered meaningless and of no effect if the receiver's charge has priority to the funds held in trust as required by the order.

21 The receiver maintains that, absent the implication of a term (which is not sought), the wording of the consent order cannot be interpreted to afford the mortgagee the priority for which it contends. The consent order is an agreement between several parties and is to be interpreted in accordance with general principles of contract and consistent with sound commercial principles and good business sense: *Pacific Destination Properties Inc. v. Granville West Capital Corp.*, 2009 BCSC 982, 62 B.L.R. (4th) 303 (B.C. S.C.) at para. 60.

22 The receiver relies on there being no amendment of the priority granted to it by express terms in the receivership order and cites the following from *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* (1984), 55 B.C.L.R. 38 (B.C. C.A.), at 44 , as recognition of the priority a receiver enjoys:

> A recent decision which contains a comprehensive review of the earlier authorities is *Oberman v. Mannahugh Hotels Ltd.*; *Mannahugh Hotels Ltd. v. Oberman*; *Assiniboine Credit Union Ltd. v. Mannahugh Hotels Ltd.*, [1980] 5 W.W.R. 487, 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312 (Q.B.) At p. 496, Wilson J. summarized his conclusions as follows:
>
> > Prima facie, then, the receiver is entitled to enter upon the discharge of his responsibilities secure in the knowledge that his costs and disbursements, including fees paid to solicitors necessarily engaged by the receiver ... will rank above all claims except those set apart by the order appointing him or otherwise entitled to rank ahead of the receiver himself: so Pearson J. in *Batten v. Wedgewood Coal & Iron Co.* [(1884), 28 Ch. D. 317], at p. 323:
> >
> > > I have been exceedingly surprised at some of the arguments which have been addressed to me, and also to find that there is so very little authority directly in point. To my mind, however, that arises from the fact that the principles on which the Court is in the habit of acting have never been challenged, and that the rule has always been to pay the receiver before distributing the estate.

23 It is said the interpretation of the consent order for which the mortgagee contends would work a commercial absurdity. The receiver was appointed by the court. It had no financial stake in the success of the receivership and no reason to agree that, in the event of a shortfall, it would forgo its own fees and expenses and be out of pocket some hundreds of thousands of dollars in costs incurred by it in endeavouring to complete the construction for the benefit of the creditors. A court-appointed receiver would never take a risk of that kind and would never be required to do so.

24 The receiver maintains the provision in the second term of the consent order, upon which the mortgagee relies, affords the mortgagee and the lien claimants a measure of security for their claims but does not afford those claims — which were at the time only contingent — any priority over the receiver's charges. It challenges the interpretation the mortgagee gives to that term, both in respect of the significance of the deemed trust and the funds being held as if they were land.

25 Beyond that, the receiver seeks to make a case for resolving any ambiguity in the terms of the consent order in its favour; alternatively, it contends the order ought to be construed as void for uncertainty.

26 I consider the terms of the consent order to be quite clear. There is no need to discuss ambiguity or uncertainty. In my view, the question is simply, what do they mean? Does the second term of the order, read in the context of the order as a whole and viewed against the factual matrix in which it was made, grant a priority for the unproven claims of the secured creditors over the receiver's charge which amends the priority granted in the receivership order? I find it does not.

Discussion

27 It is first important to recognize that the consent order did not create an express trust in favour of the secured creditors of Otter Bay. No claims had been proven; all were disputed such that the object of the trust — the beneficiaries — could not be ascertained: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), Dechamps J. for the majority at paras. 82-85. The second term of the order provides only that the funds which had been set aside to secure the claims of the mortgagee and the lien claimants are "deemed to constitute a trust", identified as the Secured/Lien Creditor Trust which is "deemed to exist" as of the date the net proceeds from the court-approved sales were held.

28 The remainder of the second term provides:

> ... and such trust funds are deemed to be held in lieu of the subject lands and premises as security for the amount claimed [by the secured creditors] and all rights, remedies and claims of interested parties affected shall continue against the trust funds as if they were land;

29 I am unable to accept the limitation the mortgagee would place on the effect of this aspect of the second term. I see no basis on which it could be said to apply only in the event the claims being secured are not proven to the extent of exhausting the deemed trust fund by which they are secured. Rather, I take the same view as the judge. The funds are held in lieu of the land, and the rights of all interested parties continue as if the funds were land. Hence the priority of the receiver's charge stands unimpaired.

30 Further, I am unable to see anything in the fifth or ninth terms of the consent order at odds with this interpretation. The fifth term simply provides that only 50% of the net proceeds of subsequent sales were to be applied to replenishing the deemed trust fund until the receiver's costs of completing the construction were recovered or secured and then all of the proceeds were to be so applied. The ninth term simply precluded security for costs being sought in the mortgagee's action concerning the validity of its mortgage unless the mortgagee sought to have more than 50% of the net proceeds of subsequent sales held before the receiver's costs of completing the construction were recovered or secured. The mortgagee contends these provisions of the order would be superfluous if the receiver's charge was to take priority over the claims the deemed trust fund secures. I do not see on what basis that can be said.

31 When the receiver made application for the approval of the sixth sale, and then sought to use the net proceeds of that sale as well as the funds held in trust to secure the claims of the mortgagee and the lien claimants, the secured creditors were faced with an uncertain outcome in circumstances where their opposition to the conduct of the receivership had not found favour with the court. In light of the receiver's continued positive projection, they faced the prospect of an order being made whereby the security they had would be lost to the cost of completing construction ($558,000) in favour of avoiding an 'as is where is' sale.

32 I can see no basis on which it could be said their claims had, at that time, priority to those funds over the receiver's charge, and I do not understand the mortgagee to now contend otherwise. At best, it says the point need not be considered. The purpose of 50% of the net proceeds of the sales being held as security for the secured claims

can only have been seen by the mortgagee and the lien claimants as some protection against all of the proceeds being expended on construction in the event there was a shortfall after the receiver recovered its fees and all its expenses. The consent order appears to me to have been intended to preserve that protection.

33 The agreement which was incorporated into the consent order would then represent some compromise. By accepting the funds could be used to build out the development, the secured creditors obtained an order, the terms of which provided those funds, as replenished, would constitute a deemed trust such that their security could not thereafter be sacrificed by court order to facilitate construction except on terms agreeable to them. The funds continued to be held, as, by order, they had been, in lieu of the subject land as if they were land such that priorities were unaffected.

34 Further, the secured creditors obtained the assurance that 50% of the proceeds of all of the subsequent sales would be held to secure their claims whereas previously the arrangement had been made on a sale-by-sale basis and there was no guarantee that would necessarily continue.

35 On the receiver's projections, there was a viable prospect that the funds would be replenished and, indeed, the agreement reflects the receiver's continuing expectation that the receivership would be completed successfully from the perspective of the secured creditors as well as those who were unsecured. It is difficult to see why the mortgagee and the lien claimants would have agreed to the funds being used as the receiver proposed if they did not expect them to be replenished, if not enhanced, which, on the terms of the consent order, would have served to improve the security of their position because of their control over what is deemed to be a trust.

36 Thus, while I accept that the consent order was to some degree a compromise, I do not accept the mortgagee's contention that the compromise was to give the secured creditors priority to any of the funds derived from the sales over the receiver's charge.

Disposition

37 It follows I would dismiss the appeal.

***Saunders J.A.*:**

I agree:

***Frankel J.A.*:**

I agree:

Appeal dismissed.

See para. 18

Original
1993 CarswellBC 75
British Columbia Supreme Court

Woodward's Ltd., Re

1993 CarswellBC 75, [1993] B.C.W.L.D. 769, 100 D.L.R. (4th) 133, 37 A.C.W.S. (3d) 1041, 77 B.C.L.R. (2d) 332

Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 and Re COMPANY ACT, R.S.B.C. 1979, c. 59;

Re WOODWARD'S LIMITED, WOODWARD STORES LIMITED and ABERCROMBIE & FITCH CO. (CANADA) LTD.

Tysoe J. [in Chambers]

Heard: January 11-12, 1993
Judgment: January 14, 1993
Docket: Doc. Vancouver A924791

Counsel: *M.A. Fitch*, *R.A. Millar* and *J.K. Irving*, for Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.
C.M. Trower, for Transcontinental West, a division of Trans-Continental Printing Inc.
D.B. Hyndman, for Accord Business Credit Inc. and others.
N.E. Kornfeld, for Dale's Industries and others.
A.L. Edgson, for Cosmair Canada Inc. and others.
A.S. Wilson, for Matsushita Electric of Canada Limited.
S.J. Gaerber, for Restwell Manufacture Ltd.
G.S. Snarch, for Palmer Jarvis Advertising.
D.I. Knowles and *C.W. Caverly*, for Cambridge Shopping Centres Limited.
L.H. Koo, for Gesco Industries Inc.
W.D. Riley, for Ernst & Young Inc., the monitor herein.

Headnote

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

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Corporations — Arrangements and compromises — Stay of proceedings — Effect of stay — Court dismissing application by suppliers of goods to debtor company within 30 days of ex parte interim stay order under Companies' Creditors Arrangement Act for order establishing trust fund in amount of company's purchases during those 30 days — Trust fund not serving intent of legislation to maintain status quo — Suppliers suffering no prejudice by debtor's choice of proceeding under C.C.A.A. rather than Bankruptcy and Insolvency Act.

In December 1992 the debtor corporation obtained an interim stay order pursuant to the *Companies' Creditors Arrangement Act*. Shortly afterward various suppliers applied for the creation of a trust fund in their favour, saying that they had not been treated fairly. Their principal complaints were that the debtor had purchased a substantial amount of inventory in the period preceding the commencement of these proceedings, about $30.4 million worth in the previous 30 days, and that the debtor had proceeded with its reorganization under the C.C.A.A. rather than the *Bankruptcy and Insolvency Act*. The *Bankruptcy and Insolvency Act* was said to give the suppliers an opportunity

to seek to protect certain rights and they said that it would be an abuse if those rights could be frustrated by allowing the debtor to choose the C.C.A.A. over the *Bankruptcy and Insolvency Act*.

Held:

Application dismissed.

The purpose of a stay under the C.C.A.A. is to effectively maintain the status quo, which is intended to accomplish three objectives: to suspend or freeze the rights of all creditors as they existed as at the date of the stay order, so that the insolvent company may have an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor; to postpone litigation in which the insolvent company is involved so that the human and monetary resources of the company can be devoted to the reorganization process; and to permit the insolvent company to take certain action that is beneficial to its continuation during the period of reorganization or its attempt to reorganize or, conversely, to restrain a non-creditor or a creditor with rights arising after the stay from exercising rights that are detrimental to the continuation of the company during the period of reorganization or its attempt to reorganize. Apart from consideration of s. 81.1 of the *Bankruptcy and Insolvency Act*, there was no justification for the creation of a trust fund. Such a fund would not serve to maintain the status quo. To the contrary, it would give the suppliers an advantage over other creditors. It would not be beneficial to the continuation of the debtor's business during the reorganization period or to the debtor's attempt to reorganize.

As for the *Bankruptcy and Insolvency Act*, there is likely to be no difference in the approach of the court when dealing with a proposal under that Act from the approach of the court when dealing with a reorganization under the C.C.A.A. as they relate to the rights of suppliers. Therefore, there was no special right of suppliers that needed to be preserved by the creation of a trust fund and there was no abuse in the debtor's choosing the C.C.A.A. over the *Bankruptcy and Insolvency Act*. In addition, the suppliers did not have any right to repossess the goods supplied by them at the time they commenced the proceedings.

Table of Authorities

Cases considered:

Alberta-Pacific Terminals, Re (1991), 8 C.B.R. (3d) 99 (B.C.S.C.) — *applied*

Century Industries Inc. v. Enterprises Union Électrique Ltée (April 29, 1992), Doc. 500-05-005804-925, Archambault J. (Que. S.C.) — *considered*

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

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

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139, 72 C.B.R. (N.S.) 20 (Q.B.) — *applied*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.) — *applied*

Steinberg Inc. c. Colgate-Palmolive Canada Inc. (1992), 13 C.B.R. (3d) 139 (Qué.) — *considered*

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331, 14 C.B.R. (3d) 88 (S.C.) — *applied*

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1

s. 178*referred to*

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [title am. 1992, c. 27, s. 1]

s. 47.1*referred to*

s. 81.1*considered*

s. 243(2)*referred to*

Civil Code of Lower Canada — *referred to*

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

s. 11*considered*

***Tysoe J.*:**

1 On December 11, 1992 I granted an interim stay Order pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") in favour of Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd. (collectively, "Woodward's"). Shortly thereafter a number of Woodward's suppliers of goods and services made applications for various forms of relief. The item of relief that was pursued at the hearing of the applications was the creation of a trust fund for the benefit of the suppliers.

2 The interim stay Order was granted on an ex parte basis and it was expressed to expire at 6 p.m. on January 8, 1993, the day on which the hearing of the Petition in this matter was intended to take place. The applications of the suppliers first came on for hearing at 4 p.m. on December 17, 1992. The relief requested at that time included (i) the setting aside or varying of the interim stay Order, (ii) the payment of the amounts owing to the suppliers, (iii) the return of the goods provided by the suppliers and (iv) the creation of the trust fund. Time did not permit the hearing of the applications on that day and the earliest they could be heard was one week later. I adjourned the applications for one week but, as I did not want the adjournment to prejudice any rights that the suppliers may have, I made an interim Order that the proceeds from the sale of any goods after December 17 would stand in the place and stead of such goods. When the matter came back on for hearing on December 24, the parties agreed that the applications could be adjourned until January 8 and heard concurrently with the hearing of the Petition.

3 The hearings began on January 8 and when it became clear that these and other applications would take several days to be heard, I extended the interim Orders until further Order of the Court with the intent that they would continue until I made my determinations on the various issues to be decided. There appears to be little doubt that there will be an extension of the stay Order and it is the terms of the continuing stay Order and the related applications that are in dispute. I will approach the present applications on the basis that the CCAA stay is going to be extended and the issue to be determined is how the suppliers should be treated within this context.

4 Woodward Stores Limited operates a chain of 59 full line and junior department stores in British Columbia and Alberta. Abercrombie & Fitch Co. (Canada) Ltd. operates two stores in Ontario. Each of these companies is a subsidiary of Woodward's Limited.

5 Woodward's has been carrying on business for 100 years. Until January 8, 1993, when it terminated 1,200 employees as part of its downsizing strategy, Woodward's had approximately 6,000 employees. Woodward's has been an important part of the economy of Western Canada for a long period of time and every effort should be made to facilitate its financial reorganization, which is the stated purpose of the CCAA.

6 Woodward's suppliers generally support its reorganization but they do not feel that they have been treated fairly in all of the circumstances. The principal complaints of the suppliers are that Woodward's purchased a substantial amount of inventory in the period preceding the commencement of these CCAA proceedings and that Woodward's is proceeding with its reorganization under the CCAA rather than the *Bankruptcy and Insolvency Act* (the "B & I Act").

7 On December 17 I directed that the Monitor appointed by the interim stay Order report to the Court regarding the inventory purchased by Woodward's during the period prior to the commencement of these proceedings. The Monitor has reported that in the 30-day period prior to December 11 Woodward's received goods having an aggregate cost of approximately $30.4 million, of which $27.3 remains unpaid. The Monitor estimates that approximately $4.3 million worth of the goods for which payment has not been made can be identified and were unsold by Woodward's at the time these proceedings were commenced. Identification of goods appears to be a

major difficulty because the Monitor believes that less than $8 million of the $30.4 worth of goods received within the 30-day period preceding December 11 can be identified by way of Woodward's inventory control system. The suppliers say that they will be able to assist in identifying the goods that were supplied by them.

8 The reason for the importance of the 30-day period preceding the commencement of these proceedings is s. 81.1 of the B & I Act which came into effect on November 30, 1992. Section 81.1 gives rights of repossession to suppliers of goods similar to the revendication rights that suppliers have previously enjoyed by virtue of the *Civil Code of Lower Canada* in effect in Quebec. In brief terms, s. 81.1(1) provides that suppliers are entitled to the return of goods supplied by them within 30 days of a written demand for repossession that can be given if the purchaser of the goods has gone into bankruptcy or receivership. Two important qualifications are that the goods have not been resold and that the goods are identifiable.

9 Section 81.1(4) is also relevant because it deals with a situation analogous to these CCAA proceedings, namely, a situation where the purchaser of the goods has filed a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*. The section provides that the time between the filing of the notice of intention and the date on which the purchaser goes into bankruptcy or receivership is not counted as part of the 30-day period following delivery of the goods within which the supplier must make its demand of repossession. Hence, if the purchaser of the goods files a notice of intention to file a proposal 20 days after the goods are delivered, the supplier can make the written demand for repos session within the first 10 days of a subsequent bankruptcy or receivership even though the reorganization attempt by means of the proposal may have taken several months. The statute is silent with respect to the resale of goods by the purchaser during the period of reorganization and, all other things being equal, the supplier will lose its right of repossession if the goods are sold during this period.

10 The suppliers submitted that if Woodward's had proceeded under the B & I Act rather than the CCAA, they could have taken one of two steps to protect their rights. First, they say that an application could have been made for the appointment of an interim receiver under s. 47.1 of the B & I Act and that upon the appointment of the interim receiver the suppliers could exercise their rights under s. 81.1. Second, they say that an application could be made under s. 81.1(8) which allows the Court to make any order it considers appropriate if a supplier is aggrieved by an act of the purchaser of the goods and that such an order could direct the creation of a trust fund. The suppliers conclude this aspect of their argument by saying that it would be an abuse if the rights under s. 81.1 could be frustrated by allowing the insolvent company to choose the CCAA over the B & I Act and that the suppliers should therefore be given the protection of the trust fund.

11 In addition to the potential rights under the B & I Act, the suppliers argued that the trust fund should be created to redress an inequity. They say that other creditors such as Woodward's banker had advance warning that Woodward's would be commencing these proceedings and that they took steps to ensure payment of the indebtedness owing to them. Although the evidence does not support an allegation that Woodward's purchased additional inventory with the knowledge that it would be commencing these proceedings, the suppliers say that Woodward's purposely choose the December 11 date to obtain the stay Order because the aggregate of all unpaid amounts for the purchase of inventory would be at its highest on or about that date. An Affidavit was filed to the effect that some of Woodward's directors first consulted the Monitor about the possibility of commencing CCAA proceedings in October, 1992.

12 There was not a consensus among the suppliers as to the exact nature of the trust fund that they were requesting be established. All of the suppliers did want the Court to make the determination that they were entitled to the monies in the trust fund if Woodward's is not successful in its reorganization effort. Most of the suppliers suggested that the fund be equal to the total cost of the purchases during the 30-day period preceding December 11. One supplier wrote a letter requesting that the fund be equal to 90 days' worth of purchases. One supplier of services was represented during the hearing and had filed its own Notice of Motion. It wanted the fund to provide for services that were purchased by Woodward's, as well as the inventory.

13 The purpose of the stay under s. 11 of the CCAA was first summarized by Wachowich J. in *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.). At p. 219 Wachowich J. said:

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

And at p. 220 he stated:

> This order is in accord with the general aim of the Companies' Creditors Arrangement Act. The intention was to prevent any manoeuvres for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed.

14 In *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.), the stay Order authorized Quintette to pay its trade creditors who were owed less than $200,000 on the basis that these creditors were mostly small local businesses which would face insolvency themselves if they were not paid. Trade creditors which were owed in excess of $200,000 complained that the Order did not maintain the status quo and they applied to be paid the first $200,000 of the debt owed to them by Quintette. In dismissing the application ThackrayJ. said the following about the status quo at p. 109:

> While it is a compelling argument to suggest that the status quo should be maintained between *classes* of creditors, I do not believe that I should be blinkered by such a narrow view. The overall design of the C.C.A.A. is to preserve the debtor as a viable operation and to reorganize its affairs to the benefit of not only the debtor but also its creditors. With that design in mind, I do not believe that Wachowich J. was suggesting that every detail of the status quo would be maintained. Indeed he went on to note that [p. 220] "The intention was to prevent any manoeuvres for positioning among creditors during the interim period".
>
> What is meant by maintaining the status quo is that the debtor will be able to stay in business, and that they will have breathing space in which to develop a proposal during which time there will be a stay under any bankruptcy or winding-up legislation, a restraint of all actions against the company, and no realization of guarantees or other rights against the company. In this case the order also restrained creditors from exercising any right of set-off.

