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COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

IN THE MATTER OF THE COMPANIES'  
*CREDITORS ARRANGEMENT ACT, RSC*  
1985, c C-36, as amended

AND IN THE MATTER OF THE COMPROMISE  
OR ARRANGEMENT OF WALLACE & CAREY  
INC., LOUDON BROS LIMITED, and CAREY  
MANAGEMENT INC.

DOCUMENT

**BENCH BRIEF OF LAW**

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## I. INTRODUCTION

1. This bench brief is filed in support of an Originating Application by Wallace & Carey Inc. (“**Wallace & Carey**”), Loudon Bros Limited (“**Loudon Bros**”), and Carey Management Inc. (“**CMI**”, and together with Wallace & Carey, and Loudon Bros, the “**Applicants**”, or the “**Companies**”) for relief under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”). Wallace & Carey and Loudon Bros are collectively referred to as the “**Logistics Companies**”.
2. The Companies are in need of urgent protection under the CCAA. While the Companies’ operations have significant value, their ability to conduct their business and generate revenue and liquidity has been impacted by continuing and evolving factors, including the COVID-19 global pandemic, as well as inflation, supply chain challenges, labour shortages, and the rising costs of goods and services that the Applicants store and distribute across the country.<sup>1</sup>
3. The Applicants urgently require the protection of the CCAA in order to: (a) stabilize their business for the benefit of all stakeholders; and (b) provide time for them to negotiate and put forward a plan of compromise and arrangement for consideration by affected creditors.<sup>2</sup>

## II. FACTS

4. The facts relevant to the Application are set out in detail in Affidavit No. 1 of Brian M. Birnie sworn June 21, 2023 (the “**Birnie Affidavit**”). A summary of the key facts as they relate to the relief requested in the Originating Application is set out below.

### A. Background

5. Wallace & Carey is a privately held, Canadian family-owned business, incorporated pursuant to the Business Corporations Act, RSA 2000, c B-9. Wallace & Carey has its head office located in Calgary, Alberta. Wallace & Carey services more than 7,000 customers across the country and has grown to become one of Canada's largest independent wholesale distribution and logistics companies.<sup>3</sup>

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<sup>1</sup> Affidavit of Brian M. Birnie sworn on June 21, 2023 (“**Birnie Affidavit**”) at paras 11, 57, 125 – 128.

<sup>2</sup> *Ibid* at para 16, 18, 145.

<sup>3</sup> *Ibid* at paras 2, 8, 20, 21.

6. Wallace & Carey is a wholly-owned subsidiary of CMI. In addition to the Logistics Companies, CMI has ownership interests in nine other entities, none of which are subject to these proceedings (collectively with the Applicants, the “**Carey Group**”).<sup>4</sup>
7. Loudon Bros is a wholly owned subsidiary of Wallace & Carey and is incorporated pursuant to the *Business Corporations Act*, RSO 1990, c B. 16.<sup>5</sup>
8. The Logistics Companies provide innovative, efficient, and cost-effective services that streamline customers' ordering, invoicing, payment, reporting and product offerings. Product specialities range from groceries and health and beauty products, to automotive and tobacco products. The Logistics Companies coordinate over 1,000 deliveries per day, equating to millions of delivered items each year.<sup>6</sup>
9. The Logistics Companies provided an “essential service” during the course of the COVID-19 pandemic. They did so by continuously supplying groceries and other high demand consumer products to convenience stores and gas stations across Canada. Such customers were highly dependant on the Logistics Companies for the uninterrupted and just-in-time delivery of much of their inventory.<sup>7</sup>
10. The Applicants' business is facing unprecedented challenges as a result of the COVID-19 global pandemic and its attendant supply chain disruptions and lockdowns, and subsequent inflationary pressures and interest rate increases. These financial stressors have been exacerbated by significant and secular declines in the sale of tobacco, a key product supplied by the Logistics Companies' business. The Logistics Companies are consequently facing a liquidity crisis that has put the viability of the Business and the continued employment of their 650 employees at risk.<sup>8</sup>

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<sup>4</sup> *Ibid* at paras 32, 35.

<sup>5</sup> *Ibid* at para 27.

<sup>6</sup> *Ibid* at para 9.

<sup>7</sup> *Ibid* at para 12.

<sup>8</sup> *Ibid* at para 11.

**B. Financial Circumstances**

***Financial Statements***

11. Wallace & Carey's most recent audited financial statements (which incorporate the financials for Loudon Bros) for the 52 weeks ended October 28, 2022 (the "**2022 Financial Statement**") confirm ongoing and growing losses as follows:<sup>9</sup>

(\$000s)	2022	2021
Sales	1,523,664	1,526,817
Cost of sales	1,491,312	1,497,801
Net loss	12,554	7,175

12. CMI's most recent audited financial statements (which incorporate the financial results of the Carey Group, including the Logistics Companies) for the 52 weeks ended October 28, 2022 (the "**CMI 2022 Financial Statement**") confirm ongoing and growing losses as follows:<sup>10</sup>

(\$000s)	2022	2021
Sales	1,524,855	1,527,736
Cost of sales	1,491,352	1,497,813
Net loss	13,786	12,365

***Cash Management System***

13. Canadian Imperial Bank of Commerce ("**CIBC**") provides CMI with a revolving asset-based loan facility (the "**Loan Facility**"). The Loan Facility is guaranteed by the Logistics Companies as well as certain other Carey Group entities.<sup>11</sup>
14. CMI manages a centralized cash management system (the "**Cash Management System**") wherein the Logistics Companies draw funds from the Loan Facility. The Logistics Companies' accounts receivable collections are paid into blocked accounts and applied in reduction of the Loan Facility. The Applicants are able to re-borrow under the

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<sup>9</sup> *Ibid* at para 58.

<sup>10</sup> *Ibid* at para 60.

<sup>11</sup> *Ibid* at para 47, 81.

Loan Facility based upon on their eligible accounts receivable and inventory, net of certain reserves.<sup>12</sup>

**Assets**

15. An unaudited balance sheet summary of the assets and liabilities of the Applicants as at June 19, 2023, is as follows:<sup>13</sup>

<b>Condensed Balance Sheet</b>			
As of June 19, 2023			
(Unaudited)			
(\$000)			
	<b>Wallace &amp; Carey</b>	<b>Loudon Bros</b>	<b>CMI</b>
<b>Current assets</b>	112,098	5,725	46,485
<b>Long term assets</b>	17,651	473	3,218
<b>Total assets</b>	129,749	6,198	49,703
<b>Total current liabilities</b>	118,446	6,120	51,963
<b>Total long-term liabilities</b>	30,749	0	7,645
<b>Total liabilities</b>	143,862	6,120	59,608
<b>Retained earnings</b>	(17,967)	(120)	(9,905)
<b>Shareholders' equity</b>	(17,966)	78	(200)

16. The Logistics Companies' most significant asset is their inventory, followed by their accounts receivable.<sup>14</sup>

**Real Property**

17. Loudon Bros owns the 23,000 square foot warehouse it operates out of at 830 Athabasca Street in Thunder Bay, Ontario. There are no mortgage encumbrances on the Loudon Bros property. Wallace & Carey owns no real property assets.<sup>15</sup>

<sup>12</sup> *Ibid* at para 48.

<sup>13</sup> *Ibid* at para 65.

