Clerk's Stamp

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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	**JOINT BRIEF OF LAW**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTIES FILING THIS DOCUMENT	COUNSEL FOR THE APPLICANTS MILLER THOMSON LLP 3000, 700 - 9th Avenue S.W. Calgary, AB, Canada T2P 3V4 Attention: James W. Reid / Pavin Takhar Phone: 403.298.2418 / 403-298-2432 Fax: 403.262.0007 Email: jwreid@millerthomson.com ptakhar@millerthomson.com COUNSEL FOR APPLICANTS' SOLE DIRECTOR DENTONS CANADA LLP 15th Floor, Bankers Court 850-2nd Street SW Calgary, AB, Canada T2P 0R8 Attention: Derek M. Pontin / James O'Sullivan Phone: 403.268.6301 / 403 268 7088 Fax: 403.268.3100 Email: derek.pontin@dentons.com james.osullivan@dentons.com File No.: 0221652.0006

COUNSEL FOR CANADIAN IMPERIAL BANK OF COMMERCE, AS AGENT

Norton Rose Fulbright Canada LLP
222 Bay Street, Suite 3000
Toronto, Ontario M5K 1E7 CANADA

Attention: Evan Cobb
Email: evan.cobb@nortonrosefulbright.com
Tel: 1 416.216.1929
Fax: 1 416.216.3930

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I. INTRODUCTION

1. 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**") obtained an initial order on June 22, 2023, which was amended and restated on June 30, 2023 (together, the "**ARIO**") under the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 (the "**CCAA**").[1]

2. This Joint Brief of Law is submitted in support of the Applicants' application seeking an Order, among other things:

   (a) declaring that service of the application filed November 7, 2023, returnable November 17, 2023 (the "**Application**"), and the supporting materials good and sufficient and, if necessary, abridging time for notice of the Application to the time actually given;

   (b) authorizing and approving the transaction (the "**Transaction**") contemplated under the asset purchase agreement (the "**Sale Agreement**") between the Applicants and 7-Eleven Canada Inc. ("**SEC**" or the "**Purchaser**") dated November 7, 2023;

   (c) authorizing and directing the Applicants and Monitor (as defined below) to take all steps and execute all such deeds, documents, and instruments as may be reasonably necessary to consummate the Transaction;

   (d) upon closing of the Transaction, vesting all of the Applicants' right, title, and interest in and to the purchased property outlined in the Sale Agreement in the name of the Purchaser (the "**Purchased Assets**"), free and clear from all claims and encumbrances, except permitted encumbrances;

   (e) approving the entering into by Wallace & Carey and CMI of a Transition Services Agreement (the "**TSA**") with the Purchaser and the Monitor upon closing of the Transaction, substantially in the form of the TSA at Scheduled B the Sale Agreement;

   (f) releasing all claims (the "**Releases**") against (i) the present and former directors, officers and employees of the Applicants; (ii) their respective legal counsel and

[1] The Initial Order and the ARIO can be found on the Monitor's website: https://www.ksvadvisory.com/experience/case/wallace-and-carey.

advisors; (iii) the legal counsel and advisors of the Applicants and the Purchaser; and (iv) the Monitor and its legal counsel (the persons listed in (i), (ii), (iii) and (iv) being collectively, the "**Released Parties**"), except in respect of claims for fraud, gross negligence, or willful misconduct by any of the Released Parties, or any claims that are not permitted to be released pursuant to section 5.1(2) of the CCAA;

(g) if necessary assigning certain real property leases and a software license to the Purchaser without the necessity of obtaining consent from the requisite contract counterparties;

(h) authorizing KSV Restructuring Inc. (the "**Monitor**") to make an interim distribution from the proceeds of the Transaction;

(i) temporarily sealing on the Court record a confidential and commercially sensitive exhibit (the "**Confidential Exhibit**") to the report of Alvarez & Marsal Canada Securities ULC (the "**Financial Advisor**"), which report is appended to the Sixth Report of the Monitor (the "**Sixth Report**"), until such time as these proceedings conclude or further order of the Court; and

(j) such further and other relief as the Applicants may request and this Honourable Court may grant.

3. This Joint Brief of Law is also submitted in support of the applications by Canadian Imperial Bank of Commerce, as agent ("**CIBC**") for:

(a) the appointment of KSV Restructuring Inc., as receiver (the "**Receiver**"), of the assets, property and undertaking of certain subsidiaries of CMI (being 772921 Alberta Ltd. ("**772**"), Spruce It Up Land Corp. ("**SIU**") and Ridge Meadows Properties Ltd. ("**Ridge Meadows**"));

(b) authorizing and approving a sale of 772's right, title and interest in certain real property assets and leases (the "**772 Assets**") to the Purchaser in connection with the Transaction; and

(c) authorizing the Receiver to make an interim distribution from the proceeds of the 772 Assets to various interested parties, including Canadian Western Bank and CIBC.

4. Capitalized terms used herein and not otherwise defined have the meanings given to them in Affidavit No.3 of Eric Rolheiser, sworn November 7, 2023 (the "**Rolheiser Affidavit**").

II. FACTS

5. The facts relevant to the Application and the CIBC application (collectively, the "**Applications**") are set out in detail in the Rolheiser Affidavit, the Sixth Report and the Affidavit of Geoffrey Golding, sworn November 8, 2023 (the "**Golding Affidavit**"). A summary of the key facts as they relate to the relief requested in the Applications is set out below.

A. Background

6. 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. Prior to filing for creditor protection under the CCAA, Wallace & Carey serviced more than 7,000 customers across the country and had grown to become one of Canada's largest independent wholesale distribution and logistics companies.[2]

7. Wallace & Carey is a wholly owned subsidiary of CMI, and Loudon Bros is a wholly owned subsidiary of Wallace & Carey.[3]

8. The Logistics Companies faced unprecedented challenges as a result of the COVID-19 global pandemic and fell into arrears with many of their vendors, leading to the CCAA proceedings and the ARIO.[4]

9. Since the granting of the ARIO, there have been issues with prepayment requirements from vendors and suppliers of the Logistics Companies.[5] Certain customers of the Logistics Companies have terminated their relationships with Wallace & Carey.[6] This ultimately negatively impacted the Applicants' liquidity.

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[2] Rolheiser Affidavit at para 7.

[3] *Ibid* at para 8.

[4] *Ibid* at paras 9-10.

[5] *Ibid* at para 12.

[6] *Ibid* at para 14.

10. The Applicants have been consolidating the Logistics Companies by winding down certain regional branches of their business.[7]

11. On August 23, 2023, the Honourable Justice M. H. Hollins granted an Order (the "**SISP Order**") within these CCAA proceedings approving, among other things, a sale and investment solicitation process to be conducted in accordance with the terms of the SISP Order (the "**SISP**").[8]

12. Additionally, the Court granted an ancillary order (the "**Ancillary Order**"), among other things, approving the engagement of the Financial Advisor as financial advisor of the Applicants, and authorizing the Applicants to conduct the SISP with the assistance of the Financial Advisor and under oversight of the Monitor.[9]

B. The SISP

13. The Applicants were required to commence the SISP due to their liquidity situation.[10]

14. The SISP had the following milestones:

MILESTONE	DEADLINE
SISP Launch Date	August 30, 2023
Phase 1 Bid Deadline	October 5, 2023
Phase 2 Bid Deadline	November 2, 2023
Transaction Approval Application Hearing	Subject to Court availability
Target Closing Date	On or before December 4, 2023

15. The SISP was designed as a two-stage process, with letters of intent to be submitted by the Phase 1 Bid Deadline and binding agreements to be submitted on or before the Phase 2 Bid Deadline.

16. The 772 Assets were marketed as part of the SISP along with the assets of the Applicants.[11]

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[7] *Ibid* at para 15.
[8] *Ibid* at para 20.
[9] *Ibid*.
[10] *Ibid* at para 18.
[11] Golding Affidavit at para 19.

17. By the Phase 1 Bid Deadline, the Financial Advisor received five LOIs, including a proposal by SEC (the "**Proposal**").[12]

18. Upon various discussions, and taking into account the Applicants' eroding financial and operational conditions, it was determined the Proposal offered the highest and best recovery for the Applicants, its stakeholders and creditors, with the best chance of closing in the short timeframe liquidity conditions required.[13]

C. Approval and Vesting Order

19. On or around November 7, 2023, the Applicants and Purchaser entered into the Sale Agreement for the Purchased Assets.

20. It is a term of the Sale Agreement that the Applicants obtain an order from the Court authorizing, approving, and confirming the Sale Agreement and the underlying Transaction, vesting the Applicants' interest in the Purchased Assets in the Purchaser free and clear of all encumbrances, liens, security interests, mortgages, charges or claims, other than encumbrances specifically permitted by the Sale Agreement.[14]

D. Assignment of Assigned Contracts

21. The Purchased Assets include certain real property leases held by Wallace & Carey, as tenant, and software licenses (together, the "**Assigned Contracts**").[15]

22. Consent for the assignment has now been provided by each of the landlords subject to entering into a definitive assignment agreement with the landlord of the Edmonton property.[16] Consent has also now been given in relation to the Software Licenses.[17]

23. It is a condition of closing of the Transaction that the Assigned Contracts be assigned.[18]

24. The Monitor approves the assignment of the Assigned Contracts.[19]

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[12] *Rolheiser Affidavit*, *supra* note 2 at para 29.
[13] *Ibid* at para 31.
[14] *Ibid* at para 36 and Exhibit A.
[15] *Ibid* at paras 49-51.
[16] *Ibid* at para 53 and Exhibit B.
[17] *Ibid* at para 55 and Exhibit D.
[18] *Ibid* at para 36.
[19] Sixth Report at para 4.0.7(e).

E. Sale of 772 Assets and Marketing of SIU and Ridge Meadows Assets

25. The Transaction requires: [20]

(a) the sale of the 772 Assets to SEC or its nominee, free and clear of claims and encumbrances; and

(b) steps to be taken to monetize CMI's subsidiary company assets, including the real estate assets of SIU and Ridge Meadows if necessary to assist in satisfying the charges granted in the CCAA proceedings.

26. The sale of the 772 Assets is an integral part of the Transaction. However, 772 is not party to the CCAA Proceedings.[21]

27. CIBC holds a general security interest on the assets of 772, SIU and Ridge Meadows as well as mortgages on, among other things, the 772 Assets.[22]

28. Counsel for CIBC delivered Notices of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") to 772, SIU and Ridge Meadows on November 7, 2023, and each of these parties has consented to waive the 10-day notice period pursuant to Section 244 of the BIA.

29. Pursuant to its security documents, CIBC is entitled to exercise various remedies, including the appointment of a receiver.

30. The appointment of the Receiver will maximize value from the Transaction and from the 772 Assets and protect the interest of CIBC and Canadian Western Bank, as mortgage holders on the 772 Assets.

31. The purchase price for the 772 Assets is based on updated value estimates for those properties obtained by the Monitor, and/or on offers received on those properties. The purchase price also excludes carrying costs (such as property taxes and utilities) that would otherwise be incurred while marketing the properties, and the realtor commissions payable are less than a typical transaction. The sale of the 772 Assets in connection with

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[20] *Golding Affidavit*, *supra* note 11 at para 21.

[21] *Ibid* at paras 23-24.

[22] *Ibid* at paras 13 & 17.

the Transaction also eliminates the risk that these properties may sell for a lower price than the purchase price under the Transaction.[23]

F. Third Party Releases

32. The Applicants request the granting of the Releases in favour of the Released Parties.[24]

33. The Releases do not release any claims related to fraud, gross negligence or willful misconduct on the part of the Released Parties, and the Releases are subject to the statutory limitations for releases under section 5.1(2) of the CCAA.[25]

34. The Released Parties have made, and will continue to make, material contributions to these CCAA Proceedings.[26]

35. The Releases will alleviate the need for the released director and officers to rely on the $4,000,000.00 D&O Charge granted in the ARIO, materially improving distributions to creditors.[27]

36. The Releases are especially appropriate in view of how the TSA is structured, which requires the ongoing participation of the director and officers in the management of the Logistics Companies business. Further, the Transaction is designed to see maximum return of value to the Applicants' stakeholders, including secured creditors, hundreds of employees, and the beneficiaries of the Tobacco Tax Charge.[28]

37. The Released Parties have acted with diligence and prudence at all times.

G. Sealing of the Confidential Exhibit

38. The Confidential Exhibit contains a summary of the LOIs received during the SISP,[29] which is confidential and commercially sensitive information.

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[23] Sixth Report at section 4.2.1(e)(i).
[24] *Rolheiser Affidavit, supra* note 2 at para 57.
[25] *Ibid* at para 59.
[26] *Ibid* at para 58.
[27] *Ibid* at para 61; Sixth Report at para 4.3.6.
[28] Sixth Report at para 4.3.4.
[29] *Rolhesier Affidavit, supra* note 2 at para 70.