15 An unusual case relating to the maintenance of the status quo is *Re Alberta-Pacific Terminals* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). In that case the owner of the facilities at which the insolvent company carried on business made application for an Order compelling the insolvent company to make the ongoing monthly payments under the operating agreement between the parties. The payments were the equivalent of rental payments under a lease. The insolvent company did not have sufficient funds to make the payments, in part because it was making the interest payments on the pre-stay debt of one of its lenders. The company had agreed to make the interest payments in exchange for the agreement of the lender to continue providing an operating credit facility. Huddart J. dismissed the application and she said the following about the status quo at p. 105:

> The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British

Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

16 This case is unusual because one would normally expect during a reorganization period that ongoing rental payments would be made and that interest on pre-stay debt would not be paid. However, the particular circumstances of the case meant that the preservation of the status quo produced a different result. The payment of the interest was considered to be a preservation of the status quo because the company required the continuation of the operating credit facility in order to survive and attempt to reorganize. The non-payment of the monthly amounts under the operating agreement was considered to be a preservation of the status quo because the company did not have sufficient funds and could not have continued if it had been required to make the payments.

17 It is my view that the maintenance of the status quo is intended to attempt to accomplish the following three objectives:

1. To suspend or freeze the rights of all creditors as they existed as at the date of the stay Order (which, in British Columbia, is normally the day on which the CCAA proceedings are commenced). This objective is intended to allow the insolvent company an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor.

2. To postpone litigation in which the insolvent company is involved so that the human and monetary resources of the company can be devoted to the reorganization process. The litigation may be resolved by way of the reorganization.

3. To permit the insolvent company to take certain action that is beneficial to its continuation during the period of reorganization or its attempt to reorganize or, conversely, to restrain a non-creditor or a creditor with rights arising after the stay from exercising rights that are detrimental to the continuation of the company during the period of reorganization or its attempt to reorganize. This is the objective recognized by *Quintette* and *Alberta-Pacific Terminals*. The first case to recognize that the maintenance of the status quo could affect the rights of non-creditors was *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20 (Alta. Q.B.). This is the objective that takes into account the broad constituency of interests served by the CCAA. As the overriding intent of the CCAA is to facilitate reorganizations, this is the overriding objective of maintaining the status quo and it may produce results that are not entirely consistent with the other objectives. The most common example of an inconsistency is a situation where the giving of effect to this objective results in an unequal treatment of creditors.

There are exceptions to the maintenance of the status quo but they are not relevant to this case.

18 Apart from consideration of s. 81.1 of the B & I Act, there is no justification for the creation of the trust fund. It would not serve to maintain the status quo. To the contrary, it would give the suppliers an advantage over other creditors of Woodward's. It would not be beneficial to the continuation of Woodward's business during the reorganization period or Woodward's attempt to reorganize. Indeed, it was the position of Woodward's on these applications that the creation of a trust fund in the amount of $30 million would make any reorganization impossible.

19 I am not prepared to order the creation of the trust fund on the basis of the allegations of events that took place prior to the commencement of these proceedings or on the basis of the timing of the commencement of these proceedings. There is no evidence in this case of fraud that could justify the preservation of assets by way of the creation of a trust fund. If the allegations were proven, it could possibly be argued that there has been an abuse of process or that Woodward's has not come to Court with clean hands. But these would not justify the creation of a

trust fund for the benefit of the suppliers. The likely result would be that the Court would decline to exercise its discretion to afford Woodward's the protection it requires to reorganize and no one is suggesting that Woodward's should not be given an opportunity to attempt to reorganize its business and financial affairs.

20 That brings me to s. 81.1 of the B & I Act. In order to decide whether the creation of a trust fund will preserve rights of the suppliers, I must consider the rights that exist as a result of s. 81.1. I am reluctant to make definitive comments regarding s. 81.1 because I am not required to make a decision under that section and I do not wish to constrain another judge who is required in the future to make such a decision. I am particularly sensitive because s. 81.1 has only been in force for 1 1/2 months and I am not aware of any cases that have considered it. However, I must make some comments about the likelihood of the Courts making certain Orders in relation to s. 81.1 because I must determine what rights are to be preserved.

21 I begin by making the observation that on December 11 when these proceedings were commenced, the suppliers had no rights under s. 81.1 that could have been acted upon because Woodward's was not in bankruptcy or receivership. In *Re Westar Mining Ltd.* (unreported, June 16, 1992, B.C. Supreme Court Action No. A921164, Vancouver Registry) [reported 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331], Macdonald J. was faced with an argument by the Crown that he should not have created a charge against Westar's assets to secure credit being extended during the reorganization period by Westar's suppliers because it would alter the priorities that would prevail in a bankruptcy of Westar. Macdonald J. rejected this argument in the following manner at p. 9 [p. 11 B.C.L.R.]:

> But, the company was not in bankruptcy on June 10 when the charge was created. The Crown claims which are not afforded the protection of a statutory lien are not yet preferred. The June 10 order creating the charge does not purport to alter the priorities which will apply between the claims of the Crown and the unsecured trade creditors as at May 14.

22 The suppliers argue that the rights that I must preserve are the right to crystallize their position under s. 81.1 by way of the appointment of an interim receiver and the right to have the Court make an Order for the creation of a trust fund pursuant to s. 81.1(8). I must therefore consider the likelihood of the Court appointing an interim receiver or making an Order for the creation of a trust fund in the event that Woodward's had filed a notice of intention to file a proposal under the B & I Act.

23 I agree with the submission of Mr. Fitch that s. 81.1 was intended to give suppliers the right to repossess goods that they had sold to the insolvent company if the company is to be liquidated by way of a bankruptcy or a receivership. Parliament directed its mind to the possibility that an insolvent company may first attempt to reorganize its affairs and it enacted subs. (4) of s. 81.1. Parliament decided that the period of the attempted reorganization should not be counted as part of the 30-day period under subs. (1) of s. 81.1. Parliament was silent as to the potential appointment of an interim receiver so that the suppliers could exercise their repossession rights during the reorganization period. Parliament was also silent as to the creation of a trust fund to be held for the benefit of the suppliers in the event that the reorganization is not successful. It must therefore be inferred in my view that Parliament intended that the insolvent company could continue to sell its goods in the ordinary course of business and utilize the sale proceeds to continue carrying on business pending its reorganization attempt.

24 It is my view that the likelihood of a Court appointing an interim receiver for the purpose of enabling suppliers to repossess the goods they supplied during the preceding 30-day period is low. The repossession of such goods would be counter-productive to the company's reorganization effort because it would deprive the company of assets it requires to continue carrying on business and to make a viable reorganization proposal. I can envisage a case where the Court may be willing to take such a step if it is concerned that the reorganization attempt may not be bona fide and the Court wishes to have an interim receiver to oversee the collection and disbursement of funds and to preserve the rights of suppliers if it is proven that the reorganization attempt was not bona fide. In this case there is no suggestion that Woodward's attempt to reorganize is not bona fide. In addition, I have reservations

about whether an interim receiver is a receiver within the meaning of s. 243(2) of the B & I Act. An interim receiver is very different from a (permanent) receiver.

25 Similarly, I believe that the likelihood of a Court making an Order under s. 81.1(8) for the creation of a trust fund is low. This would again be counter-productive to the attempt of the company to reorganize. I also doubt that it was intended by Parliament that the filing of a notice of intention to file a proposal would be considered to be an act aggrieving a supplier within the meaning of s. 81.1(8) unless, possibly, the filing was not bona fide.

26 I was referred to two Quebec decisions dealing with the CCAA and the revendication rights of suppliers in Quebec. The first case was *Century Industries Inc. v. Enterprises Union Électrique Ltée* (unreported April 29, 1992, Que. S.C. Action No. 500-05-005804-925). I have been provided with a translation of the decision. Archambault J. ordered that the proceeds from the sale of any merchandise delivered in the 30 days prior to the service of the application before him be deposited in a trust account and that the monies in the trust account not be disbursed without further Court Order. The paragraph containing the reasoning of Archambault J. reads as follows (at p. 9):

> Le tribunal doit s'assurer que le statu quo est maintenu. Si une ordonnance n'était pas rendue, la requérante pourrait, si les marchandises étaient vendues dans l'intervalle par Union Électrique, perdre ses droits quant à la revendication des marchandises qui furent vendues et livrées à Union Électrique dans les derniers 30 jours. De plus, il serait fondamentalement injuste de permettre à Union Électrique de continuer de vendre ces marchandises qui ne lui appartiennent peut-être pas, au détriment des personnes qui en sont véritablement les propriétaires.

The translation for this paragraph with which I have been provided reads as follows:

> The Court must ensure that the status quo is maintained. If no order were given, the Applicant might, if the merchandise was sold by Union Électrique in the interim, lose its rights of revendication of the goods which were sold and delivered to Union Électrique within the last 30 days. Moreover, it would be fundamentally unjust to permit Union Électrique to continue to sell merchandise which perhaps does not belong to it, to the detriment of those who are the true owners.

27 I do not believe that the last sentence of the above paragraph relates to the right of revendication. In addition to merchandise that had been delivered within the previous 30 days, the applicant had sold goods to Union Électrique by way of conditional sale and title to these goods had not passed to Union Électrique.

28 I am not familiar with the details of a supplier's right of revendication in Quebec but I think that there is an important distinction between it and the right afforded by s. 81.1 of the B & I Act. The distinction is that the right of revendication is not dependent upon the bankruptcy or receivership of the purchaser of the goods. Thus, the applicant in the *Union Électrique* case had an existing right to repossess the goods supplied by it at the time the CCAA were commenced. Archambault J. was preserving that right when he made the Order that he did. In the present case, the suppliers did not have a right to repossess the goods supplied by them at the time these proceedings were instituted.

29 The second Quebec case took a different approach. In *Steinberg Inc. v. Colgate-Palmolive Canada Inc.* (1992), 13 C.B.R. (3d) 139, a supplier made application for leave under s. 11 of the CCAA to exercise its right of revendication with respect to goods delivered to the insolvent company within the previous 30 days. The Quebec Superior Court dismissed the application. The headnote, which is consistent with the translation of the decision provided to me, reads as follows:

> The power conferred on the judge under the Act applies to all proceedings likely to affect the survival of a company. The individual interest of any creditor must be weighed against the objects of the Act and must yield to the collective interests of all creditors. Granting the application would impose on the court an obligation to

> do the same for all 30-day suppliers. Therefore, an arrangement proposal submitted to the judge at the time of the order might fail before it was presented to all creditors, and might cause the debtor to go bankrupt. It followed that the goods in question should not be allowed to be seized prior to judgment.

This reasoning is similar to my reasoning in concluding that it is unlikely that a Court would appoint an interim receiver or order the creation of a trust fund when an insolvent company is attempting to reorganize pursuant to the B & I Act.

30 The result in the *Steinberg* case is also consistent with the decision of the B.C. Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 [[1991] 2 W.W.R. 136], where the issue involved security under s. 178 of the *Bank Act*. Section 178 security creates a security interest in inventory and the bank has the right to seize and sell the inventory. The right of the bank is therefore similar to the right of revendication enjoyed by a Quebec supplier. If the goods covered by s. 178 security are sold during the period of reorganization, the bank will be prejudiced in the same fashion as a supplier whose 30-day goods are sold during the period of reorganization (except to the extent that proceeds from the sale of inventory are utilized to purchase new inventory which would become covered by the bank's s. 178 security). In *Chef Ready Foods* the B.C. Court of Appeal held that the enforcement of s. 178 security can be stayed by an Order under s. 11 of the CCAA. Gibbs J.A. said the following at p. 92:

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

31 The above passage contains persuasive reasoning why the Court is unlikely to appoint an interim receiver or to create a trust fund under the B & I Act if an insolvent company files a notice of intention to file a proposal. The ability to reorganize would be illusory for companies which deal with goods provided on credit by suppliers.

32 Subject to the point on which I will subsequently invite further submissions, I have concluded that there is likely to be no difference in the approach of the Court when dealing with a proposal under the B & I Act from the approach of the Court when dealing with a reorganization under the CCAA as they relate to the rights of suppliers. Therefore, there is no special right of suppliers that needs to be preserved by the creation of a trust fund and there is no abuse in Woodward's choosing the CCAA over the B & I Act. In addition, I repeat that the suppliers did not have any right to repossess the goods supplied by them at the time of the commencement of these proceedings. Accordingly, I dismiss the application of the suppliers for an Order creating a trust fund for their benefit.

33 Subsection 81.1(4) of the B & I Act does attempt to preserve the potential rights of suppliers by providing that the period of reorganization does not count in the computation of the 30-day period under s. 81.1(1). This is consistent with the status quo objective of suspending the rights of creditors during the period of reorganization. No submissions were made to me by the parties as to whether I can make an Order in these proceedings that has the same effect as s. 81.1(4). It may be possible that I could order that the period during which Woodward's

is attempting to reorganize will not be counted as part of the 30-day period under s. 81.1(1) with the result that if Woodward's reorganization attempt is not successful and it goes into bankruptcy or receivership, the suppliers would still have the right to repossess goods supplied by them within the 30-day period preceding the commencement of these proceedings that have not been sold by Woodward's in the meantime. I invite counsel to make submissions in this regard.

34 As I have concluded that there are no rights of the suppliers that should be preserved other than a potential postponement of the running of the 30-day period under s. 81.1 of the B & I Act, my interim Order of December 17 should be set aside as it relates to the proceeds from the sale of goods after December 17. Counsel for several of the suppliers has requested that he have the opportunity to seek instructions regarding an appeal before the Order is set aside. Counsel for Woodward's does not object. I therefore set aside my December 17 Order as it relates to the sale proceeds effective 4 p.m. on January 18, 1993 or such later time as I may order.

Order accordingly.

Original

1993 CarswellBC 564
British Columbia Court of Appeal

Woodward's Ltd., Re

1993 CarswellBC 564, [1993] B.C.W.L.D. 2160, 105 D.L.R. (4th) 517, 22 C.B.R. (3d) 25, 23 B.C.A.C. 224, 39 W.A.C. 224, 42 A.C.W.S. (3d) 993, 83 B.C.L.R. (2d) 31

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Company Act, R.S.B.C. 1979, c. 59; Re WOODWARD'S LIMITED, WOODWARD STORES LIMITED and ABERCROMBIE & FITCH CO. (CANADA) LTD. (hereinafter collectively called "WOODWARD'S")

Legg J.A. [in Chambers]

Heard: February 3, 1993
Judgment: February 10, 1993
Docket: Docs. Vancouver CA016659, CA016680, CA016685, CA016688, CA016695

Counsel: *C.M. Trower, David Bernstein, Q.C.*, and *F. Bennett*, for appellants Transcontinental West ("Transcontinental") and other unsecured creditors.
Douglas B. Hyndman, for appellants Accord Business Credit Inc. and other unsecured creditors.
G. Cuttler, for appellant Hasbro Canada Inc.
G.S. Snarch, for appellant Palmer Jarvis Advertising.
A. Edgson, for appellant Eveready Division and other unsecured creditors.
D. Lunny, for appellant M.T.C. Electric Technologists.
W.C. Kaplan, for respondent Canadian Imperial Bank of Commerce.
D.I. Knowles, for respondent Cambridge Leaseholds Limited.
D.G. Cowper and *R.A. Millar*, for respondents Woodward's.

Headnote

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

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Claims — Trust fund established to secure charge of major secured creditor — Unsecured creditors arguing that trust fund should have been set up for benefit of unpaid suppliers of goods — Trial judge not erring in setting up trust fund for secured creditor or in refusing to set up fund for unsecured creditors — Application for leave to appeal dismissed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

An insolvent company filed a petition under the *Companies' Creditors Arrangement Act* ("CCAA") seeking a stay of proceedings against it. An ex parte order granting the stay and certain interim relief was issued. Subsequently, a creditor applied for an order that the stay be lifted to permit it to file a petition in bankruptcy against the company. Leave was granted to file the petition, but further proceedings with respect to the petition were stayed until further order.

An interim order was made requiring that the proceeds of the sale of any inventory that came into the company's hands after the bankruptcy be placed into operating accounts to stand in place of the sold inventory. Certain unsecured creditors applied to set aside the interim order. The applications were dismissed. The unsecured creditors' applications for an adjournment for the purpose of obtaining the evidence necessary to make a proper

consideration of their rights was also dismissed. An order was then made allowing the company to file with the court the reorganization plan pursuant to the CCAA and the *Company Act* (B.C.). By that order, a $20-million trust fund, consisting of money deducted from the operating accounts, was established in favour of a secured creditor, the company's largest single shareholder and major landlord.

The unsecured creditors applied for leave to appeal the order, arguing that the judge erred in refusing to direct that a trust fund of $30.4 million be set up for the benefit of unpaid suppliers of goods supplied within 30 days of the date of the bankruptcy petition. They argued that they had rights under s. 81.1 of the *Bankruptcy and Insolvency Act* and that those rights should have been protected by the establishment of such a trust fund.

Held:

The applications were dismissed.

The trial judge fully considered the issue of whether to establish a trust fund for the unsecured creditors. His extensive reasons for judgment indicated that he exercised his discretion in a judicial manner. The trust fund set up for the benefit of the secured creditor was established in part to facilitate the reorganization plan and in part to secure the secured creditor's charge. The trial judge did not err in establishing the fund and had jurisdiction under the CCAA to do so.

Table of Authorities

Cases considered:

Canadian Energy Services Ltd. v. Gotaverken Energy Systems Ltd. (May 31, 1990), Doc. Vancouver CA011721 (B.C. C.A.), [1990] B.C.W.L.D. 1597 [application for judicial review denied (1990), 42 C.L.R. 50 (B.C. C.A.)] — *referred to*

Commonwealth Investors Syndicate Ltd. v. Laxton (April 29, 1992), Doc. Vancouver CA015351, Gibbs J.A. (B.C. C.A.), [1992] B.C.W.L.D. 1324 — *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*

Knitrama Fabrics Inc. v. K. & A. Textiles Inc. (1984), 53 C.B.R. (N.S.) 164 (C.S. Que.) — *referred to*

Meridian Developments Inc. v. Toronto Dominion Bank, [1984] 52 C.B.R. (N.S.) 109, 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*

Pacific National Lease Holding Corp., Re (1992), 15 C.B.R. (3d) 265, 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134 (C.A.) — *referred to*

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (June 16, 1988), Doc. Vancouver CA009236 (B.C. C.A.), [1988] B.C.W.L.D. 2679*referred to*.

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.) — *referred to*

Rosenzweig, Re (1921), 2 C.B.R. 255, 31 Que. K.B. 558, 70 D.L.R. 174 (C.A.) — *referred to*

Sun Life Savings & Mortgage Corp. v. Sampson (1991), 62 B.C.L.R. (2d) 399, 86 D.L.R. (4th) 368, 9 B.C.A.C. 262 (C.A.) — *referred to*

William Neilson Ltd. v. Red Carpet Distribution Inc., [1989] R.J.Q. 2798 (S.C.), affirmed 9 C.B.R. (3d) 86, *(*sub nom. *Banque nationale du Canada c. William Neilson Ltd.)* [1991] R.J.Q. 712, *(*sub nom. *Neilson (William) Ltd. c. Banque nationale du Canada)* 37 Q.A.C. 92 — *referred to*

Statutes considered:

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

s. 47.1

s. 81.1

s. 81.1(8)

Civil Code of Lower Canada —

art. 1543

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

s. 11

Company Act, R.S.B.C. 1979, c. 59.

Court of Appeal Act, S.B.C. 1982, c. 7 —

s. 6.1

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

***Legg J.A.*:**

1 Before me are applications for leave to appeal by unsecured creditors of Woodward's who have supplied goods and services to Woodward's. I shall refer to the applicants as appellants. They apply for leave to appeal the order of Mr. Justice Tysoe made on January 15th, 1993, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "C.C.A.A.").