<sup>14</sup> *Ibid* at para 66.

<sup>15</sup> *Ibid* at paras 30, 78.

### **Liabilities**

18. As at June 19, 2023, the Applicants have collective liabilities of over \$184 million, including, but not limited to:
- (a) secured obligations in an aggregate principal amount of approximately \$44,440,000 owing to CIBC;
  - (b) secured obligations in an aggregate principal amount of approximately \$11,784,000 owing to Canadian Western Bank (“**CWB**”);
  - (c) approximately \$25,000,000 owing for provincial and territorial tobacco taxes;
  - (d) approximately \$1,335,000 for GST, PST, and HST; and
  - (e) trade accounts payable of approximately \$86.5 million.<sup>16</sup>

### **C. The Companies’ Need for Protection under the CCAA**

19. Although revenues are now approaching pre-pandemic levels, the Logistics Companies remain burdened by approximately \$86.5 million in unsecured trade debt which they have continued to carry since the pandemic. The Logistics Companies are in arrears with many of their creditors, which creditors are variously reducing and cutting off credit, or insisting on cash on delivery as a condition of continued supply. A growing number of suppliers are also putting the Logistics Companies’ shipments on hold and demanding pay downs of the Logistics Companies’ obligations to them as a condition of doing business.<sup>17</sup>
20. The Applicants’ independent auditor advised that there was “significant doubt” about the Companies’ ability to continue as a going concern.<sup>18</sup>
21. The Applicants are facing a critical liquidity crisis and cannot meet their obligations to creditors generally as they become due.<sup>19</sup>

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<sup>16</sup> *Ibid* at para 80.

<sup>17</sup> *Ibid* at para 14.

<sup>18</sup> *Ibid* at para 137, 139.

<sup>19</sup> *Ibid* at paras 11, 15.

22. The Logistics Companies cannot continue to operate in the normal course without renegotiating certain critical vendor and customer contracts, and restructuring their unsecured debt obligations through a plan of arrangement or compromise.<sup>20</sup>
23. The Applicants, with the support of their senior secured lenders, are seeking protection under the CCAA to, among other things, negotiate and put forward a plan of compromise and arrangement for consideration by affected creditors.<sup>21</sup>

### **III. ISSUES**

24. The issues to be determined by this Honourable Court are whether:
  - (a) the Applicants are “debtor companies” to which the CCAA applies;
  - (b) the Stay of Proceedings should be granted;
  - (c) KSV Restructuring Inc. (“**KSV**”) should be appointed as Monitor in these CCAA proceedings;
  - (d) the Administration Charge should be approved;
  - (e) the Lender Priority Charge and Cash Management System should be approved;
  - (f) the D&O Charge should be approved; and
  - (g) the Tobacco Tax Charge should be approved.

### **IV. LAW AND ARGUMENT**

#### **A. The Applicants Meet the Criterial for CCAA Protection**

25. This Court may grant CCAA protection to a “debtor company”, being a company having assets or doing business in Canada, where the total claims against the debtor company exceed \$5 million.<sup>22</sup>
26. A “debtor company” is defined in section 2 of the CCAA to mean, among other things, a company that is insolvent.<sup>23</sup>

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<sup>20</sup> *Ibid* at para 16.

<sup>21</sup> *Ibid* at para 18.

<sup>22</sup> *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”) s. 3 [TAB 1].

<sup>23</sup> CCAA, s. 2 [TAB 1].



27. The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“**BIA**”) contemplates the following factors when defining an “insolvent person”:<sup>24</sup>

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

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

28. The Applicants are insolvent and cannot meet their obligations generally as they become due, including their obligations to trade creditors.<sup>25</sup>

29. The Applicants are companies to which the CCAA applies as they have liabilities in excess of \$5,000,000.<sup>26</sup>

30. As at June 19, 2023, the Applicants are indebted to CIBC in the amount of approximately \$44,440,000. CMI and Wallace & Carey are indebted to CWB in the amount of approximately \$11,784,000.<sup>27</sup>

31. As at June 19, 2023, the Logistics Companies owe tobacco tax amounts to the provinces and territories totalling approximately \$25 million, and they owe an aggregate of approximately \$86.5 million to trade creditors.<sup>28</sup>

## **B. The Cash Flow Projections**

32. The Applicants, with the assistance of KSV, have prepared cash flow statements on a go forward basis, up to and including September 30, 2023 (the “**Cash Flow Projections**”).<sup>29</sup>

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<sup>24</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s. 2 (“**BIA**”) [TAB 2].

<sup>25</sup> Birnie Affidavit, *supra* note 1 at para 150.

<sup>26</sup> *Ibid* at para 146.

<sup>27</sup> *Ibid* at para 147.

<sup>28</sup> *Ibid* at para 149.

<sup>29</sup> *Ibid* at para 151.

33. As set out in the Cash Flow Projections, from June 18, 2023, until September 30, 2023, the Applicants' principal use of cash will consist of paying rent, payroll, go forward payments to suppliers and trade creditors, tax payments, and other costs and expenses required in the ordinary course of operating the business.<sup>30</sup>

**C. A Stay of Proceedings Should Be Granted**

34. Section 11 of the CCAA provides this Court with broad discretion to "make any order that it considers appropriate in the circumstances", subject only to restrictions provided in the CCAA. Section 11.001 of the CCAA requires that any relief sought under section 11 during the initial stay must be "reasonably necessary for the continued operation of the debtor company in the ordinary course of business" during the initial ten-day stay period.<sup>31</sup>

35. Pursuant to section 11.02 of the CCAA, the Court may make an order staying proceedings for not more than 10 days.

36. Section 11.02(3) of the CCAA provides that the Court may *not* make an order staying proceedings unless the applicant satisfies the Court that circumstances exist which make the order appropriate.<sup>32</sup>

37. A stay of proceedings is appropriate in the circumstances of this case. The Logistics Companies are 100 year old businesses that provide an essential service to other businesses across Canada.<sup>33</sup>

38. While the Companies' liquidity crisis is directly correlated to the COVID-19 pandemic, their fundamental business remains strong and likely to emerge with from insolvency protection with a restructured balance sheet. The Companies also provide employment for hundreds of individuals across Canada and supply hundreds of communities with essential products.

39. The Companies are facing unprecedented challenges due to the COVID-19 global pandemic and its attendant supply chain disruptions and lockdowns, and subsequent inflationary pressures and interest rate increases. The Companies' circumstances are

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<sup>30</sup> *Ibid* at para 152.

<sup>31</sup> CCAA, *supra* note 22 ss. 11 and 11.001 [TAB 1].

<sup>32</sup> *Ibid* at s. 11.02(3).