39. The Applicants request an order to temporarily seal the Confidential Exhibit on the Court record until the termination of these CCAA Proceedings, or until further order of the Court.[30]

III. ISSUES

40. The issues before this Honourable Court are:

(a) Is the proposed Transaction contemplated by the Sale Agreement fair, commercially reasonable, and in the best interests of all stakeholders, such that it should be approved and authorized by this Court?

(b) As a necessary corollary to the Transaction, should the Court order the assignment of the Assigned Contracts?

(c) As a necessary corollary to the Transaction, should the Court approve the appointment of the Receiver, the sale of the 772 Assets to the Purchaser, and the marketing of the remaining SIU and Ridge Meadows assets by the Receiver?

(d) As a corollary to the Transaction, should the Court grant the Releases?

(e) For the preservation of the integrity of the SISP, should the Court grant the requested sealing order with respect to the Confidential Exhibit?

IV. LAW AND ARGUMENT

A. <u>The Approval and Vesting Order Approving the Transaction Should Be Granted</u>

41. The Applicants seek approval of the Transaction and Sale Agreement.

42. Section 36(1) of the CCAA provides that a sale or disposal of assets outside the ordinary course of business by a debtor may only occur with the approval of the Court on notice to affected creditors.[31]

43. In deciding whether to grant sale approval, the Court is to consider, among other things: [32]

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[30] *Ibid* at para 71.

[31] CCAA, section 36(1) **[TAB 1].**

[32] CCAA, section 36(3).

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

44. The Court has jurisdiction pursuant to Section 36(6) of the CCAA to authorize a sale free and clear of any security, charge or other restriction, provided that it also orders that the proceeds of the sale are subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is affected by the order.[33]

45. Justice Morawetz in *Re Target Canada Co* noted that the factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic checklist that must be followed in every sale transaction under the CCAA.[34] He further noted that the factors of section 36(3) overlap to an extent with the *Soundair* factors that were used for a Court to consider approval of a transaction in pre-amendment CCAA case law.[35]

46. The *Soundair* factors that Courts will consider when approving a transaction in a receivership proceeding are the following:

(a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;

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[33] CCAA, section 36(6).

[34] *Re Target Canada Co*, 2015 ONSC 2066 at para 15 **[TAB 2].**

[35] *Ibid*.

(b) whether the interests of all parties have been considered;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.[36]

47. Ultimately, the Court must look at the proposed Transaction as a whole and determine whether it is appropriate, fair and reasonable in the circumstances and thus ought to be approved.[37]

48. The Applicants submit that the Transaction satisfies the factors in section 36(3) of the CCAA and the *Soundair* factors. The Transaction is fair, reasonable and appropriate in the circumstances and should be approved for the following reasons:

(a) the Transaction arose from the SISP;

(b) the SISP was followed in order to obtain the best price;

(c) given the Applicants' liquidity constraints, there is no available alternative to the Transaction, and SEC is the only available buyer in the tight timeframe that liquidity permits;

(d) the senior secured creditor, CIBC, supports the Transaction;

(e) the Transaction preserves employment;

(f) the Monitor supports the Transaction; and

(g) there are no allegations of unfairness in the sale process conducted.

B. <u>The Assignment of the Assigned Contracts Should Be Approved</u>

49. The CCAA provides for the authority for the Court to grant an Order assigning the rights and obligations of a debtor company under a contract or agreement.[38]

50. The Court is to consider the following factors, among other things when making an Order to assign a contract:

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[36] *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 at para 16 **[TAB 3]**.

[37] *Re White Birch Paper Holding Co,* 2010 QCCS 4915 at para 49 **[TAB 4]**.

[38] CCAA, section 11.3(1) **[TAB 1]**.

(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.[39]

51. The Court may not make the order for the assignment unless it is satisfied that all monetary defaults in relation to the agreement, other than those arising by reason only of the debtor's insolvency, the commencement of CCAA proceedings or the company's failure to perform a non-monetary obligation, will be remedied on or before the day fixed by the court.[40]

52. The Monitor approves of the assignment of the Assigned Contracts.[41]

53. Further, although each of the counterparties to the Assigned Contracts has consented to the assignment of the respective contracts to SEC, given the timing of the closing of the Transaction it is likely not possible to finalize assignment agreements before the closing of the Transaction.[42]

54. The Purchaser is solvent and operates a successful convenience store chain in Canada. The Purchaser is willing and able to perform all obligations under the Assigned Contracts.[43]

55. The Applicants have sought the consent of all counterparties to the Assigned Contracts.[44] Informal consent from all counterparties has been given.

56. It is appropriate to assign the Assigned Contracts for the following reasons:

(a) the assignment of the Assigned Contracts to the Purchaser is a condition precedent under the Sale Agreement;

(b) there is no prejudice to the counterparties to the Assigned Contracts who have each consented to the assignment; and

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[39] CCAA, section 11.2(3)
[40] CCAA, section 11.2(4).
[41] Sixth Report at para 4.0.7(e).
[42] *Ibid*.
[43] *Rolheiser Affidavit, supra* note 2 at para 52.
[44] *Ibid* at paras 53 & 55.

(c) the assignment will benefit creditors and stakeholders of the Applicants by enhancing the value of the estate of the Applicants.

57. The Applicants are current on payments to each counterparty to the Assigned Contracts such that there are no known monetary defaults that need to be cured in relation to the proposed agreements.

C. The Receiver Should Be Appointed

58. In the circumstances, the appointment of the Receiver is the most efficient process to implement the sale of the 772 Assets together with the Transaction. The Appointment of the Receiver is also the most efficient process to monetize assets of SIU and Ridge Meadows as required in the Sale Agreement.

59. CIBC is a secured creditor of 772, SIU, and Ridge Meadows and is entitled to make an application for the appointment of the Receiver.

60. CIBC has sent notice to 772, SIU, and Ridge Meadows as required under Section 244 of the BIA, and each of 772, SIU and Ridge Meadows has waived the 10 day notice period thereunder.[45]

61. Section 243 of the BIA provides for the appointment of a Receiver on application by a secured creditor when it is "just and convenient" to do so.[46]

62. When considering whether the appointment of a Receiver is just and convenient, the following analysis has been applied: [47]

> The question is whether it is more in the interests of all concerned to have the receiver appointed or not. In order to answer the question the court must consider all the circumstances of the case, particularly:
>
> a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;
>
> b) The parties' conduct; and

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[45] *Golding Affidavit, supra* note 11 at para 26.

[46] BIA, section 243(1) [**TAB 5**].

[47] *Business Development Bank of Canada v Pine Tree Resorts Inc and 1212360 Ontario Limited,* 2013 ONSC 1911 at para 22 **[TAB 6]**.

c) The nature of the property and the rights and interests of the parties in relation to it.

63. Any express provision for the appointment of a receiver in the relevant security documents is also considered to be a relevant factor that supports the appointment.[48]

64. In the current circumstances, CIBC's security documents provide expressly for the right to seek appointment of a receiver.[49] In addition, the appointment of the Receiver is in the interests of all concerned. It is a necessary step to maximizing returns in connection with the Transaction and preserving the subject property to be marketed as required by the Sale Agreement. 772, SIU, and Ridge Meadows consent to the appointment of the Receiver.[50]

D. Sale of the 772 Assets Should Be Approved

65. For the reasons set out above in connection with the approval of the Transaction and the assignment of the Assigned Contracts, the sale of the 772 Assets should similarly be approved. In accordance with the *Soundair* factors:

(a) the sale of the 772 Assets in conjunction with the Transaction has been identified and negotiated through the Court-approved SISP, which was followed in order to obtain the highest and best value transaction;

(b) the positions of secured creditors with an economic interest in these assets, being CIBC and Canadian Western Bank, have been considered and these parties do not object to the sale of the 772 Assets; and

(c) there have been no suggestions of unfairness in the process to market the 772 Assets, which was carried out in accordance with the Court's direction.

66. The sale of the 772 Assets also includes an assignment of two warehouse leases under which 772 is a tenant. While the landlords under these leases have confirmed they consent to an assignment, an assignment and assumption agreement has not yet been finalized. Therefore, CIBC is seeking the Court's authorization of the assignment of these leases to the Purchaser.

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[48] *RMB Australia Holdings Limited v. Seafield Resources Ltd,* 2014 ONSC 5205 at paras 28-29 [**TAB 7**].

[49] *Golding Affidavit, supra* note 11 at para 27.

[50] *Ibid* at para 30.

67. In a similar circumstance, the Ontario Superior Court of Justice [Commercial List] in *Urban Corp* determined based upon a purposive approach to accomplish the objectives of Canadian insolvency law, the court does have the power to approve such a contract assignment in the context of a receivership proceeding. If this were not the case, the ability of a receiver to discharge its function would be severely restricted, frustrating the objectives of Canadian insolvency law. The Court in *Urban Corp* specifically identified section 243(1)(c) of the BIA, which provides that the Court may appoint a receiver to take any other action the Court considers advisable.[51]

68. The Court has authority to approve the requested assignment of leases by 772 and it is submitted that authority should be exercised in this case in furtherance of the value maximizing Transaction.

E. The Releases Should Be Granted

69. The proposed form of Approval and Vesting Order seeks the Releases in favour of the Released Parties.

70. Section 11 of the CCAA gives the Court authority to make any order it considers appropriate.[52] The granting of third-party releases is grounded in section 11 of the CCAA,[53] which may be utilized by the Courts to further the objectives of the CCAA.[54]

71. In 1997, amendments made to the CCAA included certain claims against directors of a debtor company that cannot be released or compromised. The proposed Releases do not infringe upon these exclusions which are set out at section 5.1 as follows:

> **Claims against directors — compromise**
>
> **5.1 (1)** A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

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[51] *Re Urbancorp Cumberland 1 GP Inc*, 2020 ONSC 7920 [*Urban Corp*] at paras 29-31 **[TAB 8]**.

[52] CCAA, section 11 **[TAB 1]**.

[53] Rebecca Kennedy, "Third Party Release in Canada and the United States: A Comparison of the Development of the Jurisprudence with a Comment on the Decision *In re Purdue Pharma LP* (2023) 12 Insolvency Institute of Canada at 2 **[TAB 9]**.

[54] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 70 **[TAB 10]**.

> **Exception**
>
> **(2)** A provision for the compromise of claims against directors may not include claims that
>
> **(a)** relate to contractual rights of one or more creditors; or
>
> **(b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be just and equitable in the circumstances.[55]

72. The Ontario Court of Appeal in *Metcalfe* discussed these amendments, stating that "the rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign".[56]

73. The law related to releases has expanded over the years as a result of legislative changes as seen in the CCAA amendments above and case law developments.[57] Certain factors or tests courts may look at when granting a release have also emerged.

74. The Court in *Metcalfe* first set out the following list of relevant factors for a court to consider when approving a third party release:[58]

    (a) if the parties to be released were necessary and essential to the restructuring;

    (b) if the claims to be released were rationally related to the purpose of the plan and necessary for it;

    (c) if the plan could not succeed without the release;

    (d) if the parties who were to have claims against them released were contributing in a tangible and realistic way to the plan; and

    (e) if the plan would benefit not only the debtor companies but creditors generally.

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[55] CCAA, section 5.1 **[TAB 1]**.

[56] *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 [*Metcalfe*] at para 99 **[TAB 11]**.

[57] Kennedy *supra* note *53*.

[58] *Metcalfe, supra* note 56 at para 71.

75. The Ontario Court of Appeal in *Metcalfe* found that third party releases are permitted under the CCAA in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring. [59]

76. The *Metcalfe* test was restated in the restructuring proceedings of Target Canada Co. where the Ontario Superior Court of Justice [Commercial List] set out the factors that should be considered when approving third party releases as follows:[60]

> 35 There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.
>
> 36 In considering whether to approve releases in favour of third parties, the factors to be considered by the court include:
>
> a. Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
>
> b. Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
>
> c. Whether the plan could succeed without the releases;
>
> d. Whether the parties being released were contributing to the plan;
>
> e. Whether the release benefitted the debtors as well as the creditors generally;
>
> f. Whether the creditors voting on the plan had knowledge of the nature and the effect of the releases or;
>
> g. Whether the releases were fair and reasonable and not overly broad.

77. The *Lydian* case has been the leading authority most recently cited by Canadian courts for the factors to consider when approving a third party release.[61] The Court in *Lydian* slightly revised the test set out in *Metcalf* and *Target*.

78. The criteria set out in *Lydian*, is as follows:[62]

(a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

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[59] *Ibid* at para 43 (emphasis added).