2 The principal common ground upon which the appellants seek leave to appeal is that Mr. Justice Tysoe erred in refusing to direct that a trust fund of $30.4 million be set up for the benefit of unpaid suppliers of goods. Counsel argued that the learned judge should have directed that a trust fund be set up for the benefit of unpaid suppliers of goods supplied within 30 days of December 18th, 1992, the date upon which one of the suppliers, Transcontinental, had filed a petition in bankruptcy against Woodward's. The appellants argued that they had rights under s. 81.1 of the *Bankruptcy and Insolvency Act* (the "B. & I. Act") proclaimed in force on November 30th, 1992, which allowed suppliers of goods delivered within 30 days prior to a receivership or bankruptcy to retake possession of those goods under certain circumstances. The appellants argued that their rights under that section ought to have been protected by the establishment of such a trust fund.

3 The appellants supported their arguments with a number of additional submissions. In particular, counsel submitted that the learned trial judge erred:

(1) In dismissing the application by the appellants to adjourn consideration of the applications to create a trust fund to protect the rights of the 30-day suppliers until proceedings under the C.C.A.A. had been completed and the existence of those rights had been finally determined; and

(2) In failing to exercise his discretion in a manner appropriate to balancing the interests of the creditors of Woodward's as at, and immediately prior to, December 11th, 1992, so that the appellants who supplied goods or services would be paid or compensated for goods or services supplied to Woodward's in the period immediately prior to December 11th, 1992.

4 Counsel for Transcontinental also submitted that the learned trial judge erred:

(1) In ordering the composition of the creditors' committee in accordance with the suggestions of the Monitor in his fourth report dated January 13th, 1993 because that suggested committee was not representative and acceptable to the majority of the unsecured creditors; and

(2) In creating a $20 million trust fund in favour of R.-M. Trust Company In Trust for Cambridge Leaseholds Limited because it was unnecessary and prejudicial to the unsecured creditors as a whole and because the court did not have jurisdiction under the C.C.A.A. to make such order.

5 Counsel for the appellants other than Transcontinental were opposed to any attack on the composition of the creditors' committee directed by the learned trial judge.

6 Before considering these submissions, I summarize the sequence of events which led to the learned judge making the order with which the appellants take issue.

7 Woodward's filed a petition under the C.C.A.A. on December 11th, 1992, seeking a stay of all proceedings taken or that might be taken under the B. & I. Act and the *Winding-Up Act* so that they might attempt to reorganize their affairs as contemplated by the C.C.A.A.

8 Mr. Justice Tysoe made an *ex parte* order (the "interim order") on that date granting a stay of proceedings and granting certain relief on an interim basis.

9 On December 14th, Transcontinental applied for an order that the stay of proceedings be lifted to permit the filing of the petition in bankruptcy by Transcontinental against Woodward's. On December 17th, Mr. Justice Tysoe granted Transcontinental leave to file such petition but directed that any further proceedings in relation to that petition be stayed until further order of the court. The petition in bankruptcy was filed on December 18th, 1992.

10 The learned judge also directed that the Monitor appointed under the interim order on December 11th, report to the court with its recommendations respecting the formation of a creditors' committee. Other applications made by Transcontinental were adjourned to January 8th, 1993.

11 On December 17th made a further order, effective December 18th, that the proceeds of the sale of any inventory of goods or merchandise of Woodward's which came into Woodward's hands after December 18th, be placed into the "Operating Accounts" (as defined in the interim order) to stand in place and instead of the inventory so sold, subject to certain provisos set out in the order.

12 On December 24th, 1992, the provisions of the December 17th order were extended to the date of the hearing of the petition.

13 On January 7th, 1993, the Monitor reported in report No. 1 that it was unable to determine and quantify the goods and merchandise supplied to Woodward's during the 30-day period prior to the date of the interim order or of the sale of those goods subsequent to that date.

14 On January 7th, 1993, Transcontinental applied for an order that the proceeds of sale of any 30-day goods be placed in an interest-bearing trust account in substitution for the rights of unpaid suppliers to take possession of such goods pending resolution between the respective parties or judicial disposition and that the Monitor be directed to place into a separate trust account an amount equal to any purchase orders for goods or services ordered by Woodward's. Transcontinental also sought an order that the court create a creditors' committee composed of the members named in Transcontinental's application.

15 On January 7th, 1993, in report No. 2, the Monitor made suggestions with respect to the formation of a creditors' committee.

16 On January 14th, 1993, in written reasons [77 B.C.L.R. (2d) 332], Mr. Justice Tysoe dismissed the applications made by the appellants for the establishment of a trust fund for the benefit of the suppliers and set aside the interim order he had pronounced on December 17th, 1992, relating to the proceeds of the sale of goods after December 17th.

17 During the hearing of these applications, the court was asked to adjourn the applications of the appellants for the purpose of obtaining evidence necessary to have a proper consideration of their alleged rights. Mr. Justice Tysoe dismissed the applications for an adjournment.

18 On January 15th, 1993, Mr. Justice Tysoe made the order against which these applicants seek leave to appeal. He ordered that Woodward's be at liberty to file with the court the reorganization plan pursuant to the provisions

of the C.C.A.A. and the *Company Act* on or before February 15th, 1993. By that order, he provided among other things for the creation of a $20 million trust fund made up of monies deducted from the operating accounts in favour of R.-M. Trust Company In Trust for Cambridge Leaseholds Limited, a secured creditor of Woodward's and also Woodward's largest single shareholder and major landlord.

19 Sometime before Woodward's filed its petition on December 11th, 1992, it had created two trust funds covering claims which employees might have in the event of a bankruptcy and claims the Provincial and Federal governments might have in the same event. These trust funds totalled in excess of $10 million. Their existence was confirmed in the order made on January 15th, 1993 thereby protecting directors from personal liability in the event of a bankruptcy.

20 Counsel for Transcontinental submitted that the learned judge erred in refusing to adjourn the applications for determination of whether "30-day rights" existed because:

1. There was insufficient evidence on the quantification and identification of the 30-day goods;

2. That without such evidence it would be impossible to determine what creditors were prejudiced, the extent of the prejudice and any possibilities of protecting the 30-day goods or the proceeds therefrom; and

3. The Monitor's report on the issue of 30-day goods was inconclusive and this report constituted the only facts available to the court for its consideration.

21 Counsel also submitted that s. 81.1 of the B. & I. Act, which came into force on November 30th, 1992, had not been considered in any jurisprudence to the date of these applications and that there was a serious issue over whether the provisions of the C.C.A.A. and s. 81.1 of the B. & I. Act were in conflict. He submitted that Mr. Justice Tysoe should have created the trust fund to protect the 30-day suppliers in the event of bankruptcy if the reorganization plan was not approved. Counsel argued that the learned judge was in error in failing to recognize that s. 81.1 was derived from the Quebec *Civil Code* [*of Lower Canada*], art. 1543, and that the jurisprudence under that article showed that property and goods were subject to the revendication or resiliation which allowed the supplier to give notice of seizure and repossess the goods. Under the doctrine of resiliation the goods did not pass to the buyer. Monies realized from the sale of such goods belonged to the supplier: this rule of law might very well apply in favour of the unsecured creditors in this case. Mr. Bernstein, Q.C. of the Quebec Bar, referred to *Re Rosenzweig* (1921), 2 C.B.R. 255 (Que. C.A.), *Knitrama Fabrics Inc. v. K. & A. Textiles Inc.* (1984), 53 C.B.R. (N.S.) 164 (C.S. Que.), *William Neilson Ltd. v. Red Carpet Distribution Inc.*, [1991] R.J.Q. 712 (C.A.), affirming [1989] R.J.Q. 2798 (S.C.).

22 Mr. Bennett, on behalf of Transcontinental, urged that the learned judge had decided against the rights of unpaid suppliers under the C.C.A.A., when read with the provisions of s. 81.1 of the B. & I. Act, on insufficient evidence. He argued that the learned judge had erred in his interpretation of s. 81.1 and erred in concluding that the creation of a trust fund which would give the suppliers an advantage over other creditors of Woodward's which would not be beneficial to the continuation of Woodward's business during the period of its attempt to reorganize. Counsel argued that if a trust fund had been set up to protect the suppliers, the reorganization of Woodward's would not have been frustrated because the trustee of the trust fund could lend money back to Woodward's in exchange for a first charge on the assets of Woodward's in any amount so advanced.

23 Counsel also argued that if the reorganization plan under the C.C.A.A. was rejected by Woodward's creditors or not approved by the court, Woodward's would be placed in bankruptcy, and that such bankruptcy would date back to the date of the petition filed on December 18th, 1992. The learned judge ought to have established a trust fund to enable rights that might accrue to the suppliers to be secured by this trust fund.

24 Counsel for Transcontinental also submitted that the learned judge erred in ordering that the creditors' committee be established as recommended by the Monitor in report No. 4. He submitted that the committee was

not representative and acceptable to the majority of the unsecured creditors. He also submitted that the learned judge was in error in creating a $20 million trust fund in favour of Cambridge Leaseholds Limited because it was unnecessary and prejudicial to the unsecured creditors as a whole. He submitted that the court did not have jurisdiction under the C.C.A.A. to approve the creation of such a fund.

25 Mr. Bennett and Mr. Hyndman submitted that the test which the Court of Appeal considered in granting leave to appeal pursuant to s. 6.1 of the *Court of Appeal Act* was whether there was some prospect of the appeal succeeding on its merits, that the justice hearing the application did not have to be convinced of the merits of the appeal but he had to be satisfied only that there was a substantial question to be argued. Mr. Bennett relied upon *Canadian Energy Services Ltd. v. Gotaverken Energy Systems Ltd* (May 31, 1990), Doc. Vancouver CA011721 (B.C. C.A.). Mr. Hyndman relied upon *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (June 16, 1988), Doc. Vancouver CA009236 (B.C. C.A.), at p. 2.

26 Counsel submitted that the threshold test was met because the orders of Mr. Justice Tysoe, if allowed to stand, would work a severe and substantial injustice upon the creditors who had supplied 30-day goods to Woodward's. The effect of this was that the suppliers of inventory to Woodward's were essentially "financing" the C.C.A.A. proceedings.

27 Mr. Bennett referred to *Commonwealth Investors Syndicate Ltd. v. Laxton* (April 29, 1992), Doc. Vancouver CA015351 (B.C. C.A.), and submitted that granting leave to appeal would not hinder the reorganization plan that Woodward's intends to submit by February 15th, 1993.

28 I was assisted in my deliberations by the submissions of Mr. Bernstein, Q.C. of the Quebec Bar, who submitted that under the provisions of the Quebec *Civil Code* [*of Lower Canada*] a right of resiliation or rescission of sale, as distinct from a right of revendication, existed under Quebec law in favour of the suppliers. He relied upon *Re Rosenzweig, supra*, and to a publication on Unpaid Suppliers' Rights, *The Solutions Under The New Section 81.1 of the Bankruptcy and Insolvency Act*, authored by Messrs. Fortin, Couture and Savoie, prepared for a joint conference of the Canadian Insolvency Practitioners Association and the Insolvency Institute of Canada.

29 Mr. Hyndman, for Accord Business Credit, adopted the arguments advanced by counsel for Transcontinental with respect to the submissions regarding the failure to set up a fund to protect the 30-day goods suppliers and the failure to grant an adjournment of the appellants' applications but was opposed to Transcontinental's attack on the composition of the creditors' committee.

30 In addition to the arguments advanced by counsel for Transcontinental, Mr. Hyndman submitted that even if the argument with regard to s. 81.1 of the B. & I. Act failed, the learned trial judge was in error in failing to balance the rights of 30-day goods suppliers by not affording them some protection and recognition. He submitted that the role of the court in a C.C.A.A. matter was to maintain a balance between conflicting rights and that although a status quo should be maintained, creditors, such as the 30-day suppliers, should not be deprived of their rights. He submitted that the learned judge confused the issue of entitlement with the issue of preserving the status quo, that there need not be prejudice to Woodward's by the establishment of this fund because the trust fund could be "lent" to Woodward's.

31 Other counsel for the 30-day goods suppliers, Mr. Cuttler and Mr. Edgson, and Mr. Snarch for a creditor that supplied services, took the same position as Mr. Hyndman but were opposed to the attack by Transcontinental on the composition of the creditors' committee. It appeared from the submissions that only Transcontinental was dissatisfied with the composition of the committee.

Discussion

32 In considering the submissions made on behalf of the appellants, I first consider the purposes of the C.C.A.A. This was stated by Mr. Justice Gibbs of this Court in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 at pp. 88-89:

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

33 I have also considered the approach this Court has taken to applications for leave to appeal orders made by trial judges under the C.C.A.A. and have noted that this Court has declined leave to appeal even where substantial issues existed on the grounds that the granting of leave would be prejudicial to the prospects of reorganization and hence contrary to the spirit and objective of the C.C.A.A.

34 In *Re Pacific National Lease Holding Corp.* (October 28, 1992), Doc. Vancouver CA016047 (B.C. C.A.) [reported at 15 C.B.R. (3d) 265], Macfarlane J.A. stated that this Court should exercise its powers to grant leave "sparingly". He said [at p. 272]:

> Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.
>
> Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

35 The learned trial judge considered the issue of whether to establish a trust fund for the appellants very fully. From my reading of his extensive reasons for judgment I am persuaded that he exercised his discretion in a judicial manner after weighing the rights of the appellants and considering the balance which was required to be maintained to enable a reorganization plan to proceed with the interests of all parties protected.

36 In his reasons pronounced on January 14th, 1993, he noted that on December 17th, the Monitor reported that in the 30-day period prior to December 11th, Woodward's received goods having an aggregate cost of approximately $30.4 million of which $27.3 million remained unpaid, and that the Monitor estimated that approximately $4.3 million worth of the goods for which payment had not been made could be identified and were unsold by

Woodward's at the time of the commencement of the C.C.A.A. proceedings. He noted that identification of goods appeared to be a major difficulty because the Monitor believed that less than $8 million of the $30.4 million worth of goods received within the 30-day period preceding December 11th could be identified by Woodward's Inventory Control System. He noted also that the suppliers had advised that they would be able to assist in identifying the goods that were supplied by them.

37 He then referred to the 30-day period preceding the commencement of the C.C.A.A. proceedings and its significance under s. 81.1 of the B. & I. Act. He noted that this section gave rights of repossession to suppliers of goods similar to the revendication rights that suppliers had previously enjoyed by virtue of the Quebec *Civil Code* [*of Lower Canada*]. He stated [at p. 336 B.C.L.R.]:

> In brief terms, s. 81.1(1) provides that suppliers are entitled to the return of goods supplied by them within 30 days of a written demand for repossession that can be given if the purchaser of the goods has gone into bankruptcy or receivership. Two important qualifications are that the goods have not been resold and that the goods are identifiable.

38 The learned judge then considered the suppliers' submission that if Woodward's had proceeded under the B. & I. Act rather than the C.C.A.A., the suppliers could have taken steps to protect their rights, either by applying for the appointment of an interim receiver under s. 47.1 of the B. & I. Act with the result that the suppliers could then exercise their rights under s. 81.1 or, by making an application, could under s. 81.1(8) which permits a court to make any order it considers appropriate if a supplier is aggrieved by an act of a purchaser of the goods, and that such an order could direct the creation of a trust fund.

39 In considering whether a trust fund should be created to redress an inequity, he noted that there was no evidence to support an allegation that Woodward's purchased additional inventory with the knowledge that it would be commencing C.C.A.A. proceedings.

40 After examining authorities on the purpose of a stay under s. 11 of the C.C.A.A. (*Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.), and *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. 98 (B.C. S.C.), and other authorities dealing with maintaining the status quo), the learned judge summarized the objectives intended to be accomplished by maintaining the status quo and then stated [at p. 340]:

> Apart from consideration of s. 81.1 of the B & I Act, there is no justification for the creation of the trust fund. It would not serve to maintain the status quo. To the contrary, it would give the suppliers an advantage over other creditors of Woodward's. It would not be beneficial to the continuation of Woodward's business during the reorganization period or Woodward's attempt to reorganize. Indeed, it was the position of Woodward's on these applications that the creation of a trust fund in the amount of $30 million would make any reorganization impossible.

41 He then considered what rights the appellants might have under s. 81.1 and noted that on December 11th, when these proceedings were commenced, the suppliers had no rights under that section that could have been acted upon because Woodward's was not in bankruptcy or receivership. After an examination of the provisions of s. 81.1 and the C.C.A.A., he said this [at p. 342]:

> It is my view that the likelihood of a Court appointing an interim receiver for the purpose of enabling suppliers to repossess the goods they supplied during the preceding 30-day period is low. The repossession of such goods would be counter-productive to the company's reorganization effort because it would deprive the company of assets it requires to continue carrying on business and to make a viable reorganization proposal. I can envisage a case where the Court may be willing to take such a step if it is concerned that the reorganization attempt may not be bona fide and the Court wishes to have an interim receiver to oversee the collection and

disbursement of funds and to preserve the rights of suppliers if it is proven that the reorganization attempt was not bona fide.

42 The learned judge heard further submissions from the appellants on January 15th, 1993 with respect to their potential rights under s. 81.1 and whether he should produce a result that was the same as the result that would have been created if Woodward's had filed a notice of intention to file a proposal under the B. & I. Act. He decided against the appellants in a further set of written reasons pronounced on January 21st, 1993 [reported at 17 C.B.R. (3d) 253].

43 In my opinion, the appellants have not shown that the judge erred in the exercise of his discretion. Nor have they shown an appeal to the Court from the exercise of the learned judge's discretion in refusing to approve the establishment of a trust fund to protect the appellants' rights was one with which a Division of this Court would interfere.

44 Leave to appeal is only sparingly granted to review the exercise of a broad discretion (see *Sun Life Savings & Mortgage Corp. v. Sampson* (1991), 62 B.C.L.R. (2d) 399 (C.A.)). In the absence of evidence that the exercise of the judge's discretion was clearly wrong, leave to appeal should not be granted.

45 Nor am I persuaded that the learned judge erred in refusing an adjournment of the applications to enable the appellants to obtain evidence to support their applications for the setting up of a trust fund. Time was of great importance if the reorganization plan was to proceed at all. Based upon the authorities I have cited on the approach of this Court to applications for leave to appeal under the C.C.A.A., I am not persuaded that a Division of this Court would disturb this exercise of discretion by the learned judge.

46 Nor am I persuaded that a Division of this Court would interfere with the exercise of the learned judge's discretion in appointing the committee of creditors. That committee was appointed in accordance with the suggestions of the Monitor. Its appointment and constitution were clearly matters within the discretion of the judge. If leave to appeal were granted with respect to the appointment and constitution of the creditors' committee under the C.C.A.A., then the purpose and function of the C.C.A.A. would be sterilized.

47 I have considered the submissions by the appellants that the learned judge erred in directing that a trust fund in the amount of $20 million be set up to secure the balance of outstanding amounts payable to R.-M. Trust Company In Trust for Cambridge Leaseholds Limited. Counsel for Transcontinental submitted that the learned judge had no jurisdiction under the C.C.A.A. to make such an order.

48 Counsel for Cambridge Leaseholds Limited submitted that his client was a landlord of Woodward's and a secured creditor whose accommodation by the provisions of this trust fund was necessary to assist in the reorganization plan. He further submitted that minutes of the formal order making provision for this trust fund were circulated to all counsel who had appeared on the applications heard by Mr. Justice Tysoe before the order was approved and that no objection had been taken to this provision. Mr. Trower, counsel for Transcontinental, advised me that he had not received a copy of these minutes and was unaware of this provision.

49 From my reading of the affidavits and other material on these leave applications, I understand that the trust fund has been set up to secure the charge of Cambridge Leaseholds Limited against the assets of Woodward's and that if the stay is lifted as a result of the implementation of a reorganization by Woodward's, and if this reorganization is approved by the court, the funds in this trust fund will be returned to Woodward's to be used by it for its capital expenditure requirements contemplated by the reorganization plan.

50 In short, the trust fund was established in part to facilitate the reorganization plan and in part to secure the charge of Cambridge Leaseholds Limited. I am not persuaded by the submissions made by the appellants' counsel that the learned judge did not have jurisdiction under the C.C.A.A. to make that order or that he erred in exercising

his discretion in so ordering. Nor do I agree that there is sufficient merit in this submission to persuade me that the learned judge was clearly wrong in making this order.

Summary

51 For the foregoing reasons the applications for leave to appeal are dismissed.

Applications dismissed.