<sup>33</sup> Birnie Affidavit, *supra* note 1 at paras 8, 12.

exactly those for which the restructuring objectives of the CCAA were conceived: being a “sudden, unexpected liquidity crisis, brought on by the actions of others”.<sup>34</sup>

40. If the Companies have access to the “breathing space” provided by a CCAA stay, and the opportunity for a capital infusion through the restructuring process, every indication points to the Companies emerging from CCAA protection as viable enterprises.
41. Conversely, without CCAA protection, the Companies are unable to meet their obligations as they come due and will be unable to resume normal business operations. If an initial order is not granted and the Companies are forced into liquidation, value will be lost, both in terms of wasted capital, lost employment, and the loss of an Canadian, family owned “essential service” business.
42. The Companies’ urgent need for CCAA protection falls squarely within the underlying policy intent of the CCAA, which is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. In *Century Services Inc v Canada (Attorney General)*, the Supreme Court of Canada found:<sup>35</sup>

the purpose of the CCAA — Canada’s first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the BIA may be employed to provide an orderly mechanism for the distribution of a debtor’s assets to satisfy creditor claims according to predetermined priority rules.
43. The Companies have complied with section 11.001 of the CCAA by limiting the relief sought on this application to only that which is “reasonably necessary” for their continued operations during the initial ten-day stay period.<sup>36</sup>
44. The Cash Flow Projections reflect that the Applicants are projected to have sufficient liquidity to fund their ongoing operations during the initial ten (10) day stay period.<sup>37</sup>

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<sup>34</sup> *Re Just Energy Corp.*, 2021 ONSC 1793 at para 7 [TAB 3].

<sup>35</sup> *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 15. [TAB 4].

<sup>36</sup> CCAA, *supra* note 22 s. 11.001 [TAB 1].

<sup>37</sup> Birnie Affidavit, *supra* note 1 at para 153.

**D. The Monitor Should Be Appointed**

45. The Applicants seek the appointment of KSV as monitor of the Applicants in these CCAA proceedings.
46. Under section 11.7 of the CCAA, the Court must appoint a person to monitor the business and financial affairs of a debtor company at the time that an initial order is made.<sup>38</sup>
47. Section 11.7(2) of the CCAA also sets out certain requirements for, and restrictions on, who may act as a monitor, including that the monitor be a trustee within the meaning of subsection 2 of the BIA.
48. KSV is a trustee within the meaning of section 2 of the BIA and is not subject to any of the restrictions on who may be appointed as monitor set out in section 11.7(2) of the CCAA.
49. KSV has acted in a pre-filing financial advisor role to the Companies and understands the business and the challenges they face.<sup>39</sup>

**E. The Administration Charge Should Be Granted**

50. KSV has consented to act as monitor in these proceedings to provide supervision, monitoring and to generally assist the Applicants with their restructuring efforts, including the preparation of a CCAA plan of arrangement or compromise.<sup>40</sup>
51. KSV, counsel for KSV, and counsel for the Companies (the “**Restructuring Professionals**”) will be essential to the Companies’ restructuring efforts. The Restructuring Professionals are prepared to provide or continue to provide professional services to the Companies if they are protected by a first-ranking priority charge (the “**Administration Charge**”) over the Companies’ assets.<sup>41</sup>
52. Section 11.52 of the CCAA gives this Court the jurisdiction to grant a priority charge for the fees and expenses of financial, legal, and other advisors or experts.<sup>42</sup> The proposed Initial Order creates a first-ranking Administration Charge up to \$250,000 over the

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<sup>38</sup> CCAA, *supra* note 22 s. 11.7(1) [TAB 1].

<sup>39</sup> Birnie Affidavit, *supra* note 1 at paras 158–162.

<sup>40</sup> *Ibid* at paras 162–163.

<sup>41</sup> *Ibid* at paras 165–170.

<sup>42</sup> CCAA, *supra* note 22, s. 11.52 [TAB 1].

Property of the Companies to secure the fees and disbursements of the Restructuring Professionals.<sup>43</sup>

53. The Companies believe that this Administration Charge is fair and reasonable given the size and complexity of the Companies' business and will provide the level of appropriate protection for the payment of the Restructuring Professionals' essential services during the initial ten (10) day stay period.
54. The Administration Charge is appropriately sized to reflect the beneficiaries' needs during the initial ten-day stay period. The Companies intend to apply for an increase of the Administration Charge to \$750,000 at the comeback application.<sup>44</sup>

**F. The Lender Priority Charge and Cash Management System Should be Approved**

55. The Applicants are seeking approval of the Lender Priority Charge over the Property (as defined in the Initial Order) in favour of CIBC (or the "**Lender**"), which charge shall not exceed an aggregate principal amount of \$55 million, as security for any revolving advances made pursuant to the Cash Management System over the course of these proceedings, plus interest, fees and expenses, from and after the commencement of the CCAA proceedings (the "**Lender Priority Charge**").<sup>45</sup>
56. Section 11.2 of the CCAA allows this Honourable Court to grant the Lender Priority Charge in an amount that the Court considers appropriate having regard to the Cash Flow Projections.<sup>46</sup>
57. Section 11.2(5) provides that a Court shall not grant an order for interim financing at the same time as granting an initial order under section 11.2 unless it is satisfied that the terms of the loan are limited to those terms that are reasonably necessary for the Applicants' continued operations in the ordinary course of business during the initial stay of proceedings.<sup>47</sup> What is considered "reasonably necessary" depends on the facts of each case.<sup>48</sup>

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<sup>43</sup> Birnie Affidavit, *supra* note 1 at para 168.

<sup>44</sup> *Ibid* at paras 168–169.

<sup>45</sup> *Ibid* at para 173.

<sup>46</sup> CCAA, *supra* note 22 s. 11.2(1) [TAB 1].

<sup>47</sup> CCAA, *supra* note 22 s. 11.2(5) [TAB 1].

<sup>48</sup> 8440522 Canada Inc., *Re*, 2013 ONSC 6167 at para 30 [TAB 5].

58. In determining whether the Lender Priority Charge is appropriate, a Court is required to consider the following factors under section 11.2(4) of the CCAA:<sup>49</sup>
- (a) the period during which the company is expected to be subject to proceedings under the CCAA;
  - (b) how the company's business and financial affairs are to be managed during the proceedings;
  - (c) whether the company's management has the confidence of its major creditors;
  - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
  - (e) the nature and value of the company's property;
  - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
  - (g) the monitor's report, if any.
59. The Applicants submit that it is appropriate for this Court to exercise its discretion to approve the Lender Priority Charge:
- (a) the Applicants only intend to remain under CCAA protection as long as reasonably necessary;
  - (b) the continued use of the Cash Management System will minimize disruption to the Applicants' operations, as customers will continue to pay the Logistics Companies using the pre-filing processes with which they are familiar;
  - (c) pursuant to the Cash Flow Projections, the Applicants will not have sufficient funds to get through these proceedings without drawing on the Loan Facility;<sup>50</sup>
  - (d) the continued use of the Cash Management System will provide the Companies with sufficient liquidity that will enhance the prospects of a viable compromise or arrangement; and

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<sup>49</sup> CCAA, *supra* note 22 s. 11.2(4) [TAB 1].

<sup>50</sup> Birnie Affidavit, *supra* note 1 at paras 153, 174, Exhibit "Z".