[60] *Target Canada Co*, 2016 ONCA 3651 at paras 35-36 **[TAB 12]**.

[61] *Re Rambler Metals and Mining Limited*, 2023 NLSC 134 at para 92 **[TAB 13]**; *Re Acerus Pharmaceuticals Corporation*, 2023 ONSC 3314 at para 37 **[TAB 14]**.

[62] *Re Lydian International Limited*, 2020 ONSC 4006 [*Lydian*] at para 54 **[TAB 15]**.

(b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

(c) whether the plan could succeed without the releases;

(d) whether the parties being released were contributing to the plan; and

(e) whether the release benefitted the debtors as well as the creditors generally.

79. The Court may exercise its discretionary nature, and no single factor above is determinative.[63] It is not necessary for all criteria to apply for a release to be granted and some factors may assume greater weight in one case than another.[64]

80. In *Green Relief*, an additional factor was to be considered when releases are opposed, being a consideration of the quality of the claims the objectors wish to maintain.[65]

81. Courts have not been unnecessarily restrictive in who releases can apply to, as it is not just the directors and officers that support a restructuring process. Releases have routinely been granted for directors, officers, advisors, affiliated entities, interim financiers, plan sponsors, Court officers, and purchasers.[66]

82. Additionally, third-party releases are frequently granted outside of a plan of arrangement as part of a sale approval or distribution in a CCAA proceeding.[67] It is common place for restructurings to now resolve through alternatives to a plan of arrangement. The Court in *Green Relief* referenced that the absence of a plan does not deprive the court the jurisdiction to approve a release.[68]

83. Recently, the Court in *Harte Gold* stated that "CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan both on consent and in contested matters."[69]

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[63] *Ibid.*

[64] *Re Green Relief Inc*, 2020 ONSC 6837 [*Green Relief*] at para 28 **[TAB 16]***; Re Harte Gold Corp,* 2022 ONSC 653 [*Harte Gold*] at para 80 **[TAB 17]**.

[65] *Green Relief, ibid* at paras 29-30.

[66] Kennedy, s*upra* note 53 at 1*; Re Canada Airlines Corp,* 2000 ABQB 442 at para 86 **[TAB 18]**; *Harte Gold, supra* note 64 at para 78.

[67] Kennedy *ibid* at 2*; See Harte Gold* and *Re Just Energy Group Inc,* 2022 ONSC 6354 at para 67 **[TAB 19].**

[68] *Green Relief, supra* note 64 at para 23.

[69] *Harte Gold*, *supra note* 64 at para 79.

84. Releases have been granted by courts across Canada in various circumstances, including when courts are approving reverse vesting orders,[70] terminating CCAA proceedings,[71] and approving transactions.[72]

Applying the Lydian Factors to the Releases

The Released Parties are necessary and essential to the success of the restructuring

85. The Released Parties have made significant and critical contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the director and management of Applicants have been instrumental in the conduct of the pre-filing strategic process, the SISP, and the continued operations of the Applicants during the CCAA Proceedings. The director and management are needed following the Transaction to operate the Logistics Companies business for SEC through the transition period.

86. The Released Parties have been crucial in all restructuring efforts that have occurred leading up to the Transaction. The Released Parties have provided necessary guidance and stability during the ongoing restructuring proceedings.

87. The Released Parties have achieved principal success in resolving and bringing to this Court the proposed Transaction, designed for the benefit of all of the Applicants' stakeholders, including their lenders, employees, key customer, vendors, and the provincial tax authorities.

The claims to be released are rationally connected to the restructuring

88. The claims proposed to be released are rationally connected to the Applicants' restructuring, being principally found in two buckets: (i) claims against the director and officers, as have largely arisen through statutory liabilities (i.e., not liabilities otherwise excluded under section 5.1(2) of the CCAA); and (ii) claims against professional advisors, whose only nexus of connection to the Applicants is through this restructuring proceeding.

89. The proposed Releases do not extend to matters that are not connected with the Applicants' ongoing liquidity problems, which has been the basis for the restructuring.

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[70] *Green Relief*, *supra* note 64; See also *Arrangement Relatif à Blackrock Metals Inc*, 2022 QCCS 2828 at para 128 **[TAB 20]**.

[71] *Re Entrec Corporation*, 2020 ABQB 751 at paras 3-7, 9 **[TAB 21]**.

[72] *In the Matter of a Plan of Arrangement of UrtheCast Corp*, 2021 BCSC 1819 at paras 91-95 **[TAB 22]**.

90. The proposed Releases do not seek to compromise or extinguish claims as against the Applicants themselves, who will continue to operate post-closing of the Transaction.

91. Financially, the Releases will materially improve the return to creditors, including the beneficiaries of the Tobacco Tax Charge, as the Releases will alleviate the need for the director and officers to rely on the $4,000,000 D&O Charge, which ranks ahead of the Tobacco Tax Charge. Operationally, the Releases will support the director continuing to operate the business through the transition period under the TSA. The director and officers are necessary to the Transaction as a whole and thus to the successful restructuring and transition of the business to SEC.

92. As stated in *Harte Gold*, "given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the company's restructuring".[73]

The Transaction cannot succeed without the proposed Releases

93. The Transaction contemplates a lengthy transition of the business from the Applicants to the Purchaser pursuant to the TSA. The Applicants, their director and officers, employees, and counsel will continue to provide critical management and advisory services during this extended transition period.

94. Absent the Releases, the Released Parties will have ongoing and increasing risk, at the same time as these parties having a declining incentive to operate the business through the TSA period. This will strain and disrupt the ongoing leadership and professional advice that is needed through the TSA, which could put the successful transition of the business, and the jobs of hundreds of employees in jeopardy.

95. By contrast, granting the Releases de-risks the necessary personnel needed to complete the restructuring through the TSA period. The Releases assures the necessary and ongoing leadership will continue without the interference of personal exposure for corporate liabilities. This is a rational request that is fundamental to the success of the restructuring Transaction.

[73] *Ibid* at para 81.

The Releases benefit the Applicants as well as the creditors and stakeholders generally

96. The success of the Transaction is likely to be seriously compromised if the Releases are not given due to the particularly long TSA period. It follows that the Releases benefit the Applicants as well as the creditors and stakeholders generally.

97. If the Transaction fails, it is a materially worse alternative for all of the affected parties, including lenders, employees, customers, provincial tax authorities, and vendors alike.

98. There is also a direct, measurable benefit to certain senior creditors, as set out above, concerning the alleviation of the director's and officers' need for the D&O Charge. If the Releases contemplated in the Transaction are granted, any claims that would otherwise fall to the D&O Charge are resolved and the potential holdback of $4,000,000 will be available to subordinate stakeholders. This includes the beneficiaries of the Tobacco Tax Charge, offsetting any potential prejudice to the provincial tax parties that may arise from the Releases.

99. Further, the Releases negate the need for an expensive and time consuming claims process to determine any entitlement to such funds.[74]

Creditors are aware of the nature and effect of the proposed Releases

100. All creditors on the service list were served with the Application and Rolheiser Affidavit on November 7, 2023. Further, the Monitor's counsel served the Sixth Report on the service list on November 8, 2023.

101. The form of proposed Release is included in the draft form of approval and vesting order, which is a schedule to the Application.

102. Stakeholders have had ample notice and time to raise concerns with respect to the Application.

103. As of the date of this Brief of Law, the Applicants are not aware of any creditor or other stakeholder who is objecting to the proposed Releases or any other relief sought in the Application.

[74] Sixth Report at para 4.3.6.

The Releases are fair and reasonable in the circumstances of this case

104. The proposed Releases are appropriately constrained, carving out fraud, gross negligence, and wilful misconduct and matters enumerated under section 5.1(2).

105. In respect of the released claims, the Applicants are unaware of any current outstanding director and officer liabilities. Similarly, the Applicants are unaware of any current claims against the Applicants' or the Purchaser's advisors related to their provision of services to the Applicants or to the Purchaser, as applicable. As such, the proposed Releases are aimed at liabilities that could materialize post-closing, but would arise out of pre-closing circumstances. In this regard, the Releases are forward-looking, and essentially establish an incentive, but are temporally appropriate, relating to the pre-closing period.

106. As noted above, there is no other incentive in place for the director's and officers' necessary continued contributions to this restructuring proceeding. The proposed Releases are not in addition to a key employee retention plan or any other current or horizon benefit. The proposed Releases in fact alleviate reliance on the only other director's benefit in the process – the D&O Charge – ensuring greater distributions to estate creditors in the result. This drives added value to stakeholders.

107. In respect of the nature of the Transaction, the Releases are an important consideration, as a result of how the terms and timing of the transition arrangement are to work. The TSA requires the continued operation of, and the director's continued participation with, Wallace & Carey for the next 18 months or more. This will allow a measured transition of the logistics business from the Applicants to the Purchaser (or third party service provider), while minimizing business disruption for the Purchaser. The TSA is a critical component of the Transaction, and the director, management team, and advisors are all needed for that process.

108. Under the terms of the TSA, the director receives indemnification from the Purchaser on a go-forward basis, but has no ability to address or ensure resolution of potential retrospective claims. The TSA is based on a budget approval model, and has very tight controls over cash and revenue streams. This restricts the director's and officers' ability to resolve accumulated liabilities. This is appropriate – the spirit and inherent operation of the CCAA is to compromise past liabilities for greater future prospects – but at the same time this leaves the director and officers in control of an increasingly complex operation, with significant

accumulation of potential liabilities, and essentially no ability to control resources on a go-forward basis.

109. This juxtaposition is resolved by the proposed Releases.

110. As a point of focus, the statutory provincial tobacco taxes ("**PTT**") are a primary driver of the requested Releases.[75] The Applicants are not seeking to absolve the companies of PTT obligations. The PTT is going to be partially, if not wholly repaid from the proceeds of the Transaction and other recoveries related thereto.

111. If the Transaction proceeds and other funds generated are insufficient to fully satisfy the accrued PTT, a director can be personally liable for unpaid PTT.

112. The proposed Releases are fair and reasonable in view of the PTT for the following reasons:

    (a) As set out above, the PTT has a priority charge granted under the ARIO; however, this charge is subordinate to the D&O Charge. To the extent the granting of the Releases alleviates the D&O Charge, this ensures greater flow of funds to be applied against the Tobacco Tax Charge.

    (b) The provincial legislation, using Alberta as the example, expressly states that "a director is not liable under subsection (1) if the director exercised due diligence in attempting to ensure the corporation remitted the tax".[76]

    (c) Diligence of the director of the Applicants, in this case, is observed in the fact:

        (i) the Applicants, being in the logistics business, were particularly and severely impacted by COVID-19 shut-downs that were imposed by the provincial governments;

        (ii) the Applicants were given deferrals of PTT by the Crown, as a statutory measure of support during the pandemic, so it would be unjust for the Crown to now impute that liability upon the director personally, after specifically sponsoring the accumulation of PTT arrears;

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[75] E.g., see section 20 of the *Tobacco Tax Act*, RSA 2000, c T-4 **[TAB 23]**.

[76] *Ibid*, section 20(2.1).

(iii) the evidence is robust in respect of the challenges the Applicants faced, in respect of liquidity problems, operational constraints and other factors, all not within the director's and officers' control;

(iv) comparatively, there is no evidence or suggestion of oversight or misjudgment on the part of Wallace & Carey's director, nor malfeasance or impropriety;

(v) the director and officers restored the businesses to profitability post-COVID,[77] demonstrating ongoing effort, commitment, good faith and diligence, despite prevailing head-winds;

(vi) the management team saw the necessity to engage professional advisors, led the companies into and through CCAA, to the culmination of the SISP and the Application for approval of the Transaction – it is submitted diligence is inherent in the engagement of the process and respective professionals – the alternative would have been business failure; and

(vii) the director has committed significant assets that are outside the CCAA ring-fence (that is, assets and properties owned by subsidiaries of CMI, which are companies that are not inside the CCAA), to the restructuring process and is supportive of the proposed receivership to monetize those assets for the repayment of priority creditors and PTT.

113. On the whole, the proposed Releases are supported in that the director has exercised diligence in all matters to date, the Transaction is unique in requiring the director's continued operational support without material control of cash flow, and the Releases are not of liquidated claims, so are not specifically prejudicing any counterparty.

114. The scope of the Releases is sufficiently balanced and will allow the Applicants and the Released Parties to move forward with the Transaction without hindrance and to carry out the services required during the transition period under the TSA.

[77] E.g., see Monitor's Pre-Filing Report, at section 2.2.

115. The Applicants have been, and will continue to be, fully transparent with the provincial authorities, including in respect of any payments and payment shortfalls.

116. The Applicants submit that, based on the factors set out in *Metcalf, Lydian*, *Harte Gold*, and *Green Relief*, the Releases should be approved as they are reasonable and fair in the circumstances, imperative to the restructuring, and aligned with the objectives of the CCAA.