See para. 65

2012 ONSC 7050
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 15913, 2012 ONSC 7050, 224 A.C.W.S. (3d) 21

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

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

Morawetz J.

Heard: December 7, 2012
Judgment: December 12, 2012
Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Kevin Zych, Derek J. Bell, Jonathan Bell, for Sino-Forest Corporation
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Robert Chadwick, Brendan O'Neill, for Ad Hoc Committee of Noteholders
Kenneth Rosenberg, Kirk Baert, Max Starnino, A. Dimitri Lascaris, for Class Action Plaintiffs
Won J. Kim, James C. Orr, Michael C. Spencer, Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP, Comité Syndicale Nationale de Retraite Bâtirente Inc.
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young Inc.
Peter Green, Ken Dekkar, for BDO Limited
Edward A. Sellers, Larry Lowenstein, for Board of Directors of Sino-Forest Corporation
John Pirie, David Gadsden, for Poyry (Beijing)
James Doris, for Plaintiff in New York Class Action
David Bish, for Underwriters
Simon Bieber, Erin Pleet, for David Horsley
James Grout, for Ontario Securities Commission
Emily Cole, Joseph Marin, for Allen Chan
Susan E. Freedman, Brandon Barnes, for Kai Kit Poon
Paul Emerson, for ACE/Chubb
Sam Sasso, for Travelers

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Applicant debtor corporation was integrated forest plantation operator and forest products company with majority of assets in People's Republic of China and complicated corporate structure — In 2011, reports of financial impropriety of corporation had significant negative effect, resulting in corporation defaulting under note indentures and subsequent agreement of noteholders supporting restructuring of corporation in March 2012 — At same time corporation obtained initial order under Companies'

Creditors Arrangement Act, and subsequent orders included grant of extensions of stay of proceedings, claims procedure order, and class action proceedings in Ontario as well as other jurisdictions — On August 31, 2012, court approved filing of plan to discharge all affected claims, distribute consideration in respect of proven claims and transfer ownership of corporate business to two new corporations whose shares would be distributed to all affected creditors — Plan was approved by 99 per cent of affected creditors — Corporation brought motion for order sanctioning plan of compromise and reorganization — Motion granted — Considering relevant factors on sanction hearing, sanction of order was warranted, as corporation established strict compliance with all statutory requirements and prior court orders, did nothing not authorized by Act and had fair and reasonable plan — Monitor concluded plan was preferable alternative to liquidation or bankruptcy — Plan provided fair and reasonable balance among corporation's stakeholders and provided corporation simultaneous ability to continue as going concern for all stakeholders — Plan adequately considered public interest providing certainty to corporate employees, suppliers, customers and other stakeholders — Selection of $150 million cap on indemnified noteholders class action reflected business judgment of parties' assessment risk related to Ontario class action and was commercially reasonable — Reasonable connection existed between claims being compromised and overall purpose of plan.

Table of Authorities

Cases considered by *Morawetz J.*:

Armbro Enterprises Inc., Re (1993), 1993 CarswellOnt 241, 22 C.B.R. (3d) 80 (Ont. Bktcy.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

Canadian Airlines Corp., Re (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2010), 70 C.B.R. (5th) 1, 2010 ONSC 4209, 2010 CarswellOnt 5510 (Ont. S.C.J. [Commercial List]) — followed

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — followed

Nelson Financial Group Ltd., Re (2011), 79 C.B.R. (5th) 307, 2011 CarswellOnt 3100, 2011 ONSC 2750 (Ont. S.C.J.) — referred to

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2010), 63 C.B.R. (5th) 44, 81 C.C.P.B. 56, 2010 CarswellOnt 1754, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]) — followed

Ravelston Corp., Re (2005), 2005 CarswellOnt 4267, 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]) — considered

Sino-Forest Corp., Re (2012), 2012 ONSC 4377, 2012 CarswellOnt 9430, 92 C.B.R. (5th) 99 (Ont. S.C.J. [Commercial List]) — referred to

Sino-Forest Corp., Re (2012), 2012 ONSC 5011, 2012 CarswellOnt 11239 (Ont. S.C.J. [Commercial List]) — referred to

Sino-Forest Corp., Re (2012), 2012 ONCA 816, 2012 CarswellOnt 14701 (Ont. C.A.) — referred to

Sino-Forest Corp., Re (2012), 2012 ONSC 7041, 2012 CarswellOnt 15919 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — referred to

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

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

s. 2(1) "company" — referred to

s. 2(1) "equity claim" — considered

s. 6 — pursuant to

s. 6(1) — considered

MOTION by debtor corporation for order sanctioning plan of compromise and reorganization.

***Morawetz J.*:**

1 On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

2 The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

3 With the exception of one party, SFC's position is either supported or is not opposed.

4 Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Sino-Forest Corp., Re*, 2012 ONSC 7041 (Ont. S.C.J. [Commercial List])). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

5 The defined terms have been taken from the motion record.

6 SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision") (2012 ONSC 4377, 92 C.B.R. (5th) 99 (Ont. S.C.J. [Commercial List])), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816 (Ont. C.A.)).

7 Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

8 The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

9 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

10 The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

11 Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

12 SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

13 SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

14 SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

15 On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

16 SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

17 Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

18 The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

(a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;

(b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against

SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings, preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

19 SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012 [2012 CarswellOnt 14701 (Ont. C.A.)], and unless further extended, will expire on February 1, 2013.

20 On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

21 On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

22 As of the date of filing, SFC had approximately $1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

23 After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

24 *Sino-Forest Corp., Re* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; second, there is a $1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

25 The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

26 In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

27 Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

28 The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of $6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

29 The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

30 The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of $100 million against SFC's directors and officers (this amount was later reduced to $84 million).

31 SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

32 On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

33 In reasons released on July 27, 2012 [2012 CarswellOnt 9430 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims." The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

34 On August 31, 2012 [2012 CarswellOnt 11239 (Ont. S.C.J. [Commercial List])], an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

35 According to SFC's counsel, the Plan endeavours to achieve the following purposes:

(a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;

(b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;

(c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and

(d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

36 Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

37 SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

38 SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

39 The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

40 Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. $300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust Interests.

41 Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

42 With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

43 The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

44 The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

45 The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

46 The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	Number of Votes	***%***		***Value of Votes***	***%***
Total Claims Voting For	250	98.81%	$	1,465,766,204	99.97%
Total Claims Voting Against	3	1.19%	$	414,087	0.03%
Total Claims Voting	253	100.00%	$	1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	Vote For	*Vote Against*	*Total Votes*
Class Action Indemnity Claims	4	1	5

c. the number of Defence Costs Claims votes for and against the Plan and their value:

	Number of Votes	*%*		*Value of Votes*	*%*
Total Claims Voting For	12	92.31%	$	8,375,016	96.10%
Total Claims Voting Against	1	7.69%	$	340,000	3.90%
Total Claims Voting	13	100.00%	$	8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire $150 million of the Indemnified Noteholder Class Action Limit had been voted a "no" vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	Number of Votes	*%*		*Value of Votes*	*%*
Total Claims Voting For	263	98.50%	$	1,474,149,082	90.72%
Total Claims Voting Against	4	1.50%	$	150,754,087	9.28%
Total Claims Voting	267	100.00%	$	1,624,903,169	100.00%

47 E&Y has now entered into a settlement ("E&Y Settlement") with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

48 As noted in the endorsement dated December 10, 2012, which denied the Funds' adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

49 Further, SFC's counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to dealt with at a further court-approval hearing.

Law and Argument

50 Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

51 To establish the court's approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

(b) nothing has been done or purported to be done that is not authorized by the CCAA; and

(c) the plan is fair and reasonable.

(See *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), leave to appeal denied, 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 (S.C.C.) and *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750, 79 C.B.R. (5th) 307 (Ont. S.C.J.)).

52 SFC submits that there has been strict compliance with all statutory requirements.

53 On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the $5 million statutory threshold.

54 The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

55 SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

56 Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Canadian Airlines Corp., Re*.

57 Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Canadian Airlines Corp., Re*, and *Nortel Networks Corp., Re*, [2009] O.J. No. 2166 (Ont. S.C.J. [Commercial List]). Further, courts should resist classification approaches that potentially jeopardize viable plans.

58 In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

59 I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

60 SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

61 In *Nelson Financial Group Ltd., Re*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Canwest Global Communications Corp., Re*, 2010 ONSC 4209, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]):

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;

2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;

3. If other options or alternatives have been explored and rejected as workable, this will be significant;

4. Consideration of the oppression rights of certain creditors; and

5. Unfairness to shareholders.

6. The court will consider the public interest.

62 The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

63 In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

64 I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

65 The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

66 In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global Communications Corp., Re* and *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

67 In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

68 As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

69 With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the $150 million agreed-upon amount reflects risks faced by both sides. The selection of a $150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

70 Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted

against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

71 The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 45 C.B.R. (5th) 163 (Ont. C.A.) stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

72 In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

73 Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

74 In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial*, *Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), and *Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]). Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

75 With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

76 It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

77 I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

78 Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

Disposition

79 Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and

(iii) the Plan is fair and reasonable.

80 Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

Motion granted.

Original
2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J. No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz for Target Corporation
Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")
Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust
Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous
Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — Stay extended to certain limited partnerships, which were related to or carried on operations integral to applicants' business — Stay of proceedings extended to rights of third party tenants against landlords that arose out of insolvency — Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — It was appropriate to grant broad relief to ensure status quo was maintained — Applicants were all insolvent — Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances — Creation of employee trust to cover payments to employees was approved — Key employee

retention program (KERP) and charge as security for KERP payments were approved — Appointment of Employee Representative Counsel was approved — DIP Lenders' Charge and DIP Facility were approved — Administration charge and Directors' and Officers' charge approved.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

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Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

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

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, [2004] O.T.C. 284, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — followed

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Ted Leroy Trucking Ltd., Re (2010), *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

U.S. Steel Canada Inc., Re (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — considered

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

Generally — referred to

s. 11 — considered

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

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 36 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

Words and phrases considered:

insolvent

"Insolvent" is not expressly defined in the [*Companies' Creditors Arrangement Act* (CCAA)]. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act* . . . or if it is "insolvent" as described in Stelco Inc. (Re), [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

***Morawetz R.S.J.*:**

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method

available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

d) Should the Court approve protections for employees?

e) Is it appropriate to allow payment of certain pre-filing amounts?

f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario.

A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Priszm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)]*, and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material

conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that

it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

Application granted.

See paras. 39-40, 52, 57, 73, 76 and 86

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc*., 2018 ONCA 253, 141 O.R. (3d) 192 ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

[3] The facts underlying this appeal may be briefly outlined.

[4] On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

[5] Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.[1] The mining claims were

[1] The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

[6] Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.[2]

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[2] The ownership of the surface rights is not in issue in this appeal.

[7] Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

[8] On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

[9] The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under

the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

[11] The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

[12] On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic … why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma

respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.[3]

[13] Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

[14] For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order

[3] Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

[15] On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that “an appeal is under consideration” and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.’s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period “is what it is” but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

[16] On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal.

235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

[17] Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

[18] On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

(1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

[19] The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

[20] The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

[21] In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the

statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

[22] The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

[23] The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

[24] The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including

interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

[25] To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

[26] A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

[27] The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement …
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations ... The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

[28] The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement

describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

[29] In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

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[4] To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L§21, said:

> A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

[30] As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

[31] Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)***,** 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41.

The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence,

> inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[32] Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

[33] This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[34] The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also

had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63, the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

[35] Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

[36] Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), leave to

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[5] Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

appeal refused, [2006] S.C.C.A. No. 388, involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be

> the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

[43] The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

[44] Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because

of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

[45] Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable.

[46] "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> > (a) is appointed under subsection (1); or
> >
> > (b) is appointed to take or takes possession or control – of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt – under

> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver – manager. [Emphasis in original.]

[47] *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

[48] The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

[49] In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

[50] The language of this subsection is similar to that now found in s. 243(1).

[51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

[52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh, Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver … to … take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Re Loewen Group Inc.* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.)[6].

[53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[54] In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was

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[6] This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Re Big Sky Living Inc.*, 2002 ABQB 659, 318 A.R. 165, at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").[7]

[55] Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.[8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

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[7] This 10 day notice period was introduced following the Supreme Court's decision in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

[8] *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, *the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable. [Emphasis added.]

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to

import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[61] The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

[62] Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language “take any other action that the court considers advisable”.

[63] This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

[64] In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est*

exclusio alterius) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

[65] However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis … is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R*., 2011 SCC 63, [2011] 3 S.C.R. 721, at paras. 110-111.

[66] The Supreme Court noted in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt … has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader

> than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the … provisions without regard to their underlying rationale.

[67] Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

[68] In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

[69] Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

[71] In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of

the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 – Jurisdiction to Grant a Sales Approval and Vesting Order

[72] This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

[73] The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a receiver's powers

is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

[74] This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

[75] Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

[76] It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

[77] Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc*., 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.,* Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of

the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.,* 2014 NSSC 420, 353 N.S.R. (2d) 194 stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

[79] In *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: “It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge.” Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or ‘real rights’, it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

[80] The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in “Vesting Orders Part 2”, at p. 58, “[a] vesting order is a vital legal ‘bridge’ that

facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver – which did not hold the title – is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

[81] The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

[82] As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

[83] The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

[84] If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

[85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor’s property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

[86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency – it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

[87] In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

[88] This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into

court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word “encumbrance” is not defined in the CLPA.

[89] G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at §34:10 states:

> The word “encumbrance” is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as “every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee”.

[90] The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

[91] That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co’s GORs?

[92] This takes me to the next issue – the scope of the sales approval and vesting order and whether 235 Co.’s GORs should have been extinguished.

[93] Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of “jurisdiction” but rather one

of “appropriateness” as Blair J.A. stated in *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant’s GORs from title?

[94] In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

[95] As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

[96] In some cases, courts have denied a vesting order on the basis that the debtor’s interest in the property circumscribes a receiver’s sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), the receiver sought an order authorizing it to sell the debtor’s property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the

receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

[97] Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union v. 984 Bay Street Inc*., [2005] O.J. No. 3707 (S.C.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 1726 (C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union v. 984 Bay Street Inc*., [2006] O.J. No. 3169 (S.C.).

[98] An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with

the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

[99] The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

[100] He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-

Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.[9]

[101] As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

[102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

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[9] This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corporation v. Woods Property Development Inc*., 2011 ONCA 817, 286 O.A.C. 189.

[103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

[104] For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

[105] Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

[106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: “Vesting Orders Part 2”, at pp. 60, 65.

[107] The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Funds Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an

interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the

property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

> … [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

[113] Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may

be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

[114] The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

[115] Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

[116] Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

[117] 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

[118] Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

[119] Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

[120] There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

[121] The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

[122] Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

[123] In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the

parties took the position that it was. There is therefore no need to address that issue.

[124] Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

[125] The 10 days runs from the day the order or decision was rendered: *Moss (Bankrupt), Re* (1999), 138 Man. R. (2d) 318 (C.A., in Chambers), at para. 2; *Re Koska*, 2002 ABCA 138, 303 A.R. 230, at para. 16; *CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd. (c.o.b. White Cross Pharmacy Wolseley)*, 2019 MBCA 28 (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order or decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction.[10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Re Koska*, at para. 16.

[126] Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions

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[10] *Ontario Wealth Managements Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

(see e.g. *Ontario Wealth Management Corp. v. SICA Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers), at para. 36 and *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 1), until recently, no Ontario case had directly addressed this point.

[127] Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway* (1934), [1935] O.R. 37 (C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16.

[128] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd*., 2019 ONCA 269, Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the

receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

[129] Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

[130] Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

[131] Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

[132] The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

[133] Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

[134] 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

[135] Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

[136] The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

[137] Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic … why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

[138] As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

[139] For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision.

This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

[140] Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

[141] As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

[142] The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf

(Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time …
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:
>
> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed…;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

[143] These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents;

and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distributions Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15.

[144] There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

[145] I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

[146] While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

[147] In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

[148] For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

Released: “SEP” JUN 19, 2019

“S.E. Pepall J.A.”
“I agree. P. Lauwers J.A.”
“I agree. Grant Huscroft J.A.”

See paras. 8, 53

Arrangement relating to Nemaska Lithium inc.
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2020 QCCS 3218
Quebec Superior Court

Arrangement relating to Nemaska Lithium inc.

(In the matter of the Companies' Creditors Arrangement Act or :) NEMASKA LITHIUM INC., NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC., NEMASKA LITHIUM P1P INC., NEMASKA LITHIUM WHABOUCHI MINE INC. AND NEMASKA LITHIUM INNOVATION INC., Debtors, v. PRICEWATERHOUSECOOPERS INC., Monitor, and VICTOR CANTORE, Opposing Creditor, and OMF FUND II (K) LTD. ET AL., INVESTISSEMENT QUÉBEC AND THE PALLINGHURST GROUP, Mises en cause, and FMC LITHIUM USA CORP. AND BRIAN SHENKER, Respondent

Gouin JCS

Heard: September 21, 2020 - October 8, 2020
Judgment: October 15, 2020
Docket: CS Qué. Montreal 500-11-057716-199

Counsel: *My Patrick Boucher, Gabriel Faure, Gabrielle Groulx-Maurer, Karine Joizil, Pascale Klees-Themens, Alain Tardif and François Alexandre Toupin* , for the Debtors
My Jean Fontaine and Nathalie Nouvet , for Controller
Me Dimitri Maniatis , for Victor Cantore
My David Bish, Marie-Ève Gingras and Christopher Richter , for Orion
Me Luc Morin , for Investissement Québec
My Denis Ferland and Hannah Toledano , for Pallinghurst
My François D. Gagnon and Kevin Mailloux , for FMC Lithium USA Corp.
Mes Puya Fesharaki and Robert Thornton , for Brian Shenker

Subject: Insolvency ; Corporate and Commercial

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Cases considered by *Louis J. Gouin JCS* :

AbitibiBowater inc., Re (2010), 2010 QCCS 1742, 2010 CarswellQue 4082, 71 CBR (5th) 220 (CS Que.) - referred to

Royal Bank v. Soundair Corp. (1991), 7 CBR (3d) 1, 83 DLR (4th) 76, 46 OAC 321, 4 OR (3d) 1, 1991 CarswellOnt 205 (Ont. CA) - referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. CA) - referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, 338 NR 196 (note) (SCC) - referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 BCLR (5th) 1, *(* sub nom. *Century Services Inc. v. AG of Canada)* 2011 DTC 5006 (Eng.), *(* sub nom. *Century Services Inc. v. AG of Canada)* 2011 GTC 2006 (Eng.), [2011] 2 WWR 383, 72 CBR (5th) 170, 409 NR 201, *(* sub nom. *Ted LeRoy Trucking Ltd ., Re)* 326 DLR (4th) 577, *(* sub nom. *Century Services Inc. v. Canada (AG))* [2010] 3 SCR 379, [2010] GSTC 186, *(* sub nom. *Leroy (Ted) Trucking Ltd. , Re)* 296 BCAC 1, *(* sub nom.*Leroy (Ted) Trucking Ltd., Re)* 503 WAC 1 (SCC) - referred to

9354-9186 Quebec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 CBR (6th) 1, 444 DLR (4th) 373, 1 BLR (6th) 1 (SCC) - considered

Statutes considered by *Louis J. Gouin JCS* :

Companies' Creditors Arrangement Act , RSC 1985, c. C-36
art. 3 - referred to

art. 5.1 (2) - considered

art. 11 - considered

art. 36 - considered

art. 36 (1) - considered

art. 36 (3) - considered

art. 36 (6) - considered

Securities Act , CQLR, c. V-1.1

Regulations considered by *Louis J. Gouin JCS* :

Securities Act , CQLR, c. V-1.1
Regulation 61-101 respecting measures to protect minority holders during special transactions , CQLR, c. V-1.1, r. 33

art. 331.1 - referred to

***Gouin JCS* :**

IN CONTEXT

Request for ODI

1 The Tribunal is seized of an “Application Seeking Leave to Enter into the Orion / IQ / Pallinghurst Transaction with Issuance of an Approval and Vesting Order and Ancillary Relief” (the “ *Request for a reverse devolution order* ” or the “ *Request for ODI* ”) Presented by the debtors Nemaska Lithium inc., Nemaska Lithium Shawinigan Transformation inc., Nemaska Lithium P1P inc., Nemaska Lithium Whabouchi Mine inc. and Nemaska Lithium Innovation inc. (collectively the “ *Debtors* ”) *pursuant* to sections 11 and 36 of the *Companies' Creditors Arrangement Act* [1] (“ *CCAA* ”).