- (e) no creditors will be prejudiced because the Lender already has first ranking security over the Property, such that the Lender Priority Charge does not prime any known creditors.
60. The Applicants have sought and obtained guidance from KSV on the proposed amount of the proposed Lender Priority Charge and KSV is supportive.<sup>51</sup>
61. There is precedent for the relief sought by the Applicants in respect of the Lender Priority Charge. Specifically, in *Re Comark Inc*, the Court approved an interim financing facility pursuant to which the company was required to deposit all cash from operations into a blocked account to pay down the pre-filing revolver facility.<sup>52</sup> The Court recognized that it was cash generated from Comark's post-filing operations that was being used to reduce the pre-filing indebtedness, however, the interim financing charge was found not to be securing any pre-filing obligations.<sup>53</sup>
62. In *Re Performance Sports Group Ltd*, the Ontario court noted that:
- Section 11.2(1) of the [Companies' Creditors Arrangement Act ("CCAA")] provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations.<sup>54</sup>
63. Without the continued access to the Loan Facility and use of the Cash Management System, the Companies will not be able to restructure for the benefit of all stakeholders. The amount of the Lender Priority Charge is required and reasonable in the circumstances.

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<sup>51</sup> Birnie Affidavit at para 177.

<sup>52</sup> *Re Comark Inc*, 2015 ONSC 2010 at para 19 [TAB 6].

<sup>53</sup> *Ibid* at para 28.

<sup>54</sup> *Re Performance Sports Group Ltd.*, 2016 ONSC 6800 at para 22 [TAB 7].

**G. The D&O Charge Should Be Approved**

64. The Companies are seeking approval from this Court for a directors' and officers' charge (the "**D&O Charge**") over their assets and property in the amount of \$3.33 million to secure the indemnification of the directors and officers of the Companies for liabilities they may incur during the within CCAA proceedings in their capacities as directors and officers.<sup>55</sup>
65. Section 11.51 of the CCAA provides the Court with the jurisdiction to grant the D&O Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.<sup>56</sup>
66. The Companies submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Court to exercise its jurisdiction to grant the D&O Charge in favor of the directors and officers of the Companies as:
- (a) the directors and officers may be subject to potential liabilities in connection with these CCAA proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
  - (b) the Companies' do not have directors' and officers' insurance;
  - (c) the proposed D&O Charge would only cover obligations and liabilities that the Companies' directors and officers may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;
  - (d) the Companies' directors and officers have been actively involved in the Companies' efforts to address their challenging circumstances, including through overseeing the Companies' restructuring efforts, the Companies' review and exploration of strategic opinions and alternatives in connection with their liquidity and financial challenges, communications with key secured creditors and preparation for and commencement of these CCAA proceedings;
  - (e) the Companies will require the active and committed involvement of their directors and officers in order to complete a successful restructuring;
  - (f) the Companies secured creditors do not object to the charge; and

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<sup>55</sup> Birnie Affidavit, *supra* note 1 at para 179.

<sup>56</sup> CCAA, *supra* note 22 s. 11.51 [TAB 1]



(g) the amount of the D&O Charge has been calculated based on the estimated potential exposure of the Companies' directors and officers and has been reviewed with KSV.<sup>57</sup>

67. At the Comeback Hearing, the Applicants intend to apply for an increase of the D&O Charge to \$4 million.

#### H. The Tobacco Tax Charge Should Be Approved

68. The Applicants are seeking a super-priority charge in the amount of \$18,000,000 in favour of the provincial and territorial tobacco tax authorities that are entitled to receive payments or collect monies from the Logistics Companies in respect of collected but unremitted tobacco taxes (the "**Tobacco Tax Charge**").

69. The Tobacco Tax Charge will protect its beneficiaries from any exposure due to unpaid post-filing tobacco taxes. The Tobacco Tax Charge also has the benefit of protecting the Logistics Companies' directors and officers as the non-payment of such taxes attracts liability for the directors and officers pursuant to the various statutes under which the tobacco taxes are collected.<sup>58</sup>

70. Section 11 of the CCAA provides this Court with statutory authority to grant any charge or order it deems necessary as follows:<sup>59</sup>

##### **General power of court**

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

71. The Ontario Superior Court (Commercial List) recently granted a similar tax charge in *JTI-Macdonald Corp.*<sup>60</sup>

72. The Applicants submit that the Tobacco Tax Charge is reasonable in the circumstances to meet their provincial and territorial statutory obligations.

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<sup>57</sup> Birnie Affidavit, *supra* note 1 at paras 181–183.

<sup>58</sup> Birnie Affidavit at paras 187–188.

<sup>59</sup> CCAA, *supra* note 22 CCAA s. 11 [TAB 1]

<sup>60</sup> See: Initial Order of the CCAA Proceedings of *JTI-Macdonald Corp.*, Court File No. 19-CV-615862-00CL at paras 26, 41 [TAB 8].

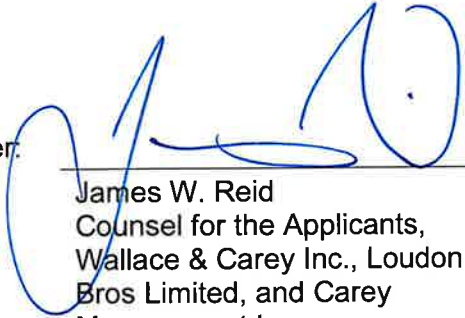
73. The amount of the been reviewed with KSV. At the Comeback Hearing, the Applicants intend to apply for an increase of the Tobacco Tax Charge to \$26 million.<sup>61</sup>

**V. CONCLUSION**

74. Based on the foregoing, the Applicants requests that this Honourable Court grant an Initial Order and provide the Applicant creditors protection under the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21<sup>st</sup> DAY OF June, 2023.

**MILLER THOMSON LLP**

Per:   
James W. Reid  
Counsel for the Applicants,  
Wallace & Carey Inc., Loudon  
Bros Limited, and Carey  
Management Inc.

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<sup>61</sup> Birnie Affidavit, *supra* note 1 at para 189.

**TABLE OF AUTHORITIES**

TAB NO.	AUTHORITY
1.	<u>Companies' Creditors Arrangement Act</u> , RSC 1985, c C-36 (excerpts)
2.	<u>Bankruptcy and Insolvency Act</u> , RSC 1985, c B-3 (excerpts)
3.	<u>Re Just Energy Corp.</u> , 2021 ONSC 1793
4.	<u>Century Services Inc. v Canada (Attorney General)</u> , 2010 SCC 60 (excerpts)
5.	<u>8440522 Canada Inc., Re</u> , 2013 ONSC 6167
6.	<u>Re Comark Inc.</u> , 2015 ONSC 2010
7.	<u>Re Performance Sports Group Ltd.</u> , 2016 ONSC 6800
8.	<u>JTI-Macdonald Corp.</u> , Initial Order, Court File No. 19-CV-615862-00CL (excerpts)

**TAB 1**



CANADA

CONSOLIDATION

CODIFICATION

## Companies' Creditors Arrangement Act

## Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to May 29, 2023

À jour au 29 mai 2023

Last amended on April 27, 2023

Dernière modification le 27 avril 2023

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

**court** means

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

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

(b) in Quebec, the Superior Court,

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

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

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

**debtor company** means any company that

(a) is bankrupt or insolvent,

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

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

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

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

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

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

**compagnie débitrice** Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

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

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

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

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

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

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

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

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

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

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

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

### Application

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

### Affiliated companies

**(2)** For the purposes of this Act,

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

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

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

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

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

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

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

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

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

### Définition de *personnes liées*

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

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

### Application

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

### Application

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

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

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

### Company controlled

**(3)** For the purposes of this Act, a company is controlled by a person or by two or more companies if

**(a)** securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

**(b)** the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

### Subsidiary

**(4)** For the purposes of this Act, a company is a subsidiary of another company if

**(a)** it is controlled by

**(i)** that other company,

**(ii)** that other company and one or more companies each of which is controlled by that other company, or

**(iii)** two or more companies each of which is controlled by that other company; or

**(b)** it is a subsidiary of a company that is a subsidiary of that other company.

R.S., 1985, c. C-36, s. 3; 1997, c. 12, s. 121; 2005, c. 47, s. 125.