F. The Sealing Order Should Be Granted

117. The Applicants and the Monitor seek an Order temporarily sealing the Confidential Exhibit, which contains a summary of the LOIs received during the SISP.

118. The Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)* set out the seminal test for determining whether a sealing order or publication ban should be granted. The Court held that a confidentiality order should only be granted when: [78]

(a) the order is necessary to prevent risk to an important interest, including a commercial interest, because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

119. The Supreme Court of Canada revisited the *Sierra Club* test in *Sherman Estate v Donovan* recasting the test as follows: [79]

> 38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (Sierra Club, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;

[78] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 **[TAB 24]**.

[79] *Sherman Estate v Donovan*, 2021 SCC 25 at para 38 **[TAB 25]**.

> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

120. The Confidential Exhibit contains commercially sensitive information which has the potential to negatively impact the value attained for the Purchased Assets under a future sale process that could be required in the event the Transaction does not close.

121. Further, the Transaction may not entail SEC acquiring the Logistics Companies' business east of Alberta. As a result a further sale process may be required for certain assets that are not wanted by the Purchaser.

122. The required media notice of the proposed publication ban has been given, and the Applicants are not aware of any party that is prejudiced by the proposed sealing order.

123. The Applicants believe that the Confidential Exhibit should not be made public until after the conclusion of these CCAA Proceedings.

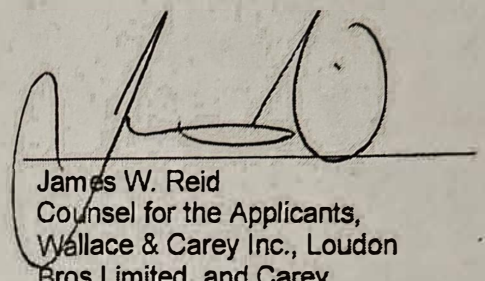
124. The Applicants respectfully request that this Honourable Court grant the requested order temporarily sealing the Confidential Exhibits.

V. CONCLUSION

125. Based on the foregoing, the Applicants and CIBC request that this Honourable Court grant orders for the relief noted at paragraphs 2 and 3.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF NOVEMBER, 2023.

MILLER THOMSON LLP

Per: 

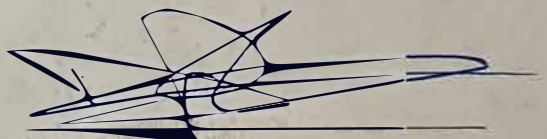
James W. Reid
Counsel for the Applicants, Wallace & Carey Inc., Loudon Bros Limited, and Carey Management Inc.

NORTON ROSE FULBRIGHT CANADA LLP

Per: Evan Cobb

Evan Cobb
Counsel for Canadian Imperial Bank of Commerce, as Agent

DENTONS CANADA LLP

Per: 

Derek M. Pontin
Counsel for the director of Wallace & Carey Inc., Loudon Bros Limited, and Carey Management Inc.

TABLE OF AUTHORITIES

TAB NO.	AUTHORITY
1	*Companies' Creditors Arrangement Act,* RSC 1985, C C-36
2	*Re Target Canada Co*, 2015 ONSC 2066
3	*Royal Bank V Soundair Corp,* 1991 CARSWELLONT 205
4	*Re White Birch Paper Holding Co*, 2010 QCCS 4915
5	*Bankruptcy And Insolvency Act*, RSC 1985, C B-3
6	*Business Development Bank Of Canada v Pine Tree Resorts Inc and 1212360 Ontario Limited,* 2013 ONSC 1911
7	*RMB Australia Holdings Limited v Seafield Resources Ltd,* 2014 ONSC 5205
8	*Re Urbancorp Cumberland 1 GP Inc*, 2020 ONSC 7920
9	Rebecca Kennedy, "Third Party Release in Canada and the United States: A Comparison of the Development of the Jurisprudence With a Comment on the Decision *In Re Purdue Pharma LP* (2023) 12 Insolvency Institute Of Canada
10	*Century Services Inc* v *Canada (Attorney General)*, 2010 SCC 60
11	*Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587
12	*Target Canada Co*, 2016 ONCA 3651
13	Re *Rambler Metals And Mining Limited*, 2023 NLSC 134 AT PARA 92
14	*Re Acerus Pharmaceuticals Corporation*, 2023 ONSC 3314

15	*Re Lydian International Limited*, 2020 ONSC 4006
16	*Re Green Relief Inc*, 2020 ONSC 6837
17	*Re Harte Gold Corp,* 2022 ONSC 653
18	*Re Canada Airlines Corp,* 2000 ABQB 442
19	*Re Just Energy Group Inc,* 2022 ONSC 6354
20	*Arrangement Relatif À Blackrock Metals Inc*, 2022 QCCS 2828
21	*Re Entrec Corporation*, 2020 ABQB 751
22	*In The Matter Of A Plan Of Arrangement Of Urthecast Corp*, 2021 BCSC 1819
23	*Tobacco Tax Act*, RSA 2000, C T-4
24	*Sierra Club Of Canada V Canada (Minister Of Finance)*, 2002 SCC 41
25	*Sherman Estate v Donovan*, 2021 SCC 25

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 October 17, 2023

Last amended on April 27, 2023

À jour au 17 octobre 2023

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Compromise with secured creditors

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

R.S., c. C-25, s. 5.

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis 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. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Resignation or removal of directors

(4) Where 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 debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Démission ou destitution des administrateurs

(4) 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 débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant

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 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.

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

2019, ch. 29, art. 136.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

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

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de

offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269.

toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard de la propriété intellectuelle

(8) Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78; 2017, ch. 26, art. 14; 2018, ch. 27, art. 269.

TAB 2

2015 ONSC 2066
Ontario Superior Court of Justice [Commercial List]

Target Canada Co., Re

2015 CarswellOnt 5211, 2015 ONSC 2066, 251 A.C.W.S. (3d) 377, 30 C.B.R. (6th) 335

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

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

Morawetz R.S.J.

Heard: March 30, 2015
Judgment: April 2, 2015
Docket: CV-15-10832-00CL

Proceedings: full reasons to *Target Canada Co., Re* (2015), 2015 CarswellOnt 4745, Morawetz R.S.J. (Ont. S.C.J. [Commercial List])

Counsel: Shawn Irving, Robert Carson, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz, for Target Corporation
Harvey Chaiton, for Directors and Officers
Alan Mark, Melaney Wagner, for Monitor, Alvarez & Marsal Inc.
Lad Kucis (Agent), for Pharmacy Franchisee Associaton Canada

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Assets in issue consisted of certain goods bearing logos, trademarks and other proprietary elements — Applicants brought motion for approval of asset purchase agreement — Motion granted — Asset purchase agreement was approved and approval and vesting order was granted — Criteria for approval of purchased assets to related party was set out in ss. 36(3) and (4) of Companies' Creditors Arrangement Act — Applicants had established that price offered by related party, viewed in isolation, exceeded all three independent valuations of purchased assets obtained by applicants and monitor — In addition, related party would assume substantial costs associated with removing exterior signage on stores — Risk theoretically associated with related party transaction had been satisfactorily addressed through efforts of applicants and monitor to evaluate salability of purchased assets to unrelated party — Process was reasonable in light of unique assets involved — Monitor supported motion for approval of asset purchase agreement — Transaction was in best interests of stakeholders — Requirements of s. 36(7) of Act had been satisfied.
Table of Authorities
Cases considered by *Morawetz R.S.J.*:

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 36 — considered

s. 36(3) — considered

s. 36(4) — considered

s. 36(7) — considered

FULL REASONS to judgment reported at *Target Canada Co., Re* (2015), 2015 CarswellOnt 4745 (Ont. S.C.J. [Commercial List]), concerning motion for approval of asset purchase agreement.

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

1 The Applicants bring this motion for approval of the Asset Purchase Agreement (the "APA") among Target Canada Co. ("TCC"), Target Brands, Inc. ("Target Brands") and Target Corporation, and vesting TCC's right, title and interest in and to the Purchased Assets (as defined in the APA) in Target Corporation.

2 The requested relief was not opposed.

3 The Purchased Assets consist of certain goods bearing the Target logos, trademarks and other proprietary elements. The Applicants take the position that the Purchased Assets cannot be sold by the Agent in the Inventory Liquidation Process unless expressly designated by TCC, because of the rights of Target Brands (a subsidiary of Target Corporation) to control the use of the intellectual property (the "Target IP").

4 The criteria for approval of the Purchased Assets to Target Corporation, a related party, is set out in sections 36(3) and (4) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (CCAA).

36(3) Factors to be considered — In deciding whether to grant authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36(4) Additional Factors — related persons — If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

5 All of the Purchased Assets represent various categories of Target Branded items, such as shopping carts, shopping baskets and the exterior signage on TCC stores. The Purchased Assets are unique in that they incorporate logos, trademarks or other indicia of TCC or its affiliates.

6 Target Brands views the Purchased Assets as using or displaying IP that is proprietary to Target Brands. Target Brands has not agreed to allow the Purchased Assets to be sold by the Agent. The Applicants are of the view that Target Brands would also likely contest any sale of the Purchased Assets to a third party purchaser.

7 The record establishes that the Applicants requested bids for the Purchased Assets from the liquidation firms which applied to be selected as agent. By following this process, the Applicants submit they sought good faith offers by which TCC could sell the assets to an unrelated third party. Only one bidder included some of the items in its bid.

8 Separately from the auction process, Target Corporation submitted an offer to purchase a number of the assets.

9 The Applicants and the Monitor formed the view that if a third party purchaser for the items could be found, such purchaser would likely discount its price to take into account the impact of the IP. That impact included the cost to remove brand or other IP elements and/or the litigation risks associated with a potential challenge by Target Brands to any unauthorized use of its IP.

10 The Applicants and the Monitor submit that it would not be beneficial to stakeholders as a whole to incur additional costs in seeking to market these unique assets. Instead, the Applicants and the Monitor sought to establish objective benchmarks to ensure that the price offered by Target Corporation was reasonable and fair, and exceeded any third party offer that might be made.

11 The Applicants have established that the price offered by Target Corporation, viewed in isolation, exceeds all three independent valuations of the Purchased Assets obtained by the Applicants and the Monitor. In addition, Target Corporation will assume the substantial costs associated with removing the exterior signage on TCC stores.

12 TCC, Target Brands and Target Corporation entered into the APA as of March 23, 2015. Under the Agreement, Target Corporation has agreed to purchase the Purchased Assets for U.S. $2,215,020.

13 The Applicants are of the view that Target Corporation is effectively the only logical purchaser for the Purchased Assets due to their unique nature.

14 The Applicants submit that, taking into account the factors listed in section 36(3) of the CCAA, the test set out in section 36(4) of the CCAA, and the general interpretative principles underlying the CCAA, the Court should grant the approval and vesting order. Further, the Applicants submit that in the absence of any indication that the Applicants have acted improvidently, the informed business judgment of the Applicants — which is supported by the advice and the consent of the Monitor, that the APA is in the best interests of the Applicants and their stakeholders and is entitled to deference by the Court.

15 I note that the factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the CCAA. Further, I also note that the factors overlap, to a certain degree, with the factors set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) ("*Soundair*"). The *Soundair* factors were applied in approving sale transactions under pre-amendment CCAA case law. Under section 36(4) of the CCAA, the Court must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interests of the stakeholders of the Applicants and that the risk to the estate associated with a related party transaction have been mitigated.

16 I am satisfied that the risk theoretically associated with a related party transaction has been satisfactorily addressed through the efforts of the Applicants and the Monitor to evaluate the salability of the Purchased Assets to an unrelated party.

17 I am also satisfied that the process was reasonable in light of the unique assets involved. Whether or not a legal challenge by Target Brands would ultimately be successful, the litigation risks would, in my view, be expected to materially affect the value of the Purchased Assets to an unrelated third party. Further, the uniqueness of the Purchased Assets makes Target Corporation the only realistic purchaser. Only Hilco Global ("Hilco") submitted a bid with respect to some, but not all, of the assets included in the Initial Offer. None of the remaining bidders elected to submit an offer. Given that only one of the liquidation firms submitted a bid, the Applicants and the Monitor considered whether the proposed sale to Target Corporation was fair and reasonable. They came to the conclusion that the likely price to be obtained by an unrelated third party did not support the sale of the Purchased Assets to an unrelated third party.

18 As required by section 36 of the CCAA, the Monitor has been involved throughout the proposed transaction. The Monitor's Seventh Report comments at length on the transaction, and specifically whether it would be fair and reasonable to accept the offer from Target Corporation. The Monitor supports the conclusion that the purchase price offered by Target Corporation far exceeds the estimated liquidation values obtained. The Monitor is of the opinion that the APA benefits the creditors of the Applicants. The Monitor supports the motion for approval of the APA.