2 A “reverse devolution” order (an “ *ODI* ”) consists, in essence, of the sale to a purchaser of the shares of the capital stock of an insolvent company, relieved of some of its assets and debts unwanted by the company. acquirer, who then continues the operations of the company.

3 Thus, the Request for ODI aims to authorize a transaction comprising a series of corporate, fiscal and commercial transactions, at various stages in time, between the Offerors (defined below) and the Debtors, including, among others, the 'exchange, transfer, cancellation, reduction and subscription of shares of the capital stock of various companies, the merger between some of them, and the disposal of certain assets and debts, not necessary for the purposes of the operations, to newly incorporated subsidiaries, which will then be under the *CCAA* and will eventually file a plan of arrangement.

4 All of these operations, provisions and planned stages make it possible, among other things, to maintain in force existing permits, licenses and authorizations, essential contracts, and to maximize the use of the various fiscal attributes available, with a view to efficiency and speed.

5 What is more, all this corporate, fiscal and commercial high-flying exercise ensures, in the end, that it is for the benefit of all.

6 Using the more well-known way of disposing of assets such as sale (vesting order) is certainly much less complex, but a sale does not generally allow permits, licenses and permits to be maintained in force. existing authorizations, and essential contracts, as well as the various fiscal attributes available, especially in highly regulated sectors, such as the mining sector.

7 As of now, the Court wishes to mention that the explanations requested by the Court at the start of the hearing so that everyone can fully understand and understand the envisaged transaction and provided by the tax experts Me Patrick Boucher, of the firm McCarthy Tétrault, attorneys for the Debtors , and Me Derek G. Chiasson, of Norton Rose Fulbright, attorneys for IQ, using the documents entitled “Transaction Steps” (the “ *Steps* ”) and “Nemaska - Proposed reorganization structure” attached (Exhibit A) the “Share Purchase Agreement” project, itself attached (Schedule A) to project [2] order of reverse devolution submitted by the Debtors, were very eloquent and enlightening, and convinced the Court of the legitimate aim pursued by the structure of "reverse devolution" proposed in the transaction subject to its approval.

8 This is a very complex and innovative structure that is the 6th time that such a structure is part of a transaction subject to a Canadian court for approval under section 36 *CCAA* , but it is the 1st time it is challenged, the transactions in the other 5 cases [3] were approved without opposition.

9 More specifically, by the Application for ODI, the Debtors ask the Court to approve, under article 36 *CCAA* , the offer of July 10, 2020 filed by OMF Fund II (K) Ltd., OMF Fund II (N) Ltd. and OMF (Cayman) Co-VII Ltd. (collectively " *Orion* "), Investissement Québec (" *IQ* ") and The Pallinghurst Group (" *Pallinghurst* "), as amended by letters dated August 10 and 23, 2020 (the " *Orion / IQ / Pallinghurst Offer* ") [4] , and this, by issuing an ODI.

10 Orion, IQ and Pallinghurst are hereinafter collectively referred to as the " *Offerors* ".

11 The Orion / IQ / Pallinghurst Offer was received as part of the solicitation process for the assets and businesses of the Debtors and entitled "Sale or Investment Solicitation Process" (the " *SISP* "), a process authorized under the judgment of the January 29, 2020 the Court entitled "SISP Approval Order" (the " *Ordinance SISP* ") [5] .

12 The SISP Order includes an Annex A, entitled "SISP Procedures" (the " *SISP Procedures* "), describing the various process procedures to be followed by the Debtors, including the following general explanations:

> Recitals
>
> [. . .]
>
> C. Pursuant to an order of the Court dated January 29, 2020 (as it may be amended, restated or supplemented from time to time, the " **SISP Approval Order** "), the Court approved a sale or investor solicitation process to be conducted in respect of the business and assets of Nemaska [les Débitrices] (as such process may be amended, restated or supplemented pursuant to the terms herein, the " **SISP** "), in accordance with the procedures, terms and conditions set our herein (the " **SISP Procedures** ').
>
> D. The SISP Procedures sets out the manner in which (i) bids and proposals for a broad range of executable transaction alternatives (restructuring, recapitalization and / or refinancing) involving the business of Nemaska [les Débitrices], as more particularly described in the Teaser Letter (the " **Business** "), and all property, assets and undertaking of Nemaska (the " **Property** "), whether *en bloc* or any portion (s) thereof , will be solicited from interested parties, (ii) any bids received will be negotiated, (iii) any Successful Bid (s) will be selected and, (iv) the Court's approval of any Successful Bid (s) will be sought .
>
> E. An investment in the Business may involve, among other things, a restructuring, recapitalization, or other form of reorganization of the business and affairs of the Business or any part thereof , and such investment may be consummated pursuant to a plan of compromise or arrangement (a " **Plan** "), an arrangement pursuant to the *Canada Business Corporations Act* , RSC, 1985, c. C-44 (respectively an " **Arrangement** " and the " **CBCA** ") or otherwise.
>
> F. The SISP Approval Order, the SISP Procedures, and any other orders of the Court made in the CCAA Proceedings relating to the SISP shall exclusively govern the process for soliciting and selecting bids for the sale of the Property or investment in the Business pursuant to a broad range of executable transaction alternatives .
>
> [. . .]
>
> (the Court underlines)

13 Thus, the SISP Order, issued without opposition, covers all the assets of the Debtors, without distinction, in whole or separately, and opens the door to a panoply of possible transactions in order to find a solution to the financial problems of the Debtors.

14 The SISP Order therefore constitutes the cornerstone, the backdrop (the " *Backdrop* ") of the Request for ODI, and it is essential that the parties always have it in mind, especially when presenting of their arguments.

15 In addition, the Request for ODI does not constitute a request for approval of a plan under the *CCAA* , but rather, as mentioned above, a request for approval by the Court [6] of the tender selected by the Debtors. following the SISP Order, that is the Orion / IQ / Pallinghurst Offer.

16 The Orion / IQ / Pallinghurst Offer is submitted to the Tribunal as filed, and it is not for the Tribunal to advise Offerors which terms and conditions are to be included in it.

17 The Tribunal's choice is as follows: approve or reject the Orion / IQ / Pallinghurst Offer.

Cantore request

18 The Request for ODI includes, among other things, a request for the existing rights in rem over the assets of the Debtors to be written off.

19 Also, at the same time as the ODI Claim, the creditor Victor Cantore (the " *Cantore Creditor* "), one of the shareholders of the debtor Nemaska Lithium inc., Filed a claim entitled "Real Rights Application" (the " *Cantore* Claim") ") Against the debtors Nemaska Lithium inc., Nemaska Lithium Shawinigan Transformation inc. and Nemaska Lithium Whabouchi Mine inc. (collectively " *Nemaska* ").

20 This dispute between the Cantore Creditor and Nemaska was the trigger for the Cantore Creditor's opposition to the Claim for ODI and, even if the merit of the Cantore Claim was not the subject of the ODI Claim, it was not The fact remains that this litigation was omnipresent throughout the hearing, the Creditor Cantore being the only one to oppose the Request for ODI, and this, tirelessly.

21 It is therefore relevant, in these circumstances, to properly situate this dispute between the Cantore Creditor and Nemaska, by specifying that it originates from the “Agreement to acquire 16 claims (Cantore Property) [the“ *Cantore Property* ” [7]] ”Of September 17, 2009 (the“ *Agreement* ”) [8] , between Exploration Nemaska inc. (“ *Exploration* ”) (now the debtor Nemaska Lithium inc.) And the Creditor Cantore, while Exploration acquired 100% of the interests of the Creditor Cantore in said claims [9] .

22 As a consideration for this acquisition, the Agreement provides, among other things, for the payment of a “Royalty” by Exploration to the Creditor Cantore, as follows:

> **1. Royalty**
>
> Payment to Groupe Cantore of a Royalty equal to 3% NSR [Net Smelter Return] on all metals. The royalty will be payable monthly on the 15th of the month and will be calculated for the period of one (1) preceding calendar month. The Company will have the option at its discretion, at any time until the expiration of a period of 3 months following the official declaration of production, to buy back 1% NSR from the holders, in proportion to their interest, for a sum of $ 1,000,000, payable in 2 equal installments, the first on the day of the exercise of the redemption option and the second 90 days later.
>
> (the " **NSR Royalty** ")

23 At a management conference for this dispute, held on September 9, 2020, the Creditor Cantore acknowledged that this text of the Agreement providing for the payment of the NSR Royalty did not grant it any real rights as such and, if it was strictly and exhaustively a question of this text, then the Cantore Request should be rejected [10] .

24 On the other hand, as it appears from the Cantore Claim, the Cantore Creditor seeks rather to obtain from the Court, first of all, a recognition and declaration to the effect that he is a beneficiary, by acquisitive prescription or otherwise, of 'a " *sui generis* real right " attached to the NSR Royalty and constituting a dismemberment of the innominate property right, so that the Court should, according to the Creditor Cantore, possibly order Nemaska to sign, among other things, a document, not still produced, noting this alleged "real *sui generis right* " affecting the Cantore Property (the " *Real right sui generis Cantore* ") And proceed to its publication in the land register of Quebec, failing which, the judgment to be made on the Cantore Request should have this effect.

25 Secondly, the Creditor Cantore asks the Court to expressly exempt the Cantore *sui generis* right in rem from the cancellation of the rights in rem requested by the Debtors under the terms of the Application for ODI, hence the opposition of the Creditor Cantore to the Request for ODI, not only on the grounds of this requested delisting, but for many reasons, as explained below, the Creditor Cantore blazing a trail.

Agreed framework for hearing the Application for ODI

26 In order to alleviate, as far as possible, the hearing of the Claim for ODI, the parties took for granted, but strictly for the purposes of this hearing, that the Creditor Cantore did in fact hold a real right *sui generis* Cantore, the debate on the merits of the Cantore Request being postponed.

27 Thus, during a management conference held on September 18, 2020 [11] , the Tribunal stated the following in this regard:

> b. As to the *sui generis* right in rem claimed by the Cantore Creditor and for which a purge is requested under the terms of the RVO Claim [the ODI Claim], the Debtors claim that, even if it were eventually decided that the Cantore Claim is well founded and that Creditor Cantore does hold a *sui generis* Real Right , then the Court has, in any event and in any event, the power to purge it, and this is what they are asking for in the RVO Request.
>
> What is the point, then, of engaging in a long debate for the purposes of determining whether in fact the Cantore Creditor holds a *sui generis* Real Right if, in the end, the Tribunal is asked to simply purge it.
>
> The parties will therefore limit the first step of the Cantore Request to discussing the power of the Tribunal to order such a purge . A positive response could thus cut short the debate for the purposes of determining whether or not the Cantore Creditor actually benefits from a *sui generis* right in rem .
>
> (the Court underlines)

28 On the other hand, after a few days of hearing the Application for ODI, which stretched out much longer than expected, it was decided to postpone until later, not only the question of the existence or not of the right in real *sui generis* Cantore , but also that relating to the power of the Court to purge it, if the real right *sui generis* Cantore exists, and this, without consequence on the power of the Court to purge the other rights in rem affecting the assets of the Debtors.

29 The draft ODI attached as Exhibit [12] to the ODI Application was then amended to provide for a temporary exception for the Cantore Application and the Cantore *sui generis right* claimed therein, so that if ever it is decided by the Tribunal that this right exists and cannot be purged, then it will affect the assets covered and forming part of the Orion / IQ / Pallinghurst Offer, and the Offerors will be responsible for the consequences, if any.

30 The postponement of this debate, which was essentially aimed at ensuring that the Cantore Request was no longer an obstacle to the urgent obtaining of the approval by the Court of the Orion / IQ / Pallinghurst Offer, since the Court was willing to go in this direction, did not put an end to the opposition of the Creditor Cantore to the Demand for ODI, far from it.

31 Thus, the Creditor Cantore continued to claim that the Tribunal simply did not have the authority and the competence to grant the Claim for ODI except, on the other hand, if it also included a settlement of the Cantore Claim which would then be approved. by the Tribunal.

32 As discussed below, it became clear to the Court, throughout the hearing, that the Creditor Cantore, through the arguments he presented, did not take into account what had been decided by the Order SISP, the Demand Backdrop for ODI.

33 Everything was analyzed piecemeal by the Creditor Cantore, isolated from the overall portrait, far from what the Court had already authorized.

34 On several occasions, the Tribunal had the strange impression that the opposition of Creditor Cantore was an exercise in negotiation with the Debtors and Offerors, thus undermining the legitimacy of the arguments it advanced.

35 To such an extent that, on October 8, 2020 5:19 am, the Tribunal sent an email to the prosecutors present at the hearing, mentioning, among other things, the following:

> [. . .]
>
> I ask you all to be practical and don't take a legal position in front of the Court on this issue, or any other issue , as a bargaining tool.
>
> [. . .]
>
> (the Court underlines)

Unfortunate incident

36 Moreover, during this same management conference of September 18, 2020, the Court allowed the attorney representing several hundred shareholders of Nemaska Lithium inc. as well as one of the tenderers within the framework of the SISP, namely the tenderer Edda Stock Finance SAS and Zingher Construct SRL (" *E&Z* "), to possibly ask questions when the SISP which led to the filing of the Request for ODI would be of again explained, and this, for the sake of transparency, no dispute of the Application for ODI having been filed by them.

37 On this occasion, the Court formulated, among others, the following warnings, first with regard to the SISP, already authorized by the SISP Order, and with regard to the rights of the shareholders of Nemaska Lithium inc. :

> The Tribunal wishes to reiterate that although the process was followed as rigorously as the Monitor suggests in his Report and that a tenderer, in this case EDDA [E&Z], did not follow and respect the rules applicable to the process and his submission was thus rejected, then he has only him to blame. There is no question, in such circumstances, that this tenderer has " *a second kick at the can* ". The credibility and seriousness of the entire bid solicitation process are at stake.
>
> Furthermore, the Court reiterates that in an insolvency context, such as in the present case, the economic interests of the Shareholders, if any such interests still exist, are entirely subordinate to those of all the creditors of the Debtors. , and this, until these creditors have been fully paid, which is not envisaged in this case and has, it seems, never been considered by anyone. This is a fundamental principle in the matter and one which must never be lost sight of.
>
> Notwithstanding this, and for the sake of strict transparency, the Court will allow the Shareholders' attorney to ask the 3 witnesses mentioned above [a representative of the Debtors (Mr. Jacques Mallette, chairman of the board of directors), their financial advisor (Mr. Thomas Bachand de FBN) and the Controller (Mr. Christian Bourque)] a few questions, but this fundamental principle should never be forgotten, this said with the greatest sympathy felt for the Shareholders who are going through a very difficult period.

38 However, after hearing, on September 25, 2020, the testimony of Mr. Thomas Bachand, representative of the financial advisor to the Debtors, namely Financière Banque Nationale (“ *FBN* ”), then questioned by the Debtors' attorney regarding the progress of the SISP, including the filing of the E&Z *Submission* (the “ *E&Z Submission* ”), it became clear to the Tribunal that E&Z had disregarded the Fundamental Rules applicable to the SISP and established by the Tribunal under the SISP Order and the SISP Procedures and , bluntly, the Court indicated to the prosecutor of E&Z at the end of the day.

39 Mainly, the required deposit of 5% of the amount of the E&Z Bid was never made, nor the deposit of the contractual documents corresponding to the transaction structure proposed by E&Z under the terms of the E&Z Bid, also required at the time of the deposit of a submission under the SISP.

40 Before doing so, E&Z required that the E&Z Submission be first accepted by the Debtors, as filed, and that the terms and conditions imposed by the SISP Order and the SISP Procedures be set aside and do not apply. not in E&Z Submission [13] .

41 It is only after such acceptance of the E&Z Submission that E&Z would make said deposit and file said contractual documents, for negotiation with the Debtors.

42 Totally unacceptable!

43 A categorical rejection of the fundamental terms and conditions of a serious and rigorous process, endorsed by the SISP Ordinance.

44 What is more, after numerous requests from FBN to E&Z to identify who was actually involved behind E&Z, the documents [14] finally submitted by E&Z were only simple household notes, prepared in the right way, without supporting document, and only confirming to the Tribunal that the E&Z Submission was simply not serious.

45 In light of the comments then made by the Court, the E&Z prosecutor asked to suspend the hearing until Monday morning, September 28, 2020, which would allow him to review the case in detail and take stock with his clients.

46 However, at the start of the hearing on September 28, 2020, the E&Z attorney informed the Court that he was no longer occupying for E&Z, and also for the shareholders Alain Fournier and Denis Carrier.

47 At the same time, the representatives of E&Z ended their semi-virtual presence at the hearing and the shareholders of Nemaska Lithium inc. present left the courtroom.

48 The Court then put an end to this unfortunate saga surrounding the E&Z Submission by asking the following prosecutors who were still present, comments recorded in the minutes of the hearing of September 28, 2020 9:50:

> [. . .]
>
> In view of this, the Court informed the prosecutors present that the subject concerning the offer which had been filed by Edda Stock Finance SAS and Zingher Construct SRL should no longer be dealt with in the context of this hearing, and the Court asked the prosecutors to make it so.

LEGISLATIVE AND JURISPRUDENTIAL FRAMEWORK OF THE ODI APPLICATION

49 As already mentioned, the Application for ODI is made pursuant to section 36 *CCAA* , which provides as follows:

> **Restriction on disposal of assets**
>
> **36 (1) A** debtor company in respect of which an order has been made under this Act is prohibited from disposing, including by sale, of assets outside the ordinary course of its affairs without the authorization court . The court may grant the authorization without it being necessary to obtain the acquiescence of the shareholders , and this despite any requirement to this effect , in particular under a federal or provincial rule of law.
>
> **Notice to creditors**
>
> **The company applying for leave to the court notifies the secured creditors who may likely be affected by the proposed provision.**
>
> **Factors to consider**
>
> **In deciding whether to grant leave, the court considers, among others , the following factors:**
>
> (a) the justification of the circumstances which led to the draft provision;
>
> (b) the Controller's agreement to the process leading to the proposed disposition, if applicable;
>
> (c) the filing by the latter of a report stating that, in his opinion, the disposition will be more advantageous to the creditors than if it were made in the course of the bankruptcy;
>
> (d) the adequacy of consultations with creditors;
>
> (e) the effects of the draft provision on the rights of any interested party , in particular creditors;
>
> f) the fairness and reasonableness of the consideration received for the assets taking into account their market value.
>
> [. . .]
>
> **Authorization to dispose of assets by freeing them from restrictions**

(6) The court may authorize the disposition of the assets of the company, purged of any charge, security or other restriction , and, if applicable, is bound to subject the proceeds of the disposition or other of its assets to a charge, security or other restriction in favor of the creditors affected by the purge.

[. . .]