## PART I

# Compromises and Arrangements

### Compromise with unsecured creditors

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

R.S., c. C-25, s. 4.

### Application

**(3)** Pour l'application de la présente loi, ont le contrôle d'une compagnie la personne ou les compagnies :

**a)** qui détiennent — ou en sont bénéficiaires —, autrement qu'à titre de garantie seulement, des valeurs mobilières conférant plus de cinquante pour cent du maximum possible des voix à l'élection des administrateurs de la compagnie;

**b)** dont lesdites valeurs mobilières confèrent un droit de vote dont l'exercice permet d'élire la majorité des administrateurs de la compagnie.

### Application

**(4)** Pour l'application de la présente loi, une compagnie est la filiale d'une autre compagnie dans chacun des cas suivants :

**a)** elle est contrôlée :

**(i)** soit par l'autre compagnie,

**(ii)** soit par l'autre compagnie et une ou plusieurs compagnies elles-mêmes contrôlées par cette autre compagnie,

**(iii)** soit par des compagnies elles-mêmes contrôlées par l'autre compagnie;

**b)** elle est la filiale d'une filiale de l'autre compagnie.

L.R. (1985), ch. C-36, art. 3; 1997, ch. 12, art. 121; 2005, ch. 47, art. 125.

## PARTIE I

# Transactions et arrangements

### Transaction avec les créanciers chirographaires

**4** Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers chirographaires ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 4.



### Form of applications

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

### Documents that must accompany initial application

**(2)** An initial application must be accompanied by

- (a)** a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b)** a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c)** copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

### Publication ban

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

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

### General power of court

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

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

### Relief reasonably necessary

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

### Forme des demandes

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

### Documents accompagnant la demande initiale

**(2)** La demande initiale doit être accompagnée :

- a)** d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;
- b)** d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;
- c)** d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

### Interdiction de mettre l'état à la disposition du public

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

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

### Pouvoir général du tribunal

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

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

### Redressements normalement nécessaires

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

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

2019, c. 29, s. 136.

### Rights of suppliers

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

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

2005, c. 47, s. 128.

### Stays, etc. — initial application

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

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

### Stays, etc. — other than initial application

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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

2019, ch. 29, art. 136.

### Droits des fournisseurs

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

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

2005, ch. 47, art. 128.

### Suspension : demande initiale

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

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;
- c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

### Suspension : demandes autres qu'initiales

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

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

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

#### Burden of proof on application

(3) The court shall not make the order unless

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

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

#### Restriction

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

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

#### Stays — directors

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

#### Exception

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

#### Persons deemed to be directors

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

2005, c. 47, s. 128.

#### Persons obligated under letter of credit or guarantee

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

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

#### Preuve

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

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

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

#### Restriction

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

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

#### Suspension — administrateurs

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

#### Exclusion

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

#### Présomption : administrateurs

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

2005, ch. 47, art. 128.

#### Suspension — lettres de crédit ou garanties

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

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

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

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

### Interim financing

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

### Priority — secured creditors

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

### Priority — other orders

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

### Factors to be considered

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

- (a)** the period during which the company is expected to be subject to proceedings under this Act;
- (b)** how the company's business and financial affairs are to be managed during the proceedings;
- (c)** whether the company's management has the confidence of its major creditors;
- (d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e)** the nature and value of the company's property;

titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

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

**11.11** [Abrogé, 2005, ch. 47, art. 128]

### Financement temporaire

**11.2 (1)** Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

### Priorité — créanciers garantis

**(2)** Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

### Priorité — autres ordonnances

**(3)** Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

### Facteurs à prendre en considération

**(4)** Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;
- b)** la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;
- c)** la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d)** la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;
- e)** la nature et la valeur des biens de la compagnie;

- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

#### Additional factor – initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

#### Assignment of agreements

**11.3 (1)** On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

#### Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

#### Factors to be considered

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

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

#### Facteur additionnel : demande initiale

(5) Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

#### Cessions

**11.3 (1)** Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

#### Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

#### Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a) l'acquiescement du contrôleur au projet de cession, le cas échéant;
- b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;
- c) l'opportunité de lui céder les droits et obligations.



is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

### Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

### Security or charge relating to director's indemnification

**11.51 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

### Priority

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

### Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

### Negligence, misconduct or fault

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

### Court may order security or charge to cover certain costs

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

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

### Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

### Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

**11.51 (1)** Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

### Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

### Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

### Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

### Biens grevés d'une charge ou sûreté pour couvrir certains frais

**11.52 (1)** Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

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

#### Priority

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

#### Bankruptcy and Insolvency Act matters

**11.6** Notwithstanding the *Bankruptcy and Insolvency Act*,

- (a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and
- (b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from
  - (i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or
  - (ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

#### Court to appoint monitor

**11.7 (1)** When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

- a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;
- b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;
- c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

#### Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

#### Lien avec la *Loi sur la faillite et l'insolvabilité*

**11.6** Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

- a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;
- b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

- (i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,
- (ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

#### Nomination du contrôleur

**11.7 (1)** Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

### Restrictions on who may be monitor

**(2)** Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

**(a)** if the trustee is or, at any time during the two preceding years, was

**(i)** a director, an officer or an employee of the company,

**(ii)** related to the company or to any director or officer of the company, or

**(iii)** the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

**(b)** if the trustee is

**(i)** the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

**(ii)** related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

### Court may replace monitor

**(3)** On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

1997, c. 12, s. 124; 2005, c. 47, s. 129.

### No personal liability in respect of matters before appointment

**11.8 (1)** Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

**(a)** that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

**(b)** that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

### Personnes qui ne peuvent agir à titre de contrôleur

**(2)** Sauf avec l'autorisation du tribunal et aux conditions qu'il peut fixer, ne peut être nommé pour agir à titre de contrôleur le syndic :

**a)** qui est ou, au cours des deux années précédentes, a été :

**(i)** administrateur, dirigeant ou employé de la compagnie,

**(ii)** lié à la compagnie ou à l'un de ses administrateurs ou dirigeants,

**(iii)** vérificateur, comptable ou conseiller juridique de la compagnie, ou employé ou associé de l'un ou l'autre;

**b)** qui est :

**(i)** le fondé de pouvoir aux termes d'un acte constitutif d'hypothèque — au sens du *Code civil du Québec* — émanant de la compagnie ou d'une personne liée à celle-ci ou le fiduciaire aux termes d'un acte de fiducie émanant de la compagnie ou d'une personne liée à celle-ci,

**(ii)** lié au fondé de pouvoir ou au fiduciaire visé au sous-alinéa (i).

### Remplacement du contrôleur

**(3)** Sur demande d'un créancier de la compagnie, le tribunal peut, s'il l'estime indiqué dans les circonstances, remplacer le contrôleur en nommant un autre syndic, au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité*, pour agir à ce titre à l'égard des affaires financières et autres de la compagnie.

1997, ch. 12, art. 124; 2005, ch. 47, art. 129.