19 I am satisfied that the transaction is in the best interests of stakeholders. The transaction does provide some enhanced economic value to the estate. Further, the APA Agreement allows the Monitor, TCC and Target Corporation to agree upon the timetable for delivery of the Purchased Assets. This flexibility is of assistance to TCC and its Inventory Liquidation Process. In addition, there are no fees or commission payable on the transaction and the Agreement does provide certain guaranteed value to TCC.

20 The Applicants submit that all of the other statutory requirements for obtaining relief under section 36 have been satisfied. In particular, no parties have registered security interests against the Purchased Assets.

21 I am also satisfied that the requirements of section 36(7) have been satisfied. This section provides a degree of protection to employees and former employees for unpaid wages the employees would have been entitled to receive under the *Bankruptcy and Insolvency Act*, in addition to amounts that are owing for post-filing services to a debtor company. I also accept the Applicants' submissions that because they have been paying employees for all post-filing services and the Employee Trust will satisfy claims arising from any early termination of eligible employees, the requirements of section 36(7) have been satisfied.

22 For the foregoing reasons, the Asset Purchase Agreement is approved and the Approval and Vesting Order is granted.

Order accordingly.

End of Document

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air

Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it

negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not*

TAB 4

2010 QCCS 4915
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 10954, 2010 QCCS 4915, [2010] Q.J. No. 10469, 193
A.C.W.S. (3d) 1067, 72 C.B.R. (5th) 49, J.E. 2010-2002, EYB 2010-180748

In the Matter of the Plan of Arrangement and Compromise of : White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F. F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de gros Cacouna inc. and Papier Masson ltée (Petitioners) v. Ernst & Young Inc. (Monitor) and Stadacona Limited Partnership, F. F. Soucy Limited Partnership and F. F. Soucy Inc. & Partners, Limited Partnership (Mises en cause) and Service d'impartition Industriel Inc., KSH Solutions Inc. and BD White Birch Investement LLC (Intervenant) and Sixth Avenue Investment Co. LLC, Dune Capital LLC and Dune Capital International Ltd. (Opposing parties)

Robert Mongeon, J.C.S.

Heard: 24 september 2010
Oral reasons: 24 september 2010 *
Written reasons: 15 october 2010
Docket: C.S. Montréal 500-11-038474-108

Proceedings: refused leave to appeal *White Birch Paper Holding Co., Re* (2010), 2010 QCCA 1950 (C.A. Que.)

Counsel: None given.

Subject: Insolvency; Corporate and Commercial

Headnote

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

Corporation experienced financial difficulties and placed itself under protection of Companies' Creditors Arrangement Act — In context of its restructuring, corporation contemplated sale of all its assets — Bidding process was launched and several investors filed offers — Corporation entered into asset sale agreement with winning bidder — US bankruptcy court approved process without modifications — Court approved process with some modifications and set date of September 17, 2010, as limit to submit bid — On September 17, unsuccessful bidder filed new bid — At outcome of bidding process, corporation decided to sell its assets once again to winning bidder — On September 24, corporation brought motion seeking court's approval of sale — Motion granted — Evidence showed that no stakeholder objected to sale and that all parties agreed to participate in bidding process — Once bidding process was started, there was no turning back unless process was defective — Court was not convinced that winning bid should be set aside just because unsuccessful bidder lost — Court was of view that bidding process met criteria established by jurisprudence — In addition, monitor supported position of winning bidder — Therefore, sale should be approved as is.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

Société a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, la société a considéré vendre tous ses actifs — Processus d'appel d'offres a été lancé et plusieurs investisseurs ont déposé leurs offres — Société a signé une entente de vente d'actifs avec le soumissionnaire gagnant — Tribunal américain de faillite a approuvé le processus sans modifications — Tribunal a approuvé le processus avec quelques modifications et a fixé la date du 17 septembre 2010 comme étant la date limite pour soumettre une soumission — Soumissionnaire déçu a déposé une nouvelle offre le 17 septembre — Au terme du processus d'appel d'offres, la société a décidé de vendre ses actifs une fois de plus au soumissionnaire gagnant — Société a déposé, le 24 septembre, une requête visant

addressed the Court for directions but nothing of the sort was done. The process was allowed to continue and it appears evident that it is only because of the end result which is not satisfactory that we now have a contestation of the results.

43 The arguments which were put before me with a view to setting aside the winning bid (leaving aside those under Section 36 of the CCAA to which I will come to a minute) have not convinced me to set it aside. The winning bid certainly satisfies a great number of interested parties in this file, including the winning bidders, including the Monitor and several other creditors.

44 I have adverse representations from two specific groups of creditors who are secured creditors of the White Birch Group prior to the issue of the Initial Order which have, from the beginning, taken strong exceptions to the whole process but nevertheless, they constitute a limited group of stakeholders. I cannot say that they speak for more interests than those of their own. I do not think that these creditors speak necessarily for the mass of unsecured creditors which they allege to be speaking for. I see no benefit to the mass of creditors in accepting their submissions, other than the fact that the Monitor will dispose of US$500,000.00 less than it will if the winning bid is allowed to stand.

45 I now wish to address the question of Section 36 CCAA.

46 In order to approve the sale, the Court must take into account the provisions of Section 36 CCAA and in my respectful view, these conditions are respected.

47 Section 36 CCAA reads as follows:

> 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> (4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
>
> (5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (*a*) or (*b*).

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

(added underlining)

48 The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.

49 The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.

50 Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 CarswellOnt 3509 (Ont. S.C.J. [Commercial List]), and she writes at paragraph 13:

> The proposed disposition of assets meets the Section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.* decision. Indeed, to a large degree, the criteria overlap. The process was reasonable as the Monitor was content with it (and this is the case here). Sufficient efforts were made to attract the best possible bid (this was done here through the process, I don't have to review this in detail); the SISP was widely publicized (I am given to understand that, in this present instance, the SISP was publicized enough to generate the interest of many interested bidders and then a smaller group of Qualified Bidders which ended up in the choice of one « Stalking Horse » bidder); ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy (this was all done in the present case.) The logical extension of that conclusion is that the AHC Transaction is as well (and, of course, understand that the words « preferable to a bankruptcy » must be added to this last sentence). The effect of the proposed sale on other interested parties is very positive. (It doesn't mean by saying that, that it is positive upon all the creditors and that no creditor will not suffer from the process but given the representations made before me, I have to conclude that the proposed sale is the better solution for the creditors taken as a whole and not taken specifically one by one) Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors.

51 Here, we may have an argument that the sale will not provide significant recoveries for unsecured creditors but the question which needs to be asked is the following: "Is it absolutely necessary to provide interest for all classes of creditors in order to approve or to set aside a "Stalking Horse bid process"?

52 In my respectful view, it is not necessary. It is, of course, always better to expect that it will happen but unfortunately, in any restructuring venture, some creditors do better than others and sometimes, some creditors do very badly. That is quite

unfortunate but it is also true in the bankruptcy alternative. In any event, in similar circumstances, the Court must rely upon the final recommendation of the Monitor which, in the present instance, supports the position of the winning bidder.

53 In *Nortel Networks Corp., Re*, Mister Justice Morawetz, in the context of a Motion for the Approval of an Assets Sale Agreement, Vesting Order of approval of an intellectual Property Licence Agreement, etc. basically took a similar position (2009 CarswellOnt 4838 (Ont. S.C.J. [Commercial List]), at paragraph 35):

> The duties of the Court in reviewing a proposed sale of assets are as follows:
>
> 1) It should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> 2) It should consider the interests of all parties;
>
> 3) It should consider the efficacy and integrity of the process by which offers have been obtained;
>
> 4) and it should consider whether there has been unfairness in the working out of the process.

54 I agree with this statement and it is my belief that the process applied to the present case meets these criteria.

55 I will make no comment as to the standing of the « bitter bidder ». Sixth Avenue mayo have standing as a stakeholder while it may not have any, as a disgruntled bidder.

56 I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c. in *Abitibi Bowater*, in his decision of May 3rd, 2010 where, in no unclear terms he did not think that as such, a bitter bidder should be allowed a second strike at the proverbial can.

57 There may be other arguments that could need to be addressed in order to give satisfaction to all the arguments provided to me by counsel. Again, this has been a long day, this has been a very important and very interesting debate but at the end of the whole process, I am satisfied that the integrity of the « Stalking Horse » bid process in this file, as it was put forth and as it was conducted, meets the criteria of the case law and the CCAA. I do not think that it would be in the interest of any of the parties before me today to conclude otherwise. If I were to conclude otherwise, I would certainly not be able to grant the suggestion of « Sixth Avenue », to qualify its bid as the winning bid; I would have to eradicate the entire process and cause a new auction to be held. I am not prepared to do that.

58 I believe that the price which will be paid by the winning bidder is satisfactory given the whole circumstances of this file. The terms and conditions of the winning bid are also acceptable so as a result, I am prepared to grant the Motion. I do not know whether the Order which you would like me to sign is available and I know that some wording was to be reviewed by some of the parties and attorneys in this room. I don't know if this has been done. Has it been done? Are KSH and SIII satisfied or content with the wording?

Attorney:

I believe, Mister Justice, that KSH and SIII have.....their satisfaction with the wording. I believe also that Dow Jones, who's present, ...their satisfaction. However, AT&T has communicated that they wish to have some minor adjustments.

The Court:

Are you prepared to deal with this now or do you wish to deal with it during the week-end and submit an Order for signature once you will have ironed out the difficulties, unless there is a major difficulty that will require further hearing?

Attorney:

TAB 5

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 October 17, 2023

Last amended on April 27, 2023

À jour au 17 octobre 2023

Dernière modification le 27 avril 2023

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(g) generally, for carrying into effect the purposes and provisions of this Part.

R.S., 1985, c. B-3, s. 240; 1992, c. 27, s. 88.

f) changer ou prescrire, à l'égard de toute province, les catégories de dettes auxquelles la présente partie ne s'applique pas;

f.1) régir le renvoi des procédures dans une province autre que celle où l'ordonnance de fusion a été rendue;

g) prendre toute autre mesure d'application de la présente partie.

L.R. (1985), ch. B-3, art. 240; 1992, ch. 27, art. 88.

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

(c) take any other action that the court considers advisable.

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

TAB 6

Most Negative Treatment: Check subsequent history and related treatments.

2013 ONSC 1911
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. Pine Tree Resorts Inc.

2013 CarswellOnt 12749, 2013 ONSC 1911, 232 A.C.W.S. (3d) 393, 6 C.B.R. (6th) 205

Business Development Bank of Canada Applicant and Pine Tree Resorts Inc. and 1212360 Ontario Limited Respondents

Mesbur J.

Heard: March 27, 2013
Judgment: April 2, 2013
Docket: CV-13-9991-00CL

Proceedings: leave to appeal refused *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (2013), 115 O.R. (3d) 617, 100 C.B.R. (5th) 91, 2013 ONCA 282, 2013 CarswellOnt 5026, 307 O.A.C. 1 (Ont. C.A.)

Counsel: George Benchetrit for Applicant
Milton Davis for Respondents
David Preger for Romspen Investment Corporation

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure; Property

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.E Miscellaneous

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Respondents owned and operated inn — Inn experienced financial difficulties over years — Applicant had lent respondent over $3.3 million in two loans secured by first mortgages against bulk of properties that formed inn's premises — Applicant held additional security through general security agreements granted by respondents over all assets — Respondents failed to make scheduled payments that were due and were in default under loan agreements and mortgages — In August 2011, applicant demanded payment of outstanding arrears but respondents failed to pay — In October 2011, applicant demanded payment of outstanding balances of loan — Parties worked toward forbearance agreement — They did not reach agreement, but respondents paid arrears under loans until January 2012 — Respondents were required to make large principal payment in July 2012 but did not — Applicant issued demand for payment of loan arrears — Applicant applied for appointment of receiver over assets of respondents — Application granted — Respondents were in default under mortgages and general security agreements — Parties agreed that inn must be sold, but disagreed on how sale should be accomplished — Where there was disagreement among stakeholders about how property should be marketed, it was appropriate to appoint receiver — Applicant had right to appoint receiver under general security agreements and mortgages — Receivership would benefit second mortgagee, as it would not be

put to immediate expense of paying arrears and other costs under mortgages — Receivership was best way to protect interests of all stakeholders with view to maximizing value for all.