(the Court underlines)

50 In its analysis of the factors listed in article 36 (3) *CCAA* , the Tribunal must verify and ensure that:

- whether sufficient efforts to get the best price have been made and whether the parties acted providently;
- the efficacy and integrity of the process followed;
- the interests of the parties; and
- whether any unfairness resulted from the process. [15]

51 Furthermore, the Tribunal considers it more than appropriate to quote large extracts from the unanimous decision of the Supreme Court of Canada in the case *9354-9186 Québec inc. vs. Callidus Capital Corp.* [16] (the " *Callidus Case* "), in order to fully grasp the backdrop that the *CCAA provides* for restructuring and the evolving nature of the proceedings brought under it, and thus fully understand the role of the judge responsible for overseeing the *CCAA*. " restructuring must play out:

> [38] To answer the above questions, we must situate them in the contemporary context of insolvency in Canada, and more specifically of the *CCAA* regime . Thus, before turning to these questions, we consider (1) the evolving nature of *CCAA* proceedings ; (2) the role of the supervising judge in these proceedings ; and (3) the scope of the review, on appeal, of the exercise of the supervising judge's discretion.
>
> (1) The Evolving Nature of *CCAA* Proceedings
>
> [39] The *CCAA* is one of the three main Canadian insolvency laws. The others are the *Bankruptcy and Insolvency Act* , RSC 1985 c. B-3 (" *BIA"*), which deals with the insolvency of individuals and corporations, and the *Winding-up and Restructuring Act* , RSC 1985 c. W-11 (" *LLR"*), which deals with the insolvency of financial institutions and certain other legal persons, such as insurance companies (*LLR* , s. 6 (1)). Although the *CCAA* and the *BIA both* allow restructuring of insolvent companies, access to the *CCAA*is limited to debtor companies that have claims totaling more than $ 5 million (*CCAA* , s. 3 (1)).
>
> [40] Taken together, Canadian insolvency laws pursue a large number of general remedial objectives which reflect the wide range of potentially "catastrophic" consequences that can result from insolvency (*Sun Indalex Finance, LLC v. Syndicat des Steelworkers* , 2013 SCC 6, [2013] 1 SCR 271, para. 1). These objectives include: resolving a debtor's insolvency quickly, efficiently and impartially ; preserve and maximize the value of a debtor's assets ; ensure fair and equitable treatment of claims filed against a debtor ; protect the public interest ; and,in the context of commercial insolvency, balancing the costs and benefits of restructuring or liquidating a company (JP Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in JP Sarra and B. Romaine, dir. *Annual Review of Insolvency Law 2016* (2017), 9, 9-10;. JP Sarra, *Rescue The! Companies' Creditors Arrangement Act* (2th ed 2013.), p. 4-5, 14; Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce,*Debtors and Creditors Must Share the Burden: Review of the Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act* (2003), p. 13-14; RJ Wood, *Bankruptcy and Insolvency Law* (2th ed. 2015), p. 4-5).
>
> [41] Among these objectives, the *CCAA* generally prioritizes "avoiding social and economic losses resulting from the liquidation of an insolvent company" (*Century Services* [17] , at para. 70). This is why the model cases which fall under this law have historically facilitated the restructuring of the debtor company which has not yet submitted a proposal by keeping it in an operational state, that is to say by allowing that it continues to operate . When such a restructuring was not possible, it was considered that it was necessary to proceed to liquidation by way of receivership or under the *BIA* regime.. This is precisely the result which was sought in the *Century Services* case (see para. 14).
>
> [42] That said, the *CCAA* is fundamentally an insolvency law, and as such, it also has "the simultaneous objectives of maximizing collection for the benefit of creditors, of preserving operating value in the wherever possible, protect jobs and communities affected by the company's financial difficulties. . .] and improve the credit system generally " (Sarra, *Rescue! The Companies' Creditors Arrangement Act* , p. 14 ; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.* , 2017 ONCA 1014 , 139 OR (3d) 1 , para. 103). In order to achieve these goals,*LACC* have evolved in such a way that they allow solutions which avoid the emergence, in a restructured form, of the debtor company that existed before the start of the proceedings, but which instead involve some form of liquidation of the debtor's assets under the very regime of the Law (Sarra, "The Oscillating

Pendulum: Canada's Sesquicentennial and Finding the Equilibium for Insolvency Law", pp. 19-21). These cases, referred to as " *CCAA* liquidation proceedings ", are now common in the *CCAA* context (see *Third Eye Capital Corporation v. Dianor Resources Inc./Dianor Resources Inc.* , 2019 ONCA 508 , 435 DLR (4th) 416 , para. 70).

[43] Liquidation proceedings under the *CCAA* take different forms and may, inter alia, include the sale of the debtor company as a going concern; the "bulk" sale of assets likely to be exploited by a purchaser; a partial liquidation of the company or a reduction of its activities; or a sale of its assets item by item (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?" in JP Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). The business results ultimately obtained following the liquidation procedures introduced under the *CCAA* regimeare also varied. Some proceedings may result in the continuity of the debtor's business in the form of another viable entity (e.g. the companies wound up in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299 (CJ Ont.) (Gen. Div.)), While others may simply result in the sale of assets and inventory without creating a new entity (e.g., the proceedings at issue in *Re Target Canada Co* . , 2015 ONSC 303, 22 CBR (6th) 323 , para. 7and 31). Still others, as in the case before us, may result in the sale of most of the debtor's assets with a view to continuing her business, leaving the debtor and interested parties to look after residual assets.

[44] *CCAA* courts first began to approve these forms of liquidation by exercising the broad discretion conferred on them by the Act . The emergence of this practice has been criticized, primarily because it seemed incompatible with the *CCAA's* objective of "restructuring" (see, eg, *Uti Energy Corp. v. Fracmaster Ltd.* , 1999 ABCA 178, 244 AR 93 , par. 15-16 , conf. 1999 ABQB 379, 11 CBR (4th) 204 , par. 40-43 ; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada "(2014), 56*Rev. can. dr. comm.* 73, p. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts use it to consent to liquidation under the *CCAA* . Section 36 gives the courts the power to authorize the sale or disposition of assets of a debtor company outside the ordinary course of business [18] . Importantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the passage of s. 36, he observed that winding-up is not necessarily inconsistent with the remedial objectives of the *CCAA*and that it could be a means "either to raise capital [and facilitate restructuring], or to avoid more serious losses to creditors, or to concentrate on profitable activities" (p. 163) . Other authors have observed that liquidation can "be a means of restructuring a business" by allowing it to survive, albeit in a different corporate form or under different ownership (Sarra, *Rescue! The Companies' Creditors arrangement Act* , p. 169 ; see KP McElcheran, *Commercial Insolvency in Canada* (4th ed 2019.), p 311).. Moreover, in the *Indalex* judgment, the company sold its assets under the *CCAA in* order to protect the jobs of its staff, even if it could not remain their employer (see para. 51).

[46] Ultimately , the relative weight given to the different objectives of the *CCAA* in a given case may vary depending on the factual circumstances , the stage of the proceedings, or the solutions that are presented to the court for approval . In this case, it is possible to draw a parallel with the context of the *BIA* . In *Orphan Well Association v. Grant Thornton Ltd.* , 2019 SCC 5, [2019] 1 SCR 150, para. 67 , this Court explained that, in general, the *BIA*has two objectives: (1) the financial rehabilitation of the bankrupt, and (2) the equitable distribution of the bankrupt's assets among the creditors. However, in cases where the debtor company will never extricate itself from bankruptcy, only the latter objective is relevant (see para. 67). Likewise, under the *CCAA* , when it is not possible to restructure a debtor company that has not filed a proposal, a liquidation aimed at protecting its going concern value and maintaining its day-to-day operations may become l 'main restorative objective. In addition, when the restructuring or liquidation is complete and the court must decide the fate of the residual assets, the objective of maximizing the recovery of creditors from these assets may come to the fore. As we will explain, the structure of the *CCAA* leaves it up to the supervising judge to undertake a case-by-case review and balancing of these remedial objectives .

(2) The Role of the Supervising Judge in *CCAA* Proceedings

[47] One of the primary means by which the *CCAA* achieves its objectives is through the special supervisory role it reserves for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act* , pp. 18-19). Each *CCAA* proceeding is supervised from start to finish by a single supervising judge. As a result of his ongoing relationship with the parties, the latter acquires an in-depth knowledge of the dynamics between the parties concerned and of the commercial realities surrounding the procedure .

[48] The *CCAA capitalizes* on the advantageous position of the supervising judge by granting him broad discretion to make a variety of orders that may meet the circumstances of each case and " [adapt] to commercial needs. and contemporary social " (*Century Services* , at para. 58) in" real time " (para. 58, citing RB Jones," The Evolution of Canadian Restructuring: Challenges for the Rule of Law ", in JP Sarra, eds., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484).The anchor of this discretionary power is art. 11, which gives the judge the power to "make any order he thinks fit". This provision has been described as the "engine" of the legislative scheme (*Stelco Inc. (Re)* (2005), 253 DLR (4th) 10 (Ont. CA), at para. 36).

> [49] While broad, the discretion conferred by the *CCAA* is not without limits . Its exercise must be directed towards achieving the remedial objectives of the *CCAA* , which we have explained above (see *Century Services* , at para. 59). In addition, the court must keep in mind the three "basic considerations " (para. 70) that the plaintiff has to demonstrate: (1) that the order sought is appropriate , and (2) that it acted in good faith and (3) with due diligence (para. 69).
>
> [50] The first two considerations, expediency and good faith, are widely known in the *CCAA* context . The court "assesses the desirability of the requested order by determining whether it will further the achievement of the policy objectives underlying the Act" (para. 70). Moreover, the well-established requirement that parties act in good faith in insolvency proceedings has recently been expressly mentioned in Art. 18.6 of the *CCAA* , which provides:
>
> **Sincerity**
>
> **18.6 (1)** Every interested party is required to act in good faith in any proceeding brought under this Act.
>
> **Good faith - powers of the court**
>
> **(2)** If it is satisfied that the interested party is not acting in good faith, the court may, at the request of any interested party, make any order it considers appropriate.
>
> (See also *BIA* , s. 4.2; *Budget Implementation Act No.1 of 2019* , SC 2019, c. 29, ss. 133 and 140.)
>
> [51] The third consideration, that of diligence, requires attention. In accordance with the *CCAA* regime in general, due diligence discourages parties from holding their positions and ensures that creditors do not strategically use trickery or place themselves in a position to gain an advantage. (*Lehndorff General Partner Ltd., Re* (1993), 17 CBR (3d) 24 (Ont CJ (Gen. Div.)), P. 31). The procedure under the *CCAA*is based on negotiations and transactions between the debtor and the parties, all of which is supervised by the supervising judge and the supervisor. It is therefore necessary that, to the extent possible, those involved in the process are on an equal footing and have a clear understanding of their respective rights (see McElcheran, p. 262). *Failure to* act diligently and in a timely manner in *CCAA* proceedings risks compromising the process and, more generally, undermining the effectiveness of the statutory scheme (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.* , 2015 BCCA 390, 377 BCAC 6 paras . 21-23; *Re BA Energy Inc.*, 2010 ABQB 507 , 70 CBR (5th) 24 ; *HSBC Bank Canada v. Bear Mountain Master Partnership* , 2010 BCSC 1563 , 72 CBR (5th) 276 para. 11; *Caterpillar Financial Services Ltd. vs. 360networks Corp.* , 2007 BCCA 14 , 279 DLR (4th) 701 , para. 51-52, where the courts have considered a party's lack of diligence).
>
> [52] We emphasize that supervising judges carry out their supervisory role with the help of a controller who is appointed by the court and whose powers and responsibilities are set out in the *CCAA* (see ss. 11.7, 11.8 and 23-25). The Monitor is an independent and impartial expert who acts as " the eyes and ears of the court " throughout the proceedings (*Essar* , at para. 109). Its main role is to provide the tribunal with advisory opinions on the fairness of any proposed plan of arrangement and on orders sought by the parties, including those relating to the sale of assets and interim financing (see *CCAA*, al. 23 (1) (d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act* , p. 566 and 569).
>
> [. . .]
>
> [67] Courts have long recognized that the wording of s. 11 of the *CCAA* indicates that Parliament has sanctioned "the broad interpretation of the power conferred by the *CCAA* that has been developed by the case law" (*Century Services* , at para. 68). Article 11 reads as follows:
>
> **General power of the court**
>
> **11** Notwithstanding anything *in the Bankruptcy and Insolvency Act* or *the Winding-up and Restructuring Act* , the court may, in the case of any claim under this Act in respect of a company debtor, make, at the request of an interested party, but subject to the restrictions provided for by this Act and with or without notice, any order he considers appropriate .
>
> According to the clear wording of the provision, the power conferred by s. It is limited only by the restrictions imposed by the *CCAA* itself , as well as by the requirement that the order be "appropriate" in the circumstances .
>
> [68] When a party seeks an order on a matter that falls within the jurisdiction of the supervising judge, but over which no provision of the *CCAA* more specifically confers jurisdiction, s. It is necessarily the provision to which one can immediately resort to found the jurisdiction of the tribunal . As Blair J. said in *Stelco* , s. 11 "makes it unnecessary to resort to inherent jurisdiction most of the time" in the *CCAA* context (para. 36).
>
> (the Court underlines)

52 The *CCAA* therefore gives the supervising judge the flexibility to make "appropriate" orders to facilitate the restructuring of an insolvent company.

53 The nature of contemporary economic problems demands that innovative solutions be considered, and if they achieve the fundamental objectives of the *CCAA* for the benefit of all, then they must be endorsed.

54 The present case is a very good example.

DECISION OF THE COURT

55 In light of the auditor's report PricewaterhouseCoopers inc. (the " *Monitor* "), entitled "Tenth Monitor's Report on the Approval of the Proposed Transaction" and dated September 10, 2020 (the " *Report* ") [19] , large extracts being reproduced below, and in light of the testimony of Jacques Mallette, Thomas Bachand and Christian Bourque, the Court can only conclude that the Debtors acted in good faith and with due diligence, and that the reverse devolution order requested by the Application for ODI is appropriate in the circumstances.

56 The Court does not accept the reasons put forward by the Creditor Cantore, some of which are listed below, in an attempt to convince it to reject the Claim for ODI, especially since the other choices are (i) the realization of the securities held by Orion, which has already been patient for several months, (ii) the "putting on hold" of the Debtors in order to possibly redo a SISP, in a few months, at a very high cost and in a market that has already been analyzed under all its seams, very uncertain and risky, or (iii) the bankruptcy of the Debtors, catastrophic choices for all, employees, creditors, including the Cantore Creditor, suppliers, the Cree Community and, in general, for the economies of the affected regions .

57 It is in a case like this, when the General Court is satisfied that the factors to be taken into consideration under article 36 *CCAA* are met and that the advantages are, in the circumstances, obvious, that the judge who supervises the restructuring and who thus has an overview of the file and the interests of all, must exercise its discretion wisely and allow the proposed solution, regardless of its degree of innovation and creativity, to be authorized and endorsed , because it definitely ensures a better result than the other choices, and this, for all.

58 Moreover, faced with insistent opposition from Creditor Cantore, despite the disastrous consequences of the other choices, the Court asked its attorney, in the event that the alleged real right *sui generis* Cantore was settled to its satisfaction and the agreed settlement then incorporated into the Orion / IQ / Pallinghurst Offer for approval by the Tribunal, whether it would maintain its grounds for opposing the ODI Demand, and its response was: NO.

59 That says it all as to the legitimacy of his grounds for opposing the ODI Request, some of which are advertised as "fundamental".

CONTROLLER'S REPORT ON SUBMISSIONS RECEIVED

60 As mentioned previously, on January 29, 2020, following the uncontested hearing of the "Amended Application to Approve a Claims Process and a Sale or Investor Solicitation Process" presented by the Debtors and targeting their assets and businesses, the Tribunal issued the SISP Order.

61 The SISP Order therefore established the SISP Procedures applicable to all bids, which were analyzed by the Debtors and the Monitor within this well-defined framework.

62 The Monitor's Report provides an account of the various steps leading to its recommendation that the ODI Request be upheld by the Tribunal.

63 From the outset, the Controller specifies that the purpose of the Report is:

> [. . .] to provide a complete overview of the Sale and Investor Solicitation Process (the " **SISP** ") leading to the acceptance of the sale proposal submitted by (i) Investissement Québec (" **IQ** "), (ii) The Pallinghurst Group (acting through Quebec Lithium Partners (UK) Limited (" **QLP** ") (" **Pallinghurst** ", and together with IQ, the " **Sponsors** "), (iii) OMF Fund II (K) Ltd. and OMF Fund II (N) Ltd. (together " **Orion** ") and (iv) OMF (Cayman) Co-VII Ltd. (" **OMF Cayman** ", collectively with the Sponsors and Orion, the" **Bid Group** ") (the" **Accepted Bid** "or" **Proposed Transaction**"). The Monitor's report will also provide information on the other bids received as part of the SISP and on the Proposed Transaction. " [20]

64 The Report thus reviews the entire process followed by the Debtors in order to dispose of their assets and businesses, by sale or investment, in the light of the SISP Order and the SISP Procedures, and the Court accepts, among other things, the comments and The following observations of the Monitor, which were repeated during the testimony of Christian Bourque, responsible for the Debtors' file with the Monitor and corroborated, in certain aspects, by Jacques Mallette, Chairman of the Board of Directors of Nemaska Lithium inc. and by Thomas Bachand from FBN:

> [. . .]
>
> C. **OVERVIEW OF THE SISP LEADING TO THE PROPOSED TRANSACTION**
>
> [. . .]
>
> 21. The Monitor is of the opinion that the SISP process that led to the Accepted Bid was conducted in a transparent and fair manner.
>
> [. . .]

E. **STRUCTURE OF THE PROPOSED TRANSACTION**

26. The transactions contemplated by the Accepted Bid (collectively, the " **RVO Transaction** ") are achieved through a corporate structure consistent with a reverse vesting order (" **RVO** ") and provide for a reorganization of Nemaska Lithium and its subsidiaries (the " **Nemaska Entities** ").

27. The RVO Transaction provides for the acquisition by the Sponsors of the Nemaska Entities' business and assets (other than certain excluded assets and excluded liabilities), by way of a RVO to be sought from the Court, the culmination of which will result in the Sponsors acquiring, on a 50-50 basis, all of the issued and outstanding shares of an entity resulting from the amalgamation of the Nemaska Entities (" **AmalCo2** "), which will itself emerge from the CCAA proceedings and subsequently be amalgamated with Orion to form the entity that will operate the business of the Debtors (" **AmalCo3 "**, referred to as " **New Nemaska Lithium "**).

28. As mentioned above, the Bid Group consists of the IQ, Pallinghurst, Orion and OMF Cayman.

29. The RVO Transaction will also involve: (i) the incorporation of a new entity (" **New ParentCo** ") to ultimately hold those liabilities that are designated by the Sponsors not to be assumed by New Nemaska Lithium (the " **Excluded Liabilities** ") ; (ii) the incorporation by New ParentCo of a wholly-owned subsidiary (" **ResidualCo** " and collectively with New ParentCo, " **Residual Nemaska Lithium** ") which will ultimately hold certain excluded assets (ie, those assets of the Nemaska Entities that are designed by the Sponsors not to be kept by New Nemaska Lithium) (the " **Excluded Assets**"); and (iii) the exchange of the shares of Nemaska Lithium for common shares of Residual Nemaska Lithium, resulting in Residual Nemaska Lithium becoming a successor reporting issuer.

30. New Nemaska Lithium will be a private company and will not be a reporting issuer under applicable Canadian securities laws.

31. The RVO structure will not require the reissuance or transfer of the Nemaska Entities' mining lease, mining claims or environmental permits, which will ensure that the business can be developed on an expedited timeline by New Nemaska Lithium. It allows for all of the permits to stay in place.

32. Pursuant to the Accepted Bid, substantially all of the current employees of the Nemaska Entities will be retained by New Nemaska Lithium in their current roles and responsibilities in all material respects.

33. The RVO Transaction is not subject to significant closing conditions, other than (i) the issuance of the RVO and (ii) the completion of required steps provided for under the *Competition Act* (Canada) .

34. The Sponsors intend to invest, from and after closing of the RVO Transaction and subject to the fulfillment of certain conditions and receipt of appropriate approvals, up to $ 600,000,000 in New Nemaska Lithium (inclusive of amounts paid to OMF Cayman in connection with the transaction) for the financing of the project, comprised of the mine and the electrochemical plant.

F. THE ACCEPTED BID [the Orion / IQ / Pallinghurst Offer]

[. . .]

36. The Accepted Bid is submitted as a credit bid and the full amount of the Orion Secured Claim is used as such by the Bid Group as consideration.

37. The consideration offered under the Accepted Bid includes (i) the assumption by New Nemaska Lithium of the Orion Secured Claim ($ 134,500,000); (ii) the assumption by New Nemaska Lithium of the Johnson Matthey Battery Materials Ltd. (" **JMBM** ") secured claim ($ 12,000,000); (iii) the assumption of various liabilities and obligation (including the Livent obligations and all of the Debtors' obligations under the Chinuchi Agreement from the closing onwards) and (iv) the transfer to Residual Nemaska Lithium of Nemaska Lithium's cash on hand on closing, subject to certain adjustments (the " **Residual Cash** ") and any Excluded Assets.