### Immunité

**11.8 (1)** Par dérogation au droit fédéral et provincial, le contrôleur qui, en cette qualité, continue l'exploitation de l'entreprise de la compagnie débitrice ou lui succède comme employeur est dégagé de toute responsabilité personnelle découlant de quelque obligation de la compagnie, notamment à titre d'employeur successeur, si celle-ci, à la fois :

**a)** l'oblige envers des employés ou anciens employés de la compagnie, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;

**b)** existait avant sa nomination ou est calculée par référence à une période la précédant.



## TAB 2



CANADA

CONSOLIDATION

CODIFICATION

## Bankruptcy and Insolvency Act

## Loi sur la faillite et l'insolvabilité

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

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

Current to May 17, 2023

À jour au 17 mai 2023

Last amended on April 27, 2023

Dernière modification le 27 avril 2023

**income trust** means a trust that has assets in Canada if

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

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

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

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

**locality of a debtor** means the principal place

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

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

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

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

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

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

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

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

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

- a) soit du prononcé de l'ordonnance de faillite la visant;
- b) soit du dépôt d'une cession de biens la visant;
- c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

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

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

- a) le dépôt d'une cession de biens la visant;
- b) le dépôt d'une proposition la visant;
- c) le dépôt d'un avis d'intention par elle;
- d) le dépôt de la première requête en faillite :
  - (i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),
  - (ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;
- e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;
- f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

**personne**

**TAB 3**

**CITATION:** Re Just Energy Corp., 2021 ONSC 1793  
**COURT FILE NO.:** CV-21-00658423-00CL  
**DATE:** 20210309

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

**BEFORE:** Koehnen J.

**COUNSEL:**

*Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Waleed Malik, David Rosenblatt and Justine Erickson, for the Applicants*

*Robert Thornton, Rebecca Kennedy and Rachel Bengino, Puya Fesharaki, for the Proposed Monitor*

*Scott Bomhof, for the Term Loan Lenders*

*Heather Meredith and James D. Gage, for the Credit Facility Lenders*

*Ryan Jacobs, Jane Dietrich and Michael Wunder, for the DIP Lender*

*Howard Gorman, for Shell*

*Robert Kennedy and Kenneth Kraft, for BP*

*Paul Bishop and Jim Robinson, Proposed Monitor*

*Brian Schartz, and Mary Kogut Brawley, US counsel for the Applicants*

*Chad Nichols and David Botter, U.S. Counsel to DIP Lender*

*Kelli Norfleet, U.S. Counsel to BP*

*Doug McIntosh, Advisor to the Credit Facility Lenders*

*John Higgins*

**HEARD:** March 9, 2021

**ENDORSEMENT****Overview**

- [1] The applicant, Just Energy Group Inc. (“Just Energy”) seeks protection under *the Companies’ Creditors Arrangement Act*, (the “CCAA”)<sup>1</sup> by way of an initial order. Just Energy is the ultimate parent of the Just Energy group of companies and limited partnerships.
- [2] Just Energy buys electricity and natural gas from power generators and re-sells it to consumer and commercial customers, usually under long term, fixed price contracts.

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<sup>1</sup> R.C.C. 1985, c. c-36, as amended

- [3] Unusually intense winter storms in Texas led to a breakdown of equipment used to generate and transmit electricity. This led Texas regulators to impose radical and immediate price increases for the power Just Energy buys. The amounts the regulator imposes must be paid within 2 days, failing which Just Energy could lose its licence and have its customers distributed among other distributors.
- [4] Those price increases have imposed a serious, temporary liquidity crisis upon Just Energy and others in its position. That liquidity crisis prompts the CCAA application. It appears that the price increases may have been imposed by a computer program that misunderstood the data it received as indicating a shortage of power that could be corrected by price increases. Price increase could not lead to more power being generated because the energy shortage was caused by the freezing and consequent breakdown of generating and transmission equipment. Price increases could not remedy that.
- [5] Just Energy is appealing the price increases and is seeking rebates from the Texas regulator. That process has not been completed.
- [6] The issue before me today is whether to grant CCAA protection for an initial period of 10 days. It is complicated by the fact that Just Energy also seeks a stay of regulatory action in Canada and the United States and seeks what at first blush, is an unusually large amount of debtor in possession financing (the “DIP”) of \$125 million for the initial 10 day period.
- [7] For the reasons set out below, I grant the stay and the DIP. It strikes me that the circumstances facing Just Energy are precisely the sort for which the CCAA is appropriate: a sudden, unexpected liquidity crisis, brought on by the action of others, which actions may still be rescinded. Without a stay, Just Energy faces almost certain bankruptcy with a loss of approximately 1,000 jobs and the possibility that a good part of the debt it owes will not be repaid. Those catastrophic consequences may be avoidable if Just Energy succeeds in its appeals of the Texas price increases and if all players are given adequate time to find solutions in a more orderly fashion than the weather crisis allowed them to.
- [8] A number of critical parties were given notice of today’s hearing. Just Energy had consulted widely with them before the hearing. These parties included secured creditors, banks, unsecured term lenders and essential suppliers. Some, including banks and some of the term lenders wish to “reserve their rights” to the comeback hearing. The DIP lender, and two important suppliers (Shell and BP) expressed concern about the reservation of rights. While those who are “reserving their rights” are of course free to do so, as a practical matter, they will be hard-pressed to undo rights that I am affording today in the initial order when the recipients of those rights will be relying on them to their detriment over the next 10 days and when the parties “reserving their rights” have not opposed the relief I am granting.

**TAB 4**



**Century Services Inc.** *Appellant*

v.

**Attorney General of Canada on behalf  
of Her Majesty The Queen in Right of  
Canada** *Respondent***INDEXED AS: CENTURY SERVICES INC. v. CANADA  
(ATTORNEY GENERAL)****2010 SCC 60**

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,  
Fish, Abella, Charron, Rothstein and Cromwell JJ.**ON APPEAL FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA**

*Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).*

*Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.*

*Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.*

**Century Services Inc.** *Appelante*

c.

**Procureur général du Canada au  
nom de Sa Majesté la Reine du chef du  
Canada** *Intimé***RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA  
(PROCUREUR GÉNÉRAL)****2010 CSC 60**

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,  
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et  
Cromwell.**EN APPEL DE LA COUR D'APPEL DE LA  
COLOMBIE-BRITANNIQUE**

*Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).*

*Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.*

*Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?*

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the ETA to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the CCAA to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

*Held* (Abella J. dissenting): The appeal should be allowed.

*Per* McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA can be resolved through an interpretation that properly recognizes the history of the CCAA, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« LTA ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« LFI »). Toutefois, le par. 18.3(1) de la LACC prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la LACC a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la LFI. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la LTA, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la LACC ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

*Arrêt* (la juge Abella est dissidente) : Le pourvoi est accueilli.