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Miscellaneous

Respondents owned and operated inn — Inn experienced financial difficulties over years — Applicant had lent respondent over $3.3 million in two loans secured by first mortgages against bulk of properties that formed inn's premises — Applicant held additional security through general security agreements granted by respondents over all assets — Respondents failed to make scheduled payments that were due and were in default under loan agreements and mortgages — In August 2011, applicant demanded payment of outstanding arrears but respondents failed to pay — In October 2011, applicant demanded payment of outstanding balances of loan — Parties worked toward forbearance agreement — They did not reach agreement, but respondents paid arrears under loans until January 2012 — Respondents were required to make large principal payment in July 2012 but did not — Applicant issued demand for payment of loan arrears — Applicant applied for appointment of receiver over assets of respondents — Application granted — Respondents were in default under mortgages and general security agreements — Parties agreed that inn must be sold, but disagreed on how sale should be accomplished — Where there was disagreement among stakeholders about how property should be marketed, it was appropriate to appoint receiver — Applicant had right to appoint receiver under general security agreements and mortgages — Receivership would benefit second mortgagee, as it would not be put to immediate expense of paying arrears and other costs under mortgages — Receivership was best way to protect interests of all stakeholders with view to maximizing value for all.

Table of Authorities

Cases considered by *Mesbur J.*:

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 74 C.B.R. (5th) 300, 2011 ONSC 1007, 2011 CarswellOnt 896 (Ont. S.C.J.) — referred to

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — referred to

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 CarswellBC 1084, 2003 BCSC 640, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

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

Generally — referred to

s. 243(1) — considered

s. 244 — referred to

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

s. 101 — considered

Mortgages Act, R.S.O. 1990, c. M.40

Generally — referred to

s. 1 "mortgagor" — considered

s. 22 — considered

s. 22(1) — considered

APPLICATION for appointment of receiver.

***Mesbur J.*:**

The application:

1 Business Development Bank of Canada (BDC) applies for the appointment of a Receiver over the assets of the respondents. The respondents own and operate the Delawana Inn in Honey Harbour Ontario. The Inn has experienced financial difficulties over the years, particularly since the economic downturn of 2008.

2 BDC has lent the respondents just over $3.3 million advanced in two loans, the first for $3 million and the second for $325,000. The two loans are secured by first mortgages against the bulk of the properties forming the Inn's premises. In addition, BDC holds additional security by way of general security agreements granted by each of the respondents over all of their assets. Mr. Fischtein, the principal of the respondents, has also provided his personal guarantee of 15% of the outstanding balance on the larger loan. Both the mortgages and the GSAs give the bank the right to appoint a receiver if the respondents default.

3 The respondents' ongoing financial difficulties resulted in their loans being transferred to the bank's special accounts department in April of 2011. The respondents then failed to make the scheduled principal and interest payments due in July and August, 2011. They also failed to pay realty taxes. They were thus in default under their loan agreements and the mortgages.

4 The bank demanded payment of the outstanding arrears in August 2011. The respondents failed to pay. In October of 2011, the bank demanded payment of the outstanding balances of the loan. The loan agreements and mortgages provide for acceleration of payment in the event of default. At the same time, the bank issued a notice of intention to enforce security (NITES) under s. 244 of the *Bankruptcy and Insolvency Act*.

5 The respondents then asked BDC to postpone principal payments due under the loans, so they could put forward a turnaround proposal. The bank agreed, and the parties worked toward a forbearance agreement. They did not reach an agreement, but the respondents did pay all principal and interest arrears under the loans in January 2012.

6 Under the loans, the respondents were required to make a large principal payment in July 2012. Just before the payment was due, the respondents advised BDC they would not make the payment. BDC then issued a demand for payment of the loan arrears.

7 The respondents asked BDC to restructure the loan, since they were hoping to redevelop the Inn into a condominium/ time-share resort.

8 The respondents and BDC then entered into a letter agreement in September of 2012 amending the loan agreement. This amendment stretched principal payments, and the term of the loans, out to October of 2031. Even though the loan was restructured in this way, the respondents still did not pay. They requested further extensions.

9 Finally, BDC reached the end of its patience. It issued a demand letter on November 23, 2012 declaring the balances of the loans were immediately due and payable. BDC also sent a NITES pursuant to the *BIA*.

10 A few days later, BDC wrote the respondents advising that if and only if they paid all loan principal arrears together with all loan interest arrears and outstanding fees by January 7, 2013, BDC would withdraw the demand for payment and would then confirm that the repayment terms under the amendment letter would continue to apply.

11 The respondents asked for more time, and sought an extension to January 31, 2013. BDC agreed to an extension to January 31 for principal payments, but only if the respondents paid the outstanding interest arrears, fees and legal fees by January 11, 2013.

12 On January 11 the respondents advised BDC the money would not be available until the following week. BDC then requested the payment be received on January 16, 2013.

13 January 16 came and went. The respondents never paid. In sum, they have paid nothing on account of the BDC loans since June of last year, a period of over nine months. As of January 31, 2013 the respondents owed BDC a total of $2,583,257.45 for principal, interest, additional interest, costs, disbursements and expenses, being the total amount of the debt secured under the mortgages and GSAs.

14 There is no question the respondents are in default under the BDC mortgages and GSAs. Both the mortgages and the GSAs give BDC the right to appoint a receiver pursuant to its security. It could appoint a private receiver if it wished. Instead, BDC moves for a court appointed receiver to sell the security. BDC takes the position this is the most transparent, cost effective

and sensible way to proceed. While it could have pursued power of sale proceedings under the terms of its mortgages, it views a receivership as a better, more just and convenient way to maximize value for all stakeholders.

15 Both the respondents and second mortgagee, Romspen Investment Corporation oppose the application. Romspen holds the second mortgage on the property secured by BDC's first mortgage. It also holds additional security on some of the respondents' other properties. Romspen is owed about $4.3 million. The respondents are also in default under the Romspen mortgages. Romspen wishes to pay the current arrears under the BDC mortgages, along with arrears of taxes and costs, and then take control of the sale of the Inn under the notices of sale it has already delivered pursuant to its mortgages.

16 Romspen takes the position that under s. 22 of the *Mortgages Act* [1] it is entitled to put the BDC mortgages into good standing, and relieve against acceleration of the full amounts due under the mortgages. This is what it proposes to do, while pursuing its rights to sell the properties under the power of sale provisions of its own mortgages.

17 Romspen says that under these circumstances it would not be just or convenient to appoint a receiver. It suggests that a receivership will be a more expensive and time consuming process than simply letting it put BDC's mortgages into good standing and maintain them in good standing while it sells the properties.

18 The respondents support Romspen's position. They agree the Inn should be sold to satisfy the outstanding debts. Mr. Fischtein, the principal of the respondents, and guarantor, says he is at the greatest risk of loss, and has a particular interest in obtaining the highest and best price for all the properties as a whole. He says the entire property should be sold, not just the portion over which BDC holds security. He says with his many years of operating the Inn, he can assist in ensuring the sales process is operated effectively and efficiently. He goes even further and says that if Romspen sells the property (with his cooperation, presumably) he would have no objection to a Monitor, acceptable to both mortgagees, reporting to BDC on the progress of a sales process.

The law:

19 BDC asks the court to appoint a receiver under both s. 101 of the *Courts of Justice Act* and s. 243(1) of the *Bankruptcy and Insolvency Act*. Both statutes provide the court may do so if it is "just or convenient".

20 In general the parties do not disagree on the appropriate legal principles to apply here. All agree that the overarching criterion in considering whether to appoint a receiver is whether it is "just and convenient" to do so. [2]

21 While appointing a receiver is generally viewed as an "extraordinary remedy", it is less so when, as is the case here, a debtor has expressly agreed to the appointment of a receiver in the event of default. [3]

22 In assessing whether it is just and convenient to appoint a receiver, the question is whether it is more in the interests of all concerned to have the receiver appointed or not. [4] In order to answer the question the court must consider all the circumstances of the case, particularly:

> a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;
>
> b) The parties' conduct; and
>
> c) The nature of the property and the rights and interests of all parties in relation to it. [5]

23 The *Mortgages Act* also has an impact on this case. Romspen wishes to avail itself of the provisions of section 22(1) of the *Mortgages Act* which says: Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

a) At any time before sale under the mortgage; or

b) Before the commencement of an action for the enforcement of the rights of

the mortgagee or of any person claiming through or under the mortgagee, the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

24 Section 1 of the *Mortgages Act* defines "mortgagor" as including "any person deriving title under the original mortgagor or entitled to redeem a mortgage." Thus Romspen, as second mortgagee is, by definition, a "mortgagor" entitled to the benefits of section 22(1).

25 Simply put, Romspen says that since BDC has not brought an action to enforce its mortgage within the meaning of the *Mortgages Act* it has an unequivocal right to put the BDC mortgage into good standing under s. 22.

26 It is against this legal framework I turn to the facts of the case to decide whether in these circumstances it would be just and equitable to appoint a receiver, or whether, if Romspen exercises its rights under s. 22 of the *Mortgages Act*, it would not be just and equitable to do so.

Discussion:

27 What is unusual about this application is that all the interested parties before the court support an immediate sale of the property. Each, particularly Mr. Fischtein, has an interest in obtaining the highest and best price for the property. They disagree, however, on who should manage the process, and what the process should be.

28 With that in mind, I will consider each party's plan, and determine what would be most just and convenient in all the circumstances, having regard to the criteria set out above.

BDC's plan

29 BDC proposes to appoint Ernst & Young (E&Y) as receiver. The rates E&Y quotes for its services range from $200 or $225 per hour for support staff, to $350 per hour for managers, up to $475 per hour for the partner who will manage the file. BDC says E&Y would market the property itself, without using a real estate agent. The receiver does not propose to open and operate the Inn, but rather to attempt to sell it before it would otherwise open in June. Because BDC holds security over the real estate and the respondents' personal property, all the Inn's non-real estate assets could also be sold in the receivership.

30 The respondents and Romspen suggest BDC's plan is flawed because BDC does not hold mortgage security over the entire property and could therefore not sell it *en bloc*. BDC's mortgage covers all but Royal Island (which Mr. Fischtein is already marketing separately as a residential family property), and three very small cottages. With the respondents' consent, these properties could be included in a sale. Even without these properties, the receiver would still be able to sell what appears to be more than 90% of the Inn's holdings.

31 BDC also points out that a receivership would provide the added benefits of a stay of proceedings, as well a vesting order in favour of any purchaser. It also suggests this is a case where the court's overall supervision of the process, coupled with the receiver's obligations as the court's officer, would be in the best interests of all stakeholders.

Romspen's plan

32 Romspen tells me that pursuant to s. 22 of the *Mortgages Act*, it will pay the principal arrears under the BDC mortgage forthwith, (i.e., within a day), and will bring all interest payments up to date, including interest on interest, together with BDC's costs and expenses, and outstanding realty taxes. It undertakes to continue to make all payments of principal and interest due

TAB 7

2014 ONSC 5205
Ontario Superior Court of Justice [Commercial List]

RMB Australia Holdings Ltd. v. Seafield Resources Ltd.

2014 CarswellOnt 12419, 2014 ONSC 5205, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

RMB Australia Holdings Limited, Applicant and Seafield Resources Ltd., Respondent

Newbould J.

Heard: September 9, 2014
Judgment: September 10, 2014
Docket: CV-14-10686-00CL

Counsel: Maria Konyukhova, Yannick Katirai for Applicant
Wael Rostom for KPMG

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Applicant Australian company lent funds to respondent Ontario company under Facility Agreement (FA) — Parties to FA included mining company in Colombia owned by respondent — All amounts under FA became payable upon default — Applicant and respondent entered into general security agreement under which respondent charged all its assets — Parties and mining company entered into share pledge agreement which provided that, in event of default under FA, applicant had right to appoint receiver — In June 2014, respondent had insufficient funds to make interest payment, triggering default — Applicant demanded payment of outstanding amounts under FA, gave notice of intention to enforce security, began enforcing its pledge of shares in mining company, and replaced mining company's board of directors — Mining company's ousted CEO refused to relinquish control and sought creditor protection in Colombia — Applicant applied to appoint receiver over respondent's assets — Application granted — It was just and convenient to appoint receiver — In accordance with FA, respondent's default granted applicant right to seek appointment of receiver — Appointment of receiver was necessary to stabilize corporate governance of mining company, as respondent's wholly-owned subsidiary and its major asset — Failure to obtain additional financing for respondent and mining company might result in significant deterioration in value — Applicant was prepared to advance funds to receiver to fund receivership and mining company's liability, thereby preserving mining company's enterprise value.
Table of Authorities
Cases considered by *Newbould J.*:
Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — considered
Elleway Acquisitions Ltd. v. Cruise Professionals Ltd. (2013), 2013 ONSC 6866, 2013 CarswellOnt 16639 (Ont. S.C.J. [Commercial List]) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 243(1) — considered
Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 101 — considered

APPLICATION to appoint receiver over respondent company's assets.