38. The Residual Cash is comprised of: (i) the cash still on hand as at the closing date (to be determined and subject to adjustments), the amount of US $ 7M from the US $ 20M escrowed funds held in respect of the Livent litigation (plus increased interest on US $ 20M), an amount under the Directors and Officers (the " **D&O** ") trust of approximately $ 2M, less (ii) the sum of $ 12M to be retained by New Nemaska Lithium to cover its assumption of the secured claim of JMBM.

39. The Excluded Liabilities include, without limiting the liabilities forming part of the Excluded Liabilities, any claim on the part of construction suppliers and sub traders holding a valid legal hypothec against the Debtors' assets.

40. With respect to JMBM, as a result of the issuance of the RVO and the implementation of the RVO Transaction, the JMBM's secured claim shall be secured only by the movable and immovable assets of Nemaska Lithium P1P Inc. as such assets exist immediately prior to the implementation of the RVO Transaction (including assets in replacement of such assets, as applicable), and only

to the same extent that such assets are secured as at that time, with any other encumbrances over assets of the Nemaska Entities, other than the assets of Nemaska Lithium P1P Inc., to be discharged as a result of the RVO Transaction.

41. The RVO Transaction contemplates that the rights of the Cree parties pursuant to the Chinuchi Agreement will not be affected.

42. The Accepted Bid specifically provides that the Debtors and the Monitor shall use their commercially reasonable efforts to obtain the RVO and therein a declaration that the Whabouchi mine is conveyed free and clear of all encumbrances, including the alleged claims and rights of Victor Cantore, except for certain permitted encumbrances.

G. BENEFITS OF THE PROPOSED TRANSACTION FOR STAKEHOLDERS

43. After submission by the Bid Group of their initial Qualified Bid, the Debtors successfully negotiated a higher consideration that eventually led to the Accepted Bid.

44. The RVO Transaction should enable the restart of the project and, therefore, the completion of the Whabouchi mine. By doing so, many creditors will benefit from conducting business with New Nemaska Lithium for the finalization of the mine.

45. Also, the RVO Transaction should allow the retention of substantially all of the current employees.

46. Finally, the RVO Transaction will enable Residual Nemaska Lithium to submit a plan of compromise and arrangement (the " **Plan** ") to the Debtors' remaining creditors, excluding claims assumed by New Nemaska Lithium, which will account for the payment in full of the secured claims and will provide a cash pool for the unsecured creditors.

47. The Monitor has considered whether the Accepted Bid would be more beneficial to the Debtors stakeholders than a sale or disposal of assets under a bankruptcy.

48. Given the SISP and the value of the Debtors 'assets, the Monitor is of the view that a sale or disposal of assets under a bankruptcy would not result in a better outcome for the Debtors' stakeholders.

49. The estimated amount to be distributed to the unsecured creditors can be illustrated as follows:

[. . .]

• [between] $ 14,240,000 [and] $ 6,240,000

[. . .]

H. **CONCLUSION AND RECOMMENDATIONS**

50. The Monitor is of the view that the Debtors have canvased [sic] the market since the beginning of 2019, including through the SISP, and that the Proposed Transaction is the best option available in the circumstances. The monitor is also of the view that:

i. The aggregate consideration provided under the Proposal Transaction is fair and reasonable in the circumstances; and

ii. There is no evidence to suggest that any viable alternative exists that would allow a better recovery for the Debtors' stakeholders.

51. Accordingly, the Monitor recommends the approval by the Court of the Accepted Bid and the RVO Transaction.

65 On reading the Report, and noting that no evidence has been presented to contradict its content, the Tribunal is of the opinion, as mentioned above, that all the factors provided for in Article 36 (3) *CCAA* are encountered to his satisfaction.

66 All reasonable efforts were made to find the best offer in the circumstances, the only one still on the table, and this was done following a rigorous, efficient, fair, equitable and transparent process, in accordance with the SISP Ordinance and the SISP Procedures.

67 As explained above, the other choices would be catastrophic for everyone, including the Cantore Creditor.

GROUNDS FOR OPPOSITION BY CREDITOR CANTORE

68 Creditor Cantore raised several grounds in an attempt to convince the Tribunal that it should not allow the Orion / IQ / Pallinghurst Offer and that the Tribunal should therefore deny the ODI Demand.

69 On the other hand, as already mentioned, if the alleged right in real *sui generis* Cantore was settled to the satisfaction of the Creditor Cantore and the agreed settlement incorporated in the Orion / IQ / Pallinghurst Offer submitted for the approval of the Court under the terms of the Application for ODI, then the Creditor Cantore would no longer maintain its grounds for opposition.

70 Notwithstanding this, the Tribunal reviews and comments below, albeit briefly, some of these grounds, which are included either in the “Objecting Party's Argument Brief” of 6 October 2020, or in the “Re-Modified and Restated Contestation of Nemaska's Approval Application ”of September 30, 2020.

There is no authority to grant a vesting order in respect of anything other than a sale or disposal of assets

71 The Court is of the opinion that the terms “dispose, in particular by sale, of assets outside the ordinary course of business” / “sell or otherwise dispose of assets outside the ordinary course of business” in Article 36 (1) *CCAA* allow a wide range of acts and modes of disposition, including, in part or in whole, by way of “reverse devolution”, an innovative solution, to be analyzed on a case-by-case basis.

72 Section 36 (1) *CCAA* does not contain any restriction in this regard.

73 Going off the beaten track is not contraindicated, on the contrary, especially when it allows better results.

74 Moreover, in the *Callidus* Case , the Supreme Court mentions the following with regard to the general discretionary power of the Tribunal provided for in article 11 *CCAA* :

> [. . .] the power conferred by s. It is limited only by the restrictions imposed by the *CCAA* itself, as well as by the requirement that the order be “appropriate” in the circumstances. " [21]

75 In the present case, the solution of an efficient and rapid “reverse devolution” does not affect the end result for the Debtors' creditors, on the contrary, it improves it.

76 Indeed, the maintenance of existing permits, licenses and authorizations and contracts essential to the operation of companies, and the possible use of the various fiscal attributes available [22] , made it easier to obtain concessions from the Bidders, and confirmed by the Monitor, which should allow a greater distribution to possibly be made to the benefit of the Debtors' creditors.

77 The sale is not the structure proposed in the Orion / IQ / Pallinghurst Offer, rather it provides for a “reverse devolution” structure, which must either be approved as submitted or be refused by the Court, each before draw their own conclusions from the upcoming decision and take responsibility for the consequences.

78 At the same time, the purge of rights in rem provided for in article 36 (6) *CCAA* helps to implement a solution envisaged and authorized under articles 36 (1) and (3) *CCAA* , otherwise the holders of rights in rem would benefit from a right of veto over any such solution, which would be unacceptable, even when assets are not effectively transferred outside the patrimony of a debtor company, as in the present case.

79 Insofar as the envisaged solution allows a better result for all, and even improves it, there is no reason why the purging of the rights in rem provided for in article 36 (6) CCAA cannot be apply.

The Proposed Transaction and RVO are impermissible under the CCAA because they permit the Debtor Entities to emerge from CCAA protection outside the confines of a plan of arrangement

80 The Court is of the opinion that hindsight is necessary when analyzing a transaction comprising a “reverse devolution” structure, such as that of the Orion / IQ / Pallinghurst Offer, in order to consider it in its whole (*the global picture*).

81 We should not seek to dissect and analyze each of the stages and components of such a transaction in order to find, for each of them, a legal basis under the *CCAA* , as the Creditor Cantore does.

82 To do so only seriously and inappropriately restricts the range of innovative solutions to deal with today's increasingly complex business and social problems.

83 This exercise requires great flexibility and, more often than ever, it increases the benefits for the interested parties, while a rigid formalism becomes a straitjacket that seriously limits choices and, more often than ever, to the detriment of interested parties.

84 As proof, refusing the only offer on the table following the SISP, namely the Orion / IQ / Pallinghurst Offer, and this, after more than 18 months in total of canvassing, would mean, as already mentioned, (i) the realization collateral held by Orion, (ii) the “putting on hold” of Debtors at a very high cost and without any assurance that a better offer could be obtained in several months from now, especially not in the current economic context, strong uncertain and risky, or (iii) the bankruptcy of the Debtors, resulting in, in all cases, catastrophic consequences for creditors, employees, suppliers, the Cree Community and the affected regions.

85 Moreover, the creditors of the Debtors do not have to vote on an application under the terms of article 36 *CCAA* , which is only submitted for the approval of the Court, which then takes into account, among other things, factors listed in section 36 (3) *CCAA* .

86 As already mentioned, the Orion / IQ / Pallinghurst Offer does not constitute a plan of arrangement submitted to the vote of the creditors of the Debtors.

87 In due course, most likely once the Steps of the proposed transaction under the Orion / IQ / Pallinghurst Offer have been completed, New ParentCo and ResidualCo will then be able to submit a plan of

arrangement to the remaining creditors. Debtors, and they will vote at that time on what will be offered to them.

The Proposed Transaction contravenes the SISP Order on the basis that it is neither a Sale Proposal nor an Investment Proposal pursuant to the terms of the SISP Order

88 The Orion / IQ / Pallinghurst Offer is a “hybrid” transaction proposal and, under the terms of the SISP Order and the SISP Procedures, the Debtors and the Monitor were given the necessary latitude [23] to consider and provide for appropriate modifications. to the circumstances, especially since there was only one offer left on the table, all subject to the final authorization of the Court, hence the Request for ODI.

89 The SISP Ordinance and the SISP Procedures thus allow the flexibility necessary to find innovative solutions to contemporary social and economic problems, as discussed above.

90 It was not necessary for the Debtors and the Monitor to apply to the Tribunal every time a modification to the terms and conditions of the SISP Procedures was contemplated and, in the circumstances, it was preferable that this be done at the Request step for ODI.

The Proposed Transaction and RVO contravenes applicable securities laws

91 The attorney for the Creditor Cantore has made much of the fact that the transaction proposed by the Orion / IQ / Pallinghurst Offer would not comply with some of the provisions of *Regulation 61-101 respecting measures to protect minority security holders in specific transactions* of the *Securities Act* [24] , which the Debtors vigorously contest.

92 In any event, the Court does not consider it appropriate to elaborate on this subject, especially in light of email [25] received on October 7, 2020 3:15 p.m. by Me Patrick Boucher from Mr. Patrick Théorêt of the Autorité des Marchés Financiers, to the suifant effect:

> [. . .]
>
> I confirm that we have no objection with your interpretation of NI 61-101 in the context of the proposed transaction. We will not intervene in the Court on this point.
>
> We also understand that the request for exemption from NMX Debtor's continuous disclosure obligations (as this term is defined in the draft “vesting order” filed in Court) made to the Court will be withdrawn from paragraph 44 of the proceedings.
>
> [. . .]

New ParentCo and ResidualCo cannot avail themselves of the CCAA

93 The Creditor Cantore places enormous emphasis on the precise moment when the two subsidiaries newly created by the debtor Nemaska Lithium inc., New ParentCo and ResidualCo, will become insolvent and will then be able to benefit from the *CCAA* regime , either within the few days that the closing session of the transaction resulting from the Orion / IQ / Pallinghurst Offer will last, and therefore after obtaining the ODI from the Court.

94 Obviously, not everything can be done at the same time and, before starting the closing session of the Orion / IQ / Pallinghurst Offer, the Court must still have authorized it.

95 As mentioned previously, a step back is necessary in order to consider the transaction as a whole (*the global picture*), always having the backdrop in mind, and not to seek to analyze a precise step, separately from the others. , for the purpose of identifying a legal basis justifying it under the *CCAA* .

96 In any event, recourse to the *CCAA* is permitted when insolvency is imminent [26] , which is definitely the case for these two subsidiaries, New ParentCo and ResidualCo, in light of the overview of the Steps of the proposed transaction.

The Proposed transaction is an impermissible disguised substantive consolidation of the estates of the Debtors

97 The Creditor Cantore has long argued that the Debtors had not obtained the prior authorization of the Court to present a “consolidated” plan.

98 However, the Request for ODI in no way constitutes a request for approval of a “consolidated” plan, but rather constitutes a request for approval of the Orion / IQ / Pallinghurst Offer, which was retained by the Debtors following the 'Obtaining the SISP Order, including the SISP Procedures, and following the framework and instructions included therein.

99 As previously mentioned, the SISP Order and the SISP Procedures covered all of the Debtors 'assets, without distinction, in whole or separately, and therefore allowed bidders to submit bids comprising all of the Debtors' assets, or only part of it. .

The release in favor of the directors and officers of the Debtors pursuant to the Proposed Transaction should not be authorized

100 The Orion / IQ / Pallinghurst Offer includes a general discharge for the benefit of, among others, the directors and officers of the Debtors.

101 The Creditor Cantore, also a shareholder of the debtor Nemaska Lithium inc., And the shareholder Brian Shenker objected to such a release being authorized by the Court at this stage, and they requested that the debate on this subject is postponed until the day of filing of the forthcoming plan of arrangement.

102 Essentially, these shareholders intend to sue, among others, the directors and officers of the Debtors for their behavior related to certain events.

103 This requested general release is part of the Orion / IQ / Pallinghurst Offer and the Offerors have included it for their own reasons.

104 It is not for the Tribunal to order them to exclude it, but the Tribunal can only note that they have in fact provided for an exception, reproduced in the draft ODI submitted to the Tribunal, namely:

> [41] [. . .] provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the Directors (as this term is defined in the Initial Order) of the Debtors that is not permitted to be released pursuant to section 5.1 (2) of the CCAA .

105 However, article 5.1 (2) *CCAA reads as* follows:

> The transaction may not, however, relate to claims relating to the contractual rights of one or more creditors or based on the false representation or unjustified or abusive conduct of the directors.

106 The Court is of the opinion that this exception adequately protects the shareholders with regard to the directors and officers of the Debtors and there is no need to elaborate further on this subject.

The Court should not authorize the transfer of the Excluded Liabilities, the Agreement and / or the NSR Royalty to New ParentCo

107 This transfer is part of the Orion / IQ / Pallinghurst Offer and of the entire proposed transaction, and there is no need to analyze it in isolation, in order to dissect all its facets.

108 In any event, in the context of a request such as that of the ODI Request, the Tribunal has the necessary power, after being satisfied that the criteria of Article 36 (3) are met, to order whether this transfer is made, without the consent of the Cantore Creditor, or any other creditor in relation to a contract to be transferred, otherwise the creditor concerned would benefit from a right of veto over the proposed transaction, which would be unacceptable.

109 In the context of the insolvency of the Debtors, the overall result of the proposed transaction with the Offerors is to the advantage of all, compared to the consequences of the other choices mentioned above.

110 Admittedly, the Creditor Cantore would like the Agreement providing for the payment of the NSR Royalty to be fully protected, without any negative consequences for him, but the Tribunal cannot accept that to be so, because that would mean the failure of the transaction provided for in the Orion / IQ / Pallinghurst Offer.

111 In addition, Creditor Cantore draws a parallel between the treatment reserved for it and that provided by the Bidders for secured creditor Johnson Matthew Battery Materials Ltd., and he would like it to be the same for him.

112 The Offerors have their own business reasons for this to be the case with this secured creditor and it is not for the Tribunal to ensure that all of the Debtors' creditors are treated equally in the Orion / IQ / Pallinghurst Offer.

113 As explained above, the Cantore Creditor is amply protected by what has been agreed with the Offerors regarding the upcoming debate on its alleged right in real *sui generis* Cantore.

114 If he succeeds in establishing the validity of this right, then some of the assets acquired by the Offerors will be subject to this right, and if he does not succeed, he will then benefit from a personal right, which will be dealt with by the Debtors. like any other personal right of an ordinary creditor of the Debtors not retained by the Offerors in connection with the Orion / IQ / Pallinghurst Offer.

The Proposed transaction is not fair and reasonable

115 As discussed on several occasions above, there is no doubt for the Tribunal that the Orion / IQ / Pallinghurst Offer is fair and reasonable and that it should be accepted as filed, as best as possible. deadlines.

116 For several months, the Court has been able to note all the efforts made by the Debtors to save their businesses and, after serious steps and a SISP implemented rigorously and in accordance with the SISP Ordinance and the SISP Procedures , the Orion / IQ / Pallinghurst Offer is the only one on the table, and it allows to restart the “clean” operations of the Debtors, with all that this entails economically.

117 To refuse it would be catastrophic!

The Monitor's commitment to use "commercially reasonable efforts to obtain the RVO" and other stipulations of the successful bid compromise the integrity of the SISP

118 In several respects, Creditor Cantore has questioned the integrity and impartiality of the Monitor.

119 The Court rejects all the allegations in this regard by Creditor Cantore, which are totally unfounded.

120 This is also another demonstration that the Creditor Cantore is blazing a trail by referring to certain terms used and to certain commitments made by the Controller in the context of negotiations with the Bidders, or otherwise, in order to get the Tribunal to conclude as it wishes.

121 The Tribunal had several occasions to observe the high professionalism of the Controller, his thoroughness and his diligence. The Tribunal was periodically informed of the progress of the case, and the Monitor always clearly answered questions that the Tribunal might ask him from time to time.

122 No event, no fact, no action allows the Tribunal to conclude that this was not so. The Controller has discharged his responsibilities under the SISP Ordinance and the SISP Procedures very well.

123 In addition, given his in-depth knowledge of the case, it is definitely appropriate that the Monitor can play an active role in the implementation of some of the stages of the transaction provided for in the Orion / IQ / Pallinghurst offer.

124 This will facilitate and allow a more expeditious outcome, and the Tribunal approves it.

CONCLUSION AND BINDING JUDGMENT NONBSTANDING APPEAL

125 The Tribunal will therefore allow the Application for ODI in accordance with its conclusions and in accordance with the draft submitted to it for this purpose.

126 Also, and as mentioned several times above, it is urgent that the Orion / IQ / Pallinghurst Offer be approved and implemented as soon as possible, the Offerors not having to suffer more delays than the Court considers unjustified in the present circumstances.

127 In addition to harming the Offerors, any additional delay harms the Debtors, their employees and suppliers, their creditors, the Cree Community and the economies of the regions affected by this situation.

128 Therefore, this judgment and the accompanying “reverse devolution” order will be enforceable immediately notwithstanding appeal and without the need to post any security whatsoever.

FOR THESE REASONS, THE COURT:

129 *WELCOMES* the *Debtors* ' Application Seeking Leave to Enter into the Orion / IQ / Pallinghurst Transaction with Issuance of an Approval and Vesting Order and Ancillary Relief;

130 *DISMISSES* the "Re-Modified and Restated Contesting of Nemaska's Approval Application" Creditor Cantore;

131 *RENDERS* the “reverse devolution” order attached to this judgment and entitled “Approval and Vesting Order”;

132 *DECLARES* this judgment and said “reverse devolution” order to be enforceable immediately notwithstanding appeal and without the need to provide any security whatsoever;

133 *THE WHOLE* with legal costs.

Footnotes

1 RSC 1985, c. C-36.

2 Exhibit P-3B.

3 *Plasco Energy Group Inc., Re* (July 17, 2015), Ont SJC, Toronto CV-15-10869-00CL (Settlement Approval Order), Spence J; *Stornoway Diamond Corporation, Re* (October 7, 2019), Que SC, Montreal 500-11-057094-191 (Approval and Vesting Order), Gouin J; *Wayland Group Corp., Re* (21 April 2020, Ont SCJ, Toronto CV-19-00632079-00CL (Approval and Vesting Order), Haney J; *Comark Holdings Inc., Re* (July 13, 2020), Ont SCJ, Toronto CV -20-00642013-00CL (Approval and Vesting and CCAA Termination Order), Hainey J; *Beleave Inc., Re* (18 September 2020), Ont SCJ, Toronto CV-20-00642097-00CL (Approval and Vesting Order, and Endorsement) , Conway J.

4 Exhibit P-2, filed "under seal" and delivered confidentially to the attorney for the Creditor Cantore.

5 Exhibit P-1.

6 Exhibit P-1, SISP Procedures, art. 15.1.

7 Exhibit P-1 of the Cantore Request.

8 Exhibit P-2 of the Cantore Request.

9 Exhibits P-3 and P-5 of the Cantore Request.

10 See the judgment of the General Court of September 15, 2020, para. [14].

11 See the hearing minutes from the management conference of September 18, 2020.

12 Exhibit P-3B, amended again on the last day of the hearing, namely October 8, 2020, see paras. [36] and [37].

13 See, among others, Exhibit-8A E.

14 Parts P-8A U and V.

15 *AbitibiBowater inc. (Arrangement relating to)* , 2010 QCCS 1742 , para. [34] - [35]; *Royal Bank v. Soundair Corp.* , (1991) 7 CBR (3d) 1 (Ont. CA) para. 16.