*La* juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la LTA et le par. 18.3(1) de la LACC en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la LACC, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édition de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

*Per Fish J.*: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dérogée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

*Le juge Fish* : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

*Per* Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

*La juge* Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édition du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44f) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édition du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

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

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

**TAB 5**



**CITATION:** Re: Mobilicity Group 2013 ONSC 6167  
**COURT FILE NO.:** 13-CV-16274-OOCL  
**DATE:** 20131004

**SUPERIOR COURT OF JUSTICE - ONTARIO  
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS  
INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS  
INCORPORATION

**BEFORE:** Newbould J.

**COUNSEL:** Robert Frank, Virginie Gauthier and Evan Cobb, for applicants  
David C. Moore for The Catalyst Capital Group Inc.  
John Porter and Leanne M. Williams, for Ernst & Young Inc, the proposed  
Monitor  
Robert J. Chadwick and Brendan O'Neill, for the proposed DIP lender and the ad  
hoc Committee of Noteholders  
Kevin P. McElcheran and James D. Gage, for Quadrangle, a shareholder and for  
subordinated note holders  
Janice Wright, for Equity Financial Trust Company, as Trustee and Collateral  
Agent under the First Lien Notes, Trustee under the Unsecured Senior Notes, and  
Collateral Agent under the Bridge Notes

**DATE HEARD:** September 30, 2013

[1] On September 30, the applicants ("Mobilicity Group") applied for protection under the CCAA. At the conclusion of the hearing I ordered that the application should be granted for reasons to follow, and an Initial Order was signed. These are my reasons.

**Background facts**

[2] The Mobilicity Group consists of Data & Audio-Visual Enterprises Wireless Inc., the operating company ("Wireless" or "Mobilicity"), its holding company Data & Audio-Visual

the financial advisors held discussions with the holders of the Bridge Notes and Catalyst to obtain what the Mobilicity Group believed to be the best available offer from each party either in the form of a final definitive term sheet or definitive agreements. These discussions occurred over the course of several weeks.

[28] The financial advisors and counsel to the Mobilicity Group evaluated these DIP financing options, including the Catalyst DIP term sheet, based upon, among other things, quantum, conditions, price, ranking and execution risk and provided their expert views to the board of directors of the Mobilicity Group. After consideration of the DIP financing options, and after considering the advice of its legal and financial advisors, the board of directors of the Mobilicity Group concluded that the DIP financing option presented by the holders of the Bridge Notes was the best available option.

[29] Catalyst contends that the DIP lending should not be approved at this time. It points to the cash flow forecast of the applicants that indicates that no DIP borrowing will be required until the week ending November 8, 2013 and says that there is time to give consideration to other DIP facilities that might be available. Mr. Moore said that he expects to obtain instructions from Catalyst to propose DIP financing that will rank equally as the DIP lending proposed by the applicants but provide more money and on better terms than that provided for in the proposal before the court.

[30] Mr. Moore relies on the statement of Blair J. (as he then was) in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4<sup>th</sup>) 314 that extraordinary relief such as DIP financing with super priority status should be kept in the Initial Order to what is reasonably necessary to meet the debtor's urgent needs during the sorting out period. Each case, of course, depends on its particular facts. Unlike *Royal Oak*, the proposed DIP financing does not give the DIP lender super priority of the kind in *Royal Oak*. It will rank behind the first lien notes held by Mr. Moore's client. The issue is whether approval of DIP financing is necessary at this time.

**TAB 6**

**CITATION:** Comark Inc. (RE), 2015 ONSC 2010  
**COURT FILE NO.:** CV-15-10920-00CL  
**DATE:** 2015-04-01

**SUPERIOR COURT OF JUSTICE - ONTARIO**

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

**AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR  
ARRANGEMENT OF COMARK INC.**

**BEFORE:**   Regional Senior Justice G.B. Morawetz

**COUNSEL:** *Marc Wasserman and Caitlin Fell*, for the Applicant

*Brian Empey and Ryan Baulke*, for Alvarez & Marsal Canada Inc., Proposed  
Monitor

*Sam Babe*, for Salus Capital Partners, LLC (DIP Lender)

**HEARD and**

**ENDORSED:** March 26, 2015

**REASONS:** April 1, 2015

**ENDORSEMENT**

[1]   The Applicant, Comark Inc. ("Comark"), brings this application for relief under the *Companies' Creditors Arrangement Act* ("CCAA").

[2]   Comark operates 343 retail stores across Canada under three distinct divisions: Ricki's, Bootlegger and Cleo (together, the "Banners"). Comark sells predominantly exclusive private label merchandise. Comark employs approximately 3,400 people.

[3]   Comark is a privately held corporation that is a portfolio company of an investment fund managed by KarpReilly LLC ("KarpReilly"). Comark's corporate headquarters are in Mississauga, Ontario (the "Corporate Headquarters") and employ 83 full time employees. Comark operates an essential distribution centre in Laval, Quebec, which employs approximately 200 people and processes approximately 9.3 million and 2 million units of merchandise each year for stores and online sales, respectively.

[4] Comark has over 300 product suppliers, primarily located in Asia and North America. Approximately 80% of Comark's unit purchases were sourced from foreign manufacturers and the remaining 20% were sourced in North America. Purchases are typically made in US dollars.

[5] Comark transports all products to its stores through third party transportation companies. Purolator is Comark's primary third party transportation provider. The Applicant is of the view that Purolator's continued services are critical to the company's ongoing operations. Approximately 90% of Comark's products are transported using Purolator.

[6] Comark has over 60 third party landlords from which it leases all of its retail and distribution locations. As part of its restructuring under these proceedings, Comark anticipates that it will disclaim certain leases in respect of Comark stores.

[7] Comark participates in co-brand community events and cause marketing with charitable organizations. Comark customers have donated amounts intended for various charities, and these donated funds are currently comingled with Comark's other funds. As of March 17, 2015, Ricki's has (Cdn.) \$40,057, Bootlegger has (Cdn.) \$108 and Cleo has (Cdn.) \$107,917 in funds received from customers in respect of donations to various charitable organizations.

[8] Comark has experienced declining financial results over the past two years.

[9] As of February 28, 2015, Comark had total assets of (Cdn.) \$112.4 million and its total indebtedness was approximately (Cdn.) \$126.1 million.

[10] Comark is financed primarily through a term loan and revolving credit facilities under a credit agreement dated as of October 31, 2014 between Comark, as the lead borrower, and Salus, as administrative collateral agent and lender thereto (the "Salus Credit Agreement").

[11] As of March 17, 2015, the Applicant reports that there was approximately U.S.\$43.1 million outstanding under the term loan facility and (Cdn.) \$24.8 million outstanding under the revolving credit facility (the "Revolving Credit Facility"). The Salus Credit Agreement has a maturity date of October 31, 2018. All of the obligations of Comark under the Salus Credit Agreement are secured by all of Comark's assets.

[12] Comark has been noted in default of the Agreement and Salus has made a demand for repayment. Comark advises that it is not able to repay its debt obligations to Salus.

[13] Comark reports that its adjusted EBITDA fell to approximately (Cdn.) \$16.5 million for the year end February 28, 2015. Comark acknowledges that this constitutes an event of default under the Salus Credit Agreement. On the occurrence of an event of default, Salus has the right to terminate the Salus Credit Agreement and declare that all obligations under it are due and payable with presentment, demand, protest or other notice of any kind.

[14] Salus delivered a Reservation of Rights Letter on March 5, 2015. On March 25, 2015, Salus made a demand for repayment for all amounts owing under the Salus Credit Agreement. Comark acknowledges that it is not able to pay the full amount owing under the Salus Credit



Agreement, which has become immediately due and payable as a result of the event of default and the demand made by Salus. Comark acknowledges that it is insolvent.