***Newbould J.*:**

1 On September 9, 2014 I granted a receiving order for brief reasons to follow. These are my reasons.

2 The applicant ("RMB") is an Australian company with its head office is in Sydney, New South Wales. RMB is the lender to the respondent ("Seafield") under a Facility Agreement and is a first ranking secured creditor of Seafield.

3 Seafield is an Ontario corporation with its head office in Toronto and is a reporting issuer listed on the Toronto Stock Exchange. It is an exploration and pre-development-stage mining company focused on acquiring, exploring and developing properties for gold mining. Seafield directly or indirectly owns mining properties or interests in Colombia, Mexico and Ontario.

4 Although Seafield was served with the material on this application, neither it nor its counsel appeared to contest the application.

5 Seafield wholly owns Minera Seafield S.A.S., a corporation existing under the laws of Colombia with its head office in Medellín, Colombia. Minera owns a number of mining titles and surface rights in Colombia, through which it controls three main mineral exploration and mining development properties. One of the properties is a 124 hectare parcel of land subject to a mineral exploitation contract granted by the Colombian Ministry of Mines (the Miraflores Property).

6 Aside from a small underground mine operated by local artisanal miners, the Columbian properties are non-operational and do not generate revenue for Seafield. Minera relies solely on Seafield for funding to, among other things: (a) continue acquiring mineral property interests; (b) perform the work necessary to discover economically recoverable reserves; (c) conduct technical studies and potentially develop a mining operation; and (d) perform the technical, environmental and social work necessary under Colombian law to maintain the Properties in good standing.

7 On February 21, 2013, Seafield as borrower, Minera as guarantor and RMB as lender and RMB's agent entered into the Facility Agreement. Pursuant to the Facility Agreement, RMB made a $16.5 million secured term credit facility available to Seafield. The Facility Agreement provided that the proceeds of the Loan must be used for: (a) the funding of work programs in accordance with approved budgets to complete a bankable feasibility study for a project to exploit the Miraflores Property and for corporate expenditures; (b) to fund certain agreed corporate working capital expenditures; and (c) to pay certain expenses associated with the preparation, negotiation, completion and implementation of the Facility Agreement and related documents.

8 All amounts under the Facility Agreement become due and payable upon the occurrence of an event of default under the Facility Agreement. Events of default include the inability of Seafield or Minera to pay its debts when they are due.

9 RMB and Seafield entered into a general security agreement under which Seafield charged all of its assets. Minera, Seafield and RMB also entered into a share pledge agreement (the "Share Pledge Agreement") pursuant to which Seafield pledged and granted to RMB a continuing security interest in and first priority lien on the issued and outstanding shares of Minera and any and all new shares in Minera that Seafield or any company related to it may acquire during the term of the Share Pledge Agreement.

10 The Share Pledge Agreement specifies that upon the delivery of a notice of default under the Facility Agreement and during the continuance of the default, RMB has the right to, among other things, (a) exercise any and all voting and/or other consensual rights and powers accruing to any owner of ordinary shares in a Colombian company under Colombian law; (b) receive all dividends in respect of the share collateral; (c) commence legal proceedings to demand compliance with the Share Pledge Agreement; (d) take all measures available to guarantee compliance with the obligations secured by the Share Pledge Agreement under the Facility Agreement or applicable Colombian law; and (e) appoint a receiver.

11 Minera gave a guarantee to RMB of amounts due under the Loan secured by a pledge agreement over the mining titles through which Minera controls its properties, a pledge agreement over its commercial establishment and the Share Pledge Agreement.

12 Seafield has not generated any material revenues during its history, is not currently generating revenues, and requires third-party financing to enable it to pay its obligations as they come due. Notwithstanding its efforts since September 2013 to find sources of such third-party financing, Seafield has been unable to do so.

13 Seafield's financial reporting is made on a consolidated basis and does not describe the financial status of Seafield and Minera separately. As stated in Seafield's unaudited condensed interim consolidated financial statements for the three and six-month periods ended June 30, 2014, as at June 30, 2014, Seafield's current liabilities exceeded its current assets by $14,108,581. As of that date, Seafield had a deficit of $44,722,780, incurred a net loss of $699,179 for the six months ended June 30, 2014 and experienced net negative cash flow of $689,583 for the six months ended June 30, 2014. As of June 30, 2014, Seafield had no non-current liabilities.

14 Seafield's non-current assets are valued at approximately $16,083,777 and include the Miraflores Property, which is booked at a value of $15,244,828. Seafield also owns property and equipment whose carrying value is reported at $808,948, including computer equipment, office equipment and land.

15 In May and June 2014, Seafield informed RMB's agent that it expected to have insufficient funds to make the interest payment of $344,477 due on June 30, 2014, triggering a default under the Facility Agreement. To date, Seafield has not made the interest payment due on June 30, 2014. The next interest payment under the Facility Agreement is due on September 30, 2014.

16 Discussions took place between RMB's agent and Messrs. Pirie and Prins of Seafield, the then only two directors of Seafield, and several proposals were made on behalf of RMB for financing that were all turned down by Seafield.

17 Seafield's financial position deteriorated through July and August, 2014. On August 15, 2014, Seafield indicated in an e-mail to RMB's agent that its cash position was dwindling and that it barely had enough to make it to the end of September.

18 Budgets provided by Seafield to the RMB suggest that total budgeted expenses for Seafield and Minera for the month of September 2014 are estimated to be approximately $231,500. Total budgeted expenses for the period from September 1, 2014 until December 31, 2014 are estimated to be approximately $920,000.

19 Following RMB's inability to negotiate a consensual resolution with Seafield's board and in light of Seafield's and Minera's dire financial situation, RMB demanded payment of all amounts outstanding under the Facility Agreement and gave notice of its intention to enforce its security by delivering a demand letter and a NITES notice on August 28, 2014.

20 On or about August 29, 2014, in accordance with RMB's rights under the Share Pledge Agreement, an agreement governed by Colombian law, RMB took steps to enforce its pledge of the shares of Minera, which it held and continues to hold in Australia, and replaced the board with directors of RMB's choosing, all of whom are employees of RMB or its agent.

21 The new Minera board was registered with the Medellin Chamber of Commerce in accordance with Colombian law. However, Minera's corporate minute book was not updated to reflect the appointment of either the new Minera board or the new CEO because Minera's general counsel and former corporate secretary refused to deliver up Minera's minute book.

22 In addition, on September 2, 2014, Minera lodged a written opposition with the Chamber seeking to reverse the appointment of the new Minera board. The evidence on behalf of RMB is that as a result of that action, it is probable that the Chamber will not register the appointment of Minera's new chief executive officer.

23 Late in the evening of September 4, 2014, Seafield issued a press release announcing that Minera had commenced creditor protection proceedings in Colombia. Such proceedings are started by making an application to the Superintendencia de Sociedades, a judicial body with oversight of insolvency proceedings in Colombia. The Superintendencia will review the

application to determine whether sufficient grounds exist to justify the granting of creditor protection to Minerva. This review could take as little as three days to complete.

24 Under Colombian law, an application for creditor protection can be lodged with the Superintendencia without the authorization of a corporation's board of directors. On September 5, 2014, the new Minera board passed a resolution withdrawing the application for creditor protection and filed it with the Superintendencia on that same day.

Analysis

25 RMB is a secured creditor of Seafield and is thus entitled to bring an application for the appointment of a receiver under section 243 of the BIA which provides:

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

26 Seafield is in breach of its obligations and has defaulted under the Facility Agreement. In accordance with the Facility Agreement, the occurrence of an Event of Default grants RMB the right to seek the appointment of a receiver.

27 As well, section 101 of the *Courts of Justice Act* permits the appointment of a receiver where it is just and convenient.

28 In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List].

30 The applicant submits, and I accept, that in the circumstances of this case, the appointment of a receiver is necessary to stabilize the corporate governance of Minera, as Seafield's wholly-owned subsidiary and its major asset.

31 RMB does not believe that Minera will be able to obtain interim financing during the pendency of creditor protection proceedings, and RMB has concerns that those assets may deteriorate in value due to lack of care and maintenance.

32 Failure to obtain additional financing for Seafield and Minera may result in significant deterioration in the value of Seafield and Minera to the detriment of all of their stakeholders. The evidence of the applicant is that among other things, it appears that the *Consulta Previa*, a mandatory, non-binding public consultation process mandated by Colombian law that involves indigenous communities located in or around natural resource projects, has not been completed. Failure to complete that process in a timely manner could lead to the potential revocation or loss of Minera's title and interests.

33 Moreover, if further funding is not obtained by Minera, it is also likely that employees of Minera will eventually resign. These employees are necessary for, among other things, ongoing care, maintenance and safeguarding of the properties and assets of Minera, facilitating due diligence inquiries by prospective purchasers or financiers, and maintaining favourable relations with the surrounding community.

34 RMB has lost confidence in the board of directors of Seafield. The details of the negotiations and the threats made by the Seafield directors, namely Messrs. Pirie and Prins, would appear to justify the loss of confidence by RMB in Seafield. RMB is not prepared to fund Seafield on the terms being demanded by Seafield's board and without changes to Seafield's governance structure.

35 Notwithstanding that RMB has replaced Minera's board and CEO in accordance with its rights in connection with the Loan and Colombian law, Minera's CEO has refused to relinquish control of Minera or its books and records, including its corporate minute book, stalling RMB's efforts to take corporate control of Minera and creating a deadlock in its corporate governance. Moreover, Minera's CEO, without authorization from the new board of directors, has commenced creditor protection proceedings in Colombia which RMB believes may be detrimental to the value of Minera's assets and all of its and Seafield's stakeholders.

36 RMB is prepared to advance funds to the receiver for purposes of funding the receivership and Minera's liability through inter-company loans. The receiver will be entitled to exercise all shareholder rights that Seafield has. The receiver will be able to flow funds that it has borrowed from RMB to Minera to enable Minera to meet its obligations as they come due, thereby preserving enterprise value.

37 In these circumstances, I find that it is just and convenient for KPMG to be appointed the receiver of the assets of Seafield.

Application granted.

End of Document

TAB 8

2020 ONSC 7920
Ontario Superior Court of Justice [Commercial List]

Urbancorp

2020 CarswellOnt 18990, 2020 ONSC 7920, 327 A.C.W.S. (3d) 17, 86 C.B.R. (6th) 125

KSV KOFMAN INC., by and on behalf of URBANCORP CUMBERLAND 1 LP, by its general partner, URBANCORP CUMBERLAND 1 GP INC. (Applicant) and URBANCORP RENEWABLE POWER INC. (Respondent)

G.B. Morawetz C.J. Ont. S.C.J.

Heard: December 11, 2020
Judgment: December 23, 2020
Docket: CV-18-600624-00CL

Counsel: Robin Schwill, Robert Nicholls, Shane Freedman, for Monitor and Receiver, KSV Restructuring Inc. (formerly KSV Kofman Inc.)
Neil Rabinovitch, for Israeli Functionary, Adv. Guy Gissin
Suzanne Murphy, Heather Meredith, Alex Steele, for Purchaser, Enwave Geo Communications LP
Jeffrey Larry, for King Towns North Inc.
Scott Bomhof, for First Capital Realty
Robert Drake, Mario Forte, for Fuller Landau Group Inc., Monitor of Urbancorp Cumberland 2 GP Inc., Urbancorp Cumberland 2 L.P., Bosvest Inc., Edge on Triangle Park Inc., Edge Residential Inc. and Westside Gallery Lofts Inc.
Maria Dimakas, for Condominium Corporations

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.ii Discretion of court
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court
Court-appointed receiver sought approval of sale of assets between receiver and monitor — Receiver also sought sealing order and assignment order — Commercial landlord opposed assignment order — Receiver applied for above-noted relief — Receiver's application granted — Parties agreed as to fairness of sale process, and price that was awarded — Purposive approach was proper one to take on issue of assignment order — If order was not made, transaction would likely be delayed and become more expensive — Court could use its inherent jurisdiction to grant requested relief — Landlord could not rely on Companies' Creditors Arrangement Act for differential treatment, as creditor — Receiver could properly assign lease — Transaction and assignment order were approved.
Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous
Court-appointed receiver sought approval of sale of assets between receiver and monitor — Receiver also sought sealing order and assignment order — Commercial landlord opposed assignment order — Receiver applied for above-noted relief —

16 The Purchaser has allocated $2.049 million of the Purchase Price to the Berm Lease (although KTNI does not agree with this allocation).

Law and Analysis

17 All parties agree that the Sale Process was properly conducted and produced a Purchase Price that is commercially reasonable in the circumstances. For this reason, it is not necessary, in my view, to review the principles set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), at para. 16 concerning sales by a receiver.

18 There is, however, opposition from KTNI as to whether the Assignment Order, which is critical to the Transaction, should be granted.