16 2020 CSC 10 .

17 *Century Services Inc. v. Canada (PG)* , [2010] 3 SCR 379.

18 It should be noted that, although s. 36 now codifies the power of the supervising judge to make an order for sale and devolution, and as it sets out the factors to guide the exercise of his discretion to grant such an order, it is silent as to the circumstances in which the courts should approve a *CCAA* liquidation rather than requiring parties to liquidate through receivership or under the *BIA* (see Sarra, *Rescue! The Companies' Creditors Arrangement Act* , pp. 167-168 ; A. Nocilla, “Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36” (2012) 52 *Can.*226, p. 243-244 and 247). This question remains open and was not referred to the Court in *Indalex* nor in these appeals.

19 Exhibit P-7.

20 Report, p. 2, para. 2.

21 *Supra* , note 16, at para. [67]

22 Exhibit P-8A Y.

23 Exhibit P-1, see, among others, paras. 1.5, 6.6, 11.2, 12.4. 12.9 and 17.2 of the “SISP Procedures” attached as Annex A to the SISP Order.

24 RLRQ, c. V-1.1, s. 331.1, r. 33.

25 Exhibit P-14.

26 *Stelco Inc., Re* , 2004 CanLII 24933 (ON SC), at para. 21, 25 and 26, Farley J. (leave to appeal to CA refused, 2004 CarswellOnt 2936 and leave to appeal to SCC refused, 2004 CarswellOnt 5200 ; see also s. 3 *CCAA* .

End of Document

See para. 35

CITATION: Royal Bank of Canada v. Casselman PHBC Ltd., 2017 ONSC 4107
COURT FILE NO.: 16-70182
DATE: 2017/07/04

COURT OF ONTARIO, SUPERIOR COURT OF JUSTICE

In the matter of the court-appointed receivership of Casselman Plywood Hardware Building Centre Ltd.

And in the matter of the bankruptcy of Casselman Plywood Hardware Building Centre Ltd., file no. 33-2183656

RE: ROYAL BANK OF CANADA, Applicant

AND:

CASSELMAN PLYWOOD HARDWARE & BUILDING CENTRE LTD, Respondent

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: André A. Ducasse, for the receiver

Jean-François Laberge, for the debtor

Martin Z. Black, for the trustee in bankruptcy

Samantha Gordon, for the Sexton Group Ltd.

Stéphanie Lauriault, for the Attorney General of Canada

HEARD: May 25, 2017, written submissions received

ENDORSEMENT

[1] There were three motions brought before the court at a special appointment on May 25th, 2017. The first was a continuation of a motion for approval and directions brought by the receiver. The second was a motion by counsel for the debtor permitting him to withdraw as lawyer of record. The third was a motion brought by one of the secured creditors to stay the bankruptcy proceeding.

[2] With regard to the motion to be removed as counsel, that motion was unopposed and in light of the bankruptcy it was entirely appropriate. The motion was granted and counsel was permitted to withdraw. All rights of the debtor corporation are now vested in the trustee and counsel for the trustee was present.

[3] As I will explain in more detail the motion to stay was based on the fact that the debtor made an assignment into bankruptcy after the receivership order was granted and without

obtaining leave of the court. While I agree that either written approval from the receiver or leave of the court ought to have been sought, no one is asking to have the bankruptcy annulled.

[4] The practical issue is at what point the receivership should be terminated and the trustee take over. The immediate question is whether the receiver or the trustee should have responsibility for evaluating the claims of secured creditors. Flowing from that decision is whether or not the Sexton Group Ltd. must appeal the disallowance of its secured claim issued by Ginsberg, Gingras & Associates Inc. as trustee in bankruptcy.

[5] For the reasons that follow I am assigning this responsibility to the receiver and making certain ancillary orders in both the receivership and in the bankruptcy. This requires a brief summary of the factual background and the law.

Background

[6] The respondent corporation is insolvent. It has debts that exceed the value of its assets and by sometime last year it had ceased to meet its liabilities as they came due. In particular in 2016 the corporation was in default under its credit facilities with the Royal Bank of Canada ("the Bank"). The Bank was also of the view that the debtor had committed several acts in breach of its obligations such as depositing funds with another bank.

[7] The debtor corporation is solely owned by a numbered company and it has a single director and officer. She is the daughter of the founder of the company and her father was a guarantor of certain company debts. He may also be a secured creditor. At the time of the application for receivership the debt to the bank approximated $1.3 million dollars. Apparently there were various efforts to refinance and a number of indulgences but eventually the Bank decided to act.

[8] In September of 2016 the Bank sued the guarantors in the Superior Court of Quebec (District of Laval, Court file no. 54017-012258-165).

[9] The Sexton Group Ltd. also commenced an action against the guarantors in Toronto (Action CV-16-551205)

[10] On October 6th, 2016 the Bank commenced this proceeding in Ontario to enforce its security by appointing a receiver.

[11] Under its security agreement the Bank had the power to appoint a private receiver ("séquestre et administrateur judiciaire") and could have done so without court approval but on October 6th, 2016 the Bank brought this application for a court appointed receiver. The distinction of course is that a privately appointed receiver answers primarily to the secured creditor while a court appointed receiver is an officer of the court and acts under court

supervision. As well a court appointed receiver has a fiduciary obligation to all interested parties[1] and has certain protections and duties set out in the order and in applicable legislation.

[12] The power to appoint a receiver on application by a secured creditor is specifically set out in s. 243 of the *Bankruptcy and Insolvency Act* (*"BIA"*) in Part XI of the Act. Providing certain preconditions are met, s. 243 permits the court to appoint a receiver to take possession of the inventory, accounts receivable or other property of an insolvent business or a business carried on by an insolvent person. Importantly however Part XI specifies duties and obligations of receivers over the property of insolvent or bankrupt businesses whether they are appointed under the *BIA*, under a security agreement or under provincial legislation.

[13] As part of the credit facility, the Bank held security over the equipment and inventory under the *Bank Act* and also a Convention De Sûreté Générale (General Security Agreement or "GSA") registered under the *Personal Property Security Act* ("PPSA"). There is no dispute about the validity of the security. Appointment of a receiver was also available under provincial legislation specifically the general powers under Section 67 (1) of the *Personal Property Security Act* or the power to grant an interlocutory receiving order under Section 101 of the *Courts of Justice Act.*

[14] For purposes of this decision, it is important to note that the powers and duties under Part XI of the *BIA* function independently of the bankruptcy provisions of the statute and are distinct from the power to appoint an interim receiver in a bankruptcy or proposed bankruptcy under s. 46 of the Act. That is to say that the secured creditor may act and the receiver must comply with the *BIA* when there is an insolvency but it is not necessary for there to be an assignment into bankruptcy. Nevertheless the Act requires that the person appointed as receiver under the *BIA* must be a trustee in bankruptcy (s. 243 (4)).

[15] It originally appeared the debtor would resist the Bank's application as it had delivered materials in opposition to the application and was attempting to put together a proposal. In its material the debtor alluded to the prospect of refinancing and declared that the appointment of a receiver would do irreparable harm. Ultimately, however, the debtor consented to the order and a receiving order was granted by Maranger J. on October 20th, 2016. The order was substantially in the form of the model receivership order adopted by the *Commercial List* and available on the court's web site. Pursuant to that order the receiver was empowered *inter alia* to take control of the business and in its discretion to liquidate and sell any of the undertaking and assets. Raymond Chabot Inc. was appointed as receiver "of all of the assets, undertakings and properties of the debtor".

[16] Amongst its other terms, the order imposed several stays and limits on other legal proceedings. In particular there was a stay on any proceedings against or in respect of the debtor or the property and the order provided that no proceeding "shall be commenced or continued except with the written consent of the receiver or with leave of this court".

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[1] *Benett on Receiverhips*, Third Edition, Carswell, page 38 citing *Ostrander v. Niagara Helicopters Ltd.*, (1973) 1 O.R. (2d) 281 (Ont. HCJ)

[17] The only order sought or granted to lift the stay was an order granted by me on December 16th, 2016 at the request of the Sexton Group Ltd. At that time, leave was granted to proceed against the guarantors in Toronto action CV-16-551205. That was the action commenced prior to the receivership and in which there was at the time a pending summary judgment motion.

[18] In the meantime the receiver had been successful in effecting a sale of all of the undertaking, properties and assets of the debtor. On December 14th, 2016 I granted orders approving the first report of the receiver, authorizing the sale of the assets of the business and the assignment of its leasehold interest in the premises. The sale produced sufficient funds to pay out the secured claim of the Bank in its entirety and to generate a surplus of approximately $600,000.00. A subsequent order made by the Beaudoin J. on March 9th, 2017 approved the second report of the receiver and authorized distribution to the the Bank. As a consequence interest has stopped running on the bank debt and the bank has now been paid in full.

[19] In addition to the bank indebtedness, there are other creditors with security registered under the *PPSA.* The Sexton Group Ltd. holds certain limited security and the founder purports to hold general security. It is possible that if both of these secured claims are valid, there will be no surplus. A preliminary analysis conducted by the trustee suggests there is something on the order of $2 million owed to unsecured creditors.

[20] Often when there is a receivership there is also a bankruptcy and when a receivership precedes a bankruptcy it is not uncommon for the receiver to be appointed as the trustee. One potential benefit of bankruptcy was thought to be its impact on the priority trust claims otherwise available to the Canada Revenue Agency ("CRA") in respect of HST claims. Interestingly counsel for the Attorney General advises that this issue is currently before the Federal Court of Appeal[2] but in any event the receiver had been discussing the possibility of an assignment into bankruptcy with the debtor.

[21] Up until the order authorizing the sale of the assets, the debtor had continued to hold out hope for a proposal and in fact had been to the bankruptcy court on November 30th to obtain an extension of time. Following the approval of the sale, however, on December 16th, 2016 the debtor filed a voluntary assignment into bankruptcy. The debtor did not appoint the receiver as trustee but instead appointed Ginsberg, Gingras & Associates Inc.[3] There is some dispute as to whether or not the Receiver was aware of this step but there is no doubt this was done without written authorization and without seeking leave of the court.

[22] In *Ed Mirvish Enterprises Limited v. Stinson Hospitality Inc.*[4] Peppal J. concluded that notwithstanding the residual powers remaining with the directors of a corporation in a receivership, the stay provisions in the model order encompassed an assignment into bankruptcy. She held that the assignment into bankruptcy in the face of her order was improper and annulled

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[2]See *Her Majesty the Queen in Right of Canada v. Callidus Capital Corporation,* 2015 FC 977, currently under appeal

[3] The Receiver was aware that Ginsberg, Gingras was involved with the debtor and had been working on the proposal.

[4] [2007] O.J. No. 3640; (2007) 36 CBR (5th) 149 (SCJ)

the bankruptcy of four companies. This was upheld by the Court of Appeal.[5] It is therefore clear that the director of the debtor corporation did not have the right to assign the corporation into bankruptcy without leave of the court or the written consent of the receiver.

[23] Notwithstanding the lack of approval, all parties have known about the bankruptcy since December of last year and no one did anything to interfere with the trustee in the discharge of its duties. As I understand it the trustee has called a first meeting of creditors and received proofs of claim.

[24] The trustee also purported to disallow the secured claim of the Sexton Group Ltd. Sexton's overall claim is for $846,650.31 but its security only attaches to an investment made by the debtor in Home Hardware. That investment is worth $350,000.00 and generates a modest income stream. Since December, the receiver has apparently received $15,000.00 in revenue from the Home Hardware investment but there have been no steps taken to liquidate it.

[25] Sexton filed a proof of claim in the bankruptcy. The debt to Sexton is pursuant to amounts owing on a term sheet or detail sheets pursuant to a group purchasing agreement. Apparently Sexton had agreed to postpone $500,000.00 of its debt and to extend further credit in October of 2015 in exchange for assignment of Casselman's investment in Home Hardware Stores Limited and certain other terms. The assignment was then registered under the *PPSA*. This is the basis for Sexton's claim to be a secured creditor.

[26] On February 3rd, 2017 the trustee purported to disallow the secured claim on the following basis:

> "Funds were originally advanced in fall of 2015, at which time no security was granted. The "term sheet" referred to in your Proof of Claim does not constitute a security agreement and did not create a security interest in the bankrupt's personal property. No security agreement was signed by the bankrupt in favour of the creditor.
> In any event the "term sheet" was subject to a condition subsequent which was never satisfied or waived by the bankrupt.
> Registration / perfection of the creditor's alleged security only occurred on May 25th, 2016, after the deadline for satisfying the aforesaid condition, and when the bankrupt was insolvent"

[27] When Sexton received this notice it did three things. Firstly, it demanded particulars of the "condition subsequent" alleged in the trustee's notice. Secondly, it brought a motion in the bankruptcy file seeking an order extending the time for appealing the disallowance until 10 days after the trustee's response. That order was granted by Kershman J. on consent but to date the trustee has not provided particulars. The third step was to bring this motion to stay the bankruptcy proceeding until after the receiver has completed its evaluation of the claims of the secured creditors.

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[5] 2007 ONCA 856; (2007) 37 CBR (5th) 13 (C.A.)

Position of the Parties

[28] In the case before me, no one is asking to annul the bankruptcy. Instead Sexton, which is the moving party on that issue asks that the bankruptcy be stayed and the disallowance of its secured claim by the trustee be put in abeyance or set aside. Sexton is of the view that the validity of the security is a matter to be determined by the receiver under the existing order. The receiver is prepared to continue with the tasks envisioned in the order appointing it but has ceased work on evaluating the secured claims until there is direction from the court. The receiver does not seek to be appointed trustee in bankruptcy and does not seek to annul the bankruptcy now under way.

[29] For its part, the trustee commends the work done by the receiver. The trustee however is of the view that the receiver should be discharged and the surplus paid to the trustee. In the trustee's view it has disallowed the secured claim by Sexton and the validity of that claim should be determined under the *BIA* which is to say by way of an appeal to the bankruptcy court. The trustee has not yet reviewed the claim of the other secured creditor as it is awaiting necessary information.

[30] For its part the receiver does not ask to be made trustee nor does it ask to annul the bankruptcy. It does propose that it be tasked to complete the vetting of the secured claims and then return to court with a proposed distribution. In any event the receiver required directions.

[31] All parties agree that the original order in the receivership permitted the receiver to evaluate the claims of other creditors but did not require it to do so.

Analysis

[32] As stated above, there appears to be no benefit in annulling the bankruptcy. Leave for an assignment into bankruptcy will therefore be given after the fact and subject to the directions set out herein, the trustee may continue with its assigned duties under the *BIA*. As I set out earlier, the practical question is how to deal with the claims of the secured creditors without duplicating effort and further eroding the value of the estate.

[33] In my view, it is significant that the receivership preceded the bankruptcy. The receiving order was comprehensive. It granted the receiver control over "all of the assets, undertakings and properties" of the debtor. Although technically this does not vest ownership of the assets in the receiver, the scope of the order permitted the receiver to sell the assets and apply to the court to vest ownership in the purchasers. The subsequent order permitted the sale and passed title to the purchasers, after payment of the Bank debt which was also approved by the court, the surplus funds remain subject to the same priority as the former assets with respect to security interests. As such, at the moment, the surplus funds are in the hands of the receiver impressed with a trust and until the court orders otherwise, there is no estate to pass to the trustee.

[34] Unlike a bankruptcy, however, the receiver does not step into the shoes of the debtor corporation. The debtor continues its corporate existence along with all of its residual rights. Those residual rights may be minimal but they include the right to challenge the work of the receiver, to oppose confirmation of any reports and to otherwise be heard in the current

litigation. Those rights are now vested in the trustee since I am validating the bankruptcy. I also understand that the trustee is in possession of all of the books and records of the debtor.

[35] Ordinarily the receiver would proceed to evaluate the priority, quantum and quality of the claims by the remaining secured creditors and report to the court with a proposed distribution of the remainder of the net proceeds of sale. This work has been interrupted by the need to bring these motions. It would be unfortunate if the receiver and trustee either have to duplicate work or if they work at cross purposes. They are both officers of the court and subject to court supervision.

[36] The court is faced with two practical options. One option is to direct the receiver to complete its work and then to report to the court with a proposal for disposition of the remaining assets. In that circumstance, the trustee in bankruptcy would stand in the shoes of the debtor having the right to be heard in this proceeding but also the obligation to co-operate by providing information and access to the books and records.

[37] The other option is to wind up the receivership and to transfer the net proceeds of sale to the trustee in bankruptcy. The trustee would then evaluate the claims of the secured creditors and determine whether those claims should be paid in priority to the general creditors.

[38] Because the receivership was put in place first and because the bankruptcy was initiated without approval by the court, I am of the view that the receiver should be authorized to complete its work. The trustee will have the right to be informed of steps taken by the receiver and to take a position when the report is submitted to the court for approval.

[39] In the event the receiver and the trustee reach different conclusions on the status and quantum of the secured claims, a hearing will be required in the receivership. There is no reason that this cannot also be combined with an appeal under the *BIA* and if necessary the court may hear oral evidence.

[40] Of course it may also transpire that the parties agree with the receiver when it makes its report and in that event all necessary orders may be made to wind up the receivership and to permit an orderly transfer to the trustee.

Order

[41] In summary I am making a number of orders;

I. Firstly I am approving the bankruptcy proceeding and granting leave for it to continue notwithstanding there should have been leave before the bankruptcy process was initiated;

II. Secondly there will be an order that the bankruptcy file and the receivership proceed in tandem before the same judge. Unless I am not available and there is a need for an urgent hearing, I will be seized of both matters;

III. The receiver is charged with the responsibility of evaluating the claims of the secured creditors and making recommendations to the court. The trustee will have a right to be

heard both in its own right as trustee and as the holder of the residual rights of the debtor corporation;

IV. The trustee may continue with the tasks imposed by the act insofar as it is possible to discharge them. The time extension granted by Justice Kershman remains in effect and is varied so that no appeal need be launched until the trustee provides the particulars and until the report of the Receiver is approved by the court;

V. I will provide further direction as may be required[A1];

VI. I do not consider this a case for awarding costs as between the parties to the motions. The court will consider what costs relating to the motions may be charged to the estate when and if it is necessary to approve the fees of the receiver and the trustee. Sexton Group's entitlement to costs will be reserved until the validity of the security is determined;

VII. The parties are to advise the court of the status of the Toronto and the Montreal actions; and

VIII. I may be spoken to if further directions are required.

[42] A copy of this endorsement will be placed in the bankruptcy file as well as in the receivership file.

Mr. Justice C. MacLeod

Date: July 4, 2017

CITATION: Royal Bank of Canada v. Casselman PHBC Ltd., 2017 ONSC 4107
COURT FILE NO.: 16-70182
DATE: 2017/07/04

In the matter of the court-appointed receivership of Casselman Plywood Hardware Building Centre Ltd.

And in the matter of the bankruptcy of Casselman Plywood Hardware Building Centre Ltd., file no. 33-2183656

ONTARIO

SUPERIOR COURT OF JUSTICE

RE:	ROYAL BANK OF CANADA, Applicant
	AND
	CASSELMAN PLYWOOD HARDWARE & BUILDING CENTRE INC., Respondent
BEFORE:	Mr. Justice Calum MacLeod
COUNSEL:	André A. Ducasse, for the receiver
	Jean-François Laberge, for the debtor
	Martin Z. Black, for the trustee in bankruptcy
	Samantha Gordon, for the Sexton Group Ltd.
	Stéphanie Lauriault, for the Attorney General of Canada

ENDORSEMENT

MacLeod J.

Released: July 4, 2017

KW CAPITAL PARTNERS LIMITED
Applicant

- and -

VERT INFRASTRUCTURE LTD.
Respondent

Court File No. CV-20-00642256-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF THE RECEIVER (FACTUM OF KSV RESTRUCTURING INC.)

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