[15] The Applicant seeks the granting of an initial order. With the benefit of the protection of the stay of proceedings, Comark is of the view that it will be provided with the necessary "breathing space" in order to allow it to develop a plan to restructure and reorganize the business and preserve enterprise of value.

[16] Comark is of the view that it requires interim financing for working capital and general corporate purposes and for post-filing expenses and costs during the CCAA proceedings.

[17] Salus has agreed to act as DIP lender (the "DIP Lender") and provide an interim financing facility (the "DIP Facility") under an amended and restated credit agreement with Salus (the "DIP Agreement"). It is a condition of the DIP Agreement that advances made to Comark be secured by a court ordered security interest, lien and charge over all of the assets and undertakings of Comark (the "DIP Lender's Charge").

[18] The Applicant advises that under the draft initial order, the charges, including the DIP Lender's Charge, do not prime TD Bank and creditors with a purchase money security interest, which are Comark's only secured creditors. Further, the company advises that it is also an express term of the DIP Agreement that advances made thereunder may not be used to satisfy pre-filing obligations under the Salus Credit Agreement. Further, the company states that the DIP Lender's Charge will not secure any obligation that exists before the date of the initial order.

[19] It is anticipated that the proceeds from Comark's operations will be used to reduce pre-filing obligations outstanding under the Salus Revolver Facility in order to free-up availability under the DIP Facility. In accordance with the DIP Facility and the current cash management system in effect, Comark's cash from business operations will be deposited into the blocked account and swept by Salus in order to reduce amounts outstanding under the Salus Revolver Facility prior to the commencement of these proceedings.

[20] In his supplementary affidavit, Mr. Bachynski states that Comark requires \$15 million during the week ending April 11, 2015 and as such, Comark is proposing a maximum DIP Charge of (Cdn.) \$28 in the draft initial order with a restriction on borrowing of (Cdn.) \$15 million prior to the proposed comeback hearing scheduled for April 7, 2015.

[21] Mr. Bachynski goes on to state that Comark will not be able to satisfy its ordinary course obligations in the CCAA proceedings without the DIP Facility.

[22] In its pre-filing report, the Monitor reports at length on the debtor-in-possession financing. In its report, the Monitor states that Salus has exercised cash dominion pursuant to the Blocked Account Agreement and the Salus Credit Agreement and has made demand under the Salus Credit Agreement. As a consequence, the Monitor states that Comark does not have access to liquidity to discharge its financial obligations. Further, given the deterioration in the Applicant's financial position and its current liquidity crisis, the Monitor states that the Applicant cannot continue to operate without the DIP Facility.

**TAB 7**

**CITATION:** Re: Performance Sports Group Ltd., 2016 ONSC 6800  
**COURT FILE NO.:** CV-16-11582-00CL  
**DATE:** 20161101

**SUPERIOR COURT OF JUSTICE – ONTARIO  
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY  
RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA  
INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL  
CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP.,  
PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER  
PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US  
HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE  
GROUP INC., PSG INNOVATION INC.

**(Applicants)**

**BEFORE:** Newbould J.

**COUNSEL:** *Peter Howard and Kathryn Esaw* , for the Applicants

*Robert I. Thornton and Rachel Bengino*, for the Proposed Monitor Ernst & Young  
Inc.

*Bernard Boucher and John Tuzyk*, for Sagard Capital Partners, L.P

*David Bish and Adam Slavens*, for Fairfax Financial Holdings Limited

*Robert Staley*, for the board of directors of Performance Sports Group Ltd.

*Joseph Latham and Ryan Baulke*, for the Ad Hoc Committee of certain term  
lenders

*Tony Reyes and Evan Cobb*, for Bank of America, the ABL DIP lender

**HEARD:** October 31, 2016



indebtedness. The time was tight and in view of the existing charges against the assets and the very limited availability of unencumbered assets, it was thought that there would be little or no interest for third parties to act as interim financing providers. Accordingly, the Applicants decided to focus their efforts on negotiating DIP financing with its current lenders and stakeholders.

[21] I am satisfied that the DIP Facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. The management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP Facility. The Monitor<sup>1</sup> is supportive of the DIP Facilities in light of the fact that the Applicants are facing a looming liquidity crisis in the very short term and the Applicants, Centerview and the CRO have determined that there is little alternative other than to enter into the proposed DIP Agreements.

[22] Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the

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<sup>1</sup> Ernst & Young has filed a Report as the Proposed Monitor. For ease of reference I refer to Ernst & Young in this decision as the Monitor.

ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

[23] The PSG Entities seek authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

- (a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations;
- (b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services;
- (c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers;
- (d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 – all of whom are entitled to be paid for their services under U.S. bankruptcy law; and
- (e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities.

[24] There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. The recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent

**TAB 8**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

THE HONOURABLE )  
JUSTICE HAINEY )  
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FRIDAY, THE 8TH  
DAY OF MARCH, 2019



IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED  
AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF **JTI-MACDONALD CORP.**

**INITIAL ORDER**

**THIS APPLICATION**, made by JTI-Macdonald Corp. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** (i) the affidavit of Robert McMaster sworn March 8, 2019 and the exhibits thereto (the "**McMaster Affidavit**") and (ii) the pre-filing report dated March 8, 2019 (the "**Pre-Filing Report**") of Deloitte Restructuring Inc. ("**Deloitte**") in its capacity as the proposed Monitor of the Applicant (the "**Monitor**") and on being advised that JTI-Macdonald TM Corp. and JT Canada LLC Inc., the secured creditors who are likely to be affected by the charges created herein (the "**Secured Creditors**") were given notice, and on hearing the submissions of counsel for the Applicant, the Secured Creditors, Deloitte and on reading the consent of Deloitte to act as the Monitor,

services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, customs clearing, warehouse or logistical services, or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

#### **NON-DEROGATION OF RIGHTS**

25. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

#### **SALES AND EXCISE TAX CHARGE**

26. **THIS COURT ORDERS** that the Canadian federal, provincial and territorial authorities that are entitled to receive payments or collect monies from the Applicant in respect of Sales & Excise Taxes shall be entitled to the benefit of and are hereby granted a charge (the “**Sales and Excise Tax Charge**”) on the Property, which charge shall not exceed an aggregate amount of

\$127 million, as security for all amounts owing by the Applicant in respect of Sales & Excise Taxes. The Sales and Excise Tax Charge shall have the priority set out in paragraphs 41 and 43 herein.

#### **PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

27. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

#### **DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

28. **THIS COURT ORDERS** that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

29. **THIS COURT ORDERS** that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of \$4.1 million, as security for the indemnity provided in paragraph 28 of this Order. The Directors' Charge shall have the priority set out in paragraphs 41 and 43 herein.

of \$3 million, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings and the CRO, other than in respect of any success fee provided for in the CRO Engagement Letter. The Administration Charge shall have the priority set out in paragraphs 41 and 43 hereof.

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

41. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Directors' Charge, and the Sales and Excise Tax Charge (collectively, the "**Charges**" and each individually, a "**Charge**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$3 million);

Second — Directors' Charge (to the maximum amount of \$4.1 million); and

Third – Sales and Excise Tax Charge (to the maximum amount of \$127 million).

42. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

43. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise (collectively, the "**Encumbrances**") in favour of any Person in respect of such Property, save and except for