19 KTNI submits that since URPI, one of the Tenants, is in receivership, the Court Officer, in its capacity as Receiver, has no statutory authority to seek the Assignment Order.

20 In support of its argument that the Assignment Order should not be granted, KTNI references s. 84.1 of the *Bankruptcy and Insolvency Act* ("BIA") and s. 11.3 of the *Companies' Creditors Arrangement Act* ("CCAA") which provide the court, in bankruptcy and CCAA proceedings, with statutory jurisdiction to make an order assigning a debtor company's rights and obligations under an agreement, on notice to every party to the agreement and to the court officer.

21 Since there is no corresponding provision in Part XI of the BIA dealing with Secured Creditors and Receivers, KTNI submits there is no jurisdiction to grant the Receiver's request for the Assignment Order.

22 In addition, KTNI submits it is not "appropriate" to grant the Assignment Orders as:

a. KTNI is not being treated fairly and equitably, and

b. KTNI's consent has not been sought.

23 In response, counsel to the Receiver submits that Canadian courts have repeatedly stated that the BIA and the CCAA are to be interpreted harmoniously. *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.). While s. 84.1 of the BIA does not specifically refer to receivers, upon a purposive analysis, this policy and its underlying principles suggest an application to receivers. While the BIA is silent on when a receiver can apply for an order assigning a debtor contract, if both a trustee and a monitor may apply for such an order, the only purposive interpretation which harmonizes the Canadian insolvency regimes and prevents the loss of value from the estate of the debtor is the application of section 84.1 of the BIA to receivers.

24 The Supreme Court recently confirmed in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para. 40 that the remedial objectives of Canadian insolvency laws are to provide timely, efficient and impartial resolution of a debtor's insolvency, to preserve and maximize the value of a debtor's assets, to ensure fair and equitable treatment of the claims against a debtor, to protect the public interest, and to balance the costs and benefits of restructuring or liquidating the debtor company.

25 In *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 16 (Y.T. S.C.), at para. 46, in determining the scope of the Court's authority to authorize the actions of the receiver, the Court held that "insisting on a purposive analysis... helps to establish the scope of powers and discretion conferred by statutes on public officials, and on the court."

26 Counsel to the Receiver also submitted that an order compelling the assignment of contracts is only required where the counterparty to such contract declines to provide their consent to the assignment. The Court held in *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), at paras. 22-23, that it had the discretion to issue an assignment order even if consent to assignment was reasonably withheld by the counterparty. While Playdium is a pre-2009 amendment example of a forced-assignment, the Receiver submits that it continues to inform courts' analyses in post-amendment cases.

27 In my view, it is necessary to take into consideration that the Purchase Price is $24,000,000. If the Transaction flounders as a result of the inability to assign the Berm Lease, the result would clearly be harmful to creditors. It is also necessary to take into account that an alternative route is available to the Receiver, specifically to take steps to bankrupt URPI and then rely on s. 84.1 of the BIA as the basis to seek the Assignment Order.

28 If the Receiver is required to take this alternative approach, it would only result in a delay in completing the Transaction and would increase the cost of completing the Transaction. This is not a desirable outcome.

29 Rather, it is preferable in my view to insist on a purposive approach to accomplish the objectives of Canadian insolvency laws.

30 Section 243(1)(c) of the BIA provides:

> 243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> . . .
>
> (c) take any other action that the court considers advisable.

31 This subsection, in conjunction with the provisions of s. 100 of the *Courts of Justice Act (Ontario)* ("CJA") is broad enough to form the basis of the Receiver's request for the Assignment Order and for the court to make such order. If not, the ability of a receiver to discharge its functions would be severely restricted to the point where the objectives of Canadian insolvency laws would be frustrated in the receivership context.

32 An alternative approach is to resort to the inherent jurisdiction of the court.

33 I recently commented on this subject in *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552 (Ont. S.C.J.).

> [65] There is also scope to grant the requested relief using the inherent jurisdiction of the court. The inherent jurisdiction of the provincial superior courts is a broad and diverse power. It has been said that inherent jurisdiction is a power that is exercisable "in any situation where the requirements of justice demands it" (*Gillespie v. Manitoba (Atty. Gen.)*, 2000 MBCA 1, at para. 92), and that "nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which is specifically appears to be so" (*Board v. Board*, [1919] A.C. 956at pp. 17-18, per Viscount Haldane).
>
> [66] Recently, the Supreme Court of Canada reviewed the inherent jurisdiction of superior courts in *Endean v. British Columbia*, 2016 SCC 42, and described it as follows:
>
> > [23] The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a "reserve or fund of powers" or a "residual source of powers", which a superior court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24; and *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at paras. 29-31. The Supreme Court acknowledges that the doctrine of inherent jurisdiction is amorphous in nature: *Ontario v. Ontario Criminal Lawyers Association of Ontario*, 2013 SCC 43, at para. 22. As a result, the parameters of what a Superior Court judge may do or not do under the power of inherent jurisdiction are unknown.
> >
> > . . .

[68] In the oft-cited *80 Wellesley St. E., Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.), the Court of Appeal for Ontario held that except where provided specifically to the contrary, the court's inherent jurisdiction is "unlimited and unrestricted in substantial law and civil matters." The Court of Appeal set out the jurisprudential basis for this holding:

In *Re-Michie Estate and City of Toronto et al.*, [1968] 1 O.R. 266 at pp. 268 - 9, Stark J, after considering the relevant provisions of the Judicature Act and the authorities, said:

> It appears clear that the Supreme Court of Ontario has broad universal jurisdiction over all matters of substantial law unless the Legislature divests from this universal jurisdiction by legislation in unequivocal terms. The rule of law relating to the jurisdiction of superior Courts was laid down at least as early as 1667 in the case of *Peacock v. Bell and Kendall* [1667], 1 Wms. Sound. 73 at p. 74, 85 E.R.84:
>
> ... And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

[69] However, the doctrine is not unlimited: it is subject to both statutory and purposive limitations. The doctrine cannot be exercised so as to contradict a statute or rule. Inherent jurisdiction is also limited to exercises that fulfil the underlying purpose of the doctrine, being to regularize and protect the administration of justice. Inherent jurisdiction should be exercised "sparingly and with caution:" *R c. Caron*, 2011 SCC 5, at para. 28.

[70] In *Endean*, the Supreme Court set out that before exercising the court's inherent jurisdiction, a justice should first determine the scope of express grants of statutory powers before dipping into this "important but murky pool of residual authority" (*Endean*, at para. 24). Having done so, in my view, it is both necessary and appropriate to exercise inherent jurisdiction in responding to this motion.

34 There is no statutory provision in the BIA that prohibits a superior court from granting the requested relief. In these circumstances, I am of the view that if s. 243(1)(c) of the BIA, in conjunction of s. 100 of the CJA, does not provide the basis for considering the Assignment Order, then it is appropriate to resort to the inherent jurisdiction of the Superior Court.

35 Having determined that there is jurisdiction for the Receiver to assign the Berm Lease, it is necessary to review the criteria the Court will consider in determining whether to order an assignment. The criteria referenced in s. 84.1(4) of the BIA and s. 11.3 of the CCAA informs the analysis for an assignment by the Receiver. The criteria are as follows:

(a) whether the monitor approved the proposed assignment (only relevant to CCAA proceedings);

(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.

36 KTNI accepts that the first two factors have been established in that the Monitor has approved of the assignment and the financial obligations of the proposed assignee are nominal.

37 The remaining issue is whether it would be appropriate to assign the rights and obligations to that person.

38 The Receiver submits that it is appropriate to assign the rights and obligations of the Tenants under the Berm Lease to the Purchaser for the following reasons:

(a) the Sale Process was approved by the Court;

(b) the assignment of the Berm Lease does not preclude KTNI from asserting a claim as to an allocation of a portion of the Sale Proceeds based on the value inherent in the Berm Lease;

TAB 9

Third-party Release in Canada and the United States: A Comparison of the Development of the Jurisprudence with a Comment on the Decision *In re Purdue Pharma LP*

by Rebecca Kennedy

1. Abstract

This paper focuses on a comparative analysis of the use of third-party releases in insolvency proceedings in Canada and the United States of America. Recently, in the United States, third-party releases have been denied in one jurisdiction that was previously thought to allow third-party releases as part of a Plan. The same restrictions are not present in the Canadian jurisprudence. In contrast, third-party releases continue to expand in Canada. The paper further focuses on the different releases in Canada and the United States, with a discussion on the restrictions set out in *Purdue Pharma LP*. Further, the paper examines the use of releases in cross border cases and any differences seen *in Companies Creditors Arrangement Act*,[1] chapter 11 and Chapter 15 cases.

2. Introduction

Third-party releases, or non-debtor releases, have morphed over the years through both legislative changes and the case law developments such that they are now standard in most Canadian restructuring cases. These releases now routinely release directors, officers, advisors, affiliated entities, interim financiers, plan sponsors and purchasers. The breadth of claims that are released against the non-debtors have also evolved and expanded in scope over the years.

In contrast, in the United States, the jurisprudence is divided, depending on the State and Circuit, as to whether third-party releases will be granted, and if so, the scope of any such release.

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[1] *Companies Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA].

This paper will examine the history of third-party releases in the Canadian jurisprudence, the varied decisions both allowing and disallowing third-party releases in the United States, the recent restrictions imposed since the *Purdue Pharma LP* restructuring case, and the potential implications on cross border proceedings.

3. Third-Party Releases in Canada

(a) What are Third-Party Releases?

Third-party releases are the compromise or release of claims against any party who is not considered the debtor company under the *Companies' Creditors Arrangement Act*.[2] These releases now take the form of provisions in a plan or in certain orders that release non-debtors, such as officers, directors, shareholders, plan sponsors, interim financiers, or non-debtor affiliates, from claims and causes of action held by creditors or other non-debtor parties.

The authority to grant third-party releases, save for those available to directors pursuant to section 5.1 of the CCAA, is not codified in the CCAA. Therefore, the authority to grant third-party releases is rooted in section 11 of the CCAA, which gives the supervising court the authority to make any order that it considers appropriate in the circumstances.[3]

The broad jurisdiction found in section 11 of the CCAA may be applied by the courts in furtherance of the objectives of the CCAA.[4] The objective of the CCAA is a remedial in nature, favouring going concern outcomes for debtor companies over a liquidation.[5] In certain circumstances, the

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[2] CCAA, *ibid*.
[3] CCAA, *ibid.*, s. 11.
[4] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70 [*Century Services*].
[5] *Century Services*, *ibid*., at para. 18 and 76.

release of claims against certain non-debtor parties who are reasonably connected to the restructuring will be required to effect a successful going concern outcome for the debtor entities.

The ability to include these third-party releases pursuant to a Plan under the CCAA is now settled law in the Canadian jurisprudence. The most notable decision was *Re Metcalfe & Mansfield Alternative Investments II Corp*.,[6] where the decision by the Ontario Court of Appeal put an end to much of the debate on this topic in Canada and recognized that such releases can be granted to facilitate and enable a successful restructuring.

Since *Metcalfe*, the fresh start principles that underlying third-party releases have expanded and are no longer restricted to the negotiation of Plan or settlement. As will be demonstrated, third-party releases are now available in circumstances where a compromise is not being negotiated with creditors but is being approved by the order of the supervising court. Ultimately, there are circumstances that well warrant the granting of these third-party releases even where a negotiated settlement is not available to the debtor, because a going concern outcome (including third-party releases) is still better for all the stakeholders than a liquidation of the debtor.

(b) The History of Third-Party Releases in Canada

(i) The Evolution in Canada (Prior to 1997)

Prior to 1992 third-party releases were restricted and not granted in the ordinary course in Canadian restructurings.

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[6] *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 [*Metcalfe*].

One of the earliest cases granting a third-party release in Canada is *Algoma Steel Corp v Royal Bank*,[7] which approved third-party releases in favour of its directors and officers, employees, and advisors of the debtor company. The release in Algoma's CCAA arrangement was sanctioned by the court in 1992, prior to the 1997 CCAA amendments (the amendment which codified the releases and compromise of certain claims against directors). The Algoma CCAA plan provided the following:

> 6.03 Releases
>
> From and after the Effective Date, each Creditor and Shareholder of Algoma prior to the Effective Date (other than Dofasco) will be deemed to forever release Algoma from any and all suits, claims and causes of action that it may have had against Algoma **or its directors, officers, employees and advisors.**[8] (Emphasis added).

Also in 1992, the CCAA plan of Campeau Corporation included the following release provisions:

> 5.3 Release
>
> From and after the Plan Implementation Date, each holder of Senior Unsecured Debt, Debt Balances, Debentures, Shares, warrants, options or share appreciation rights, other than a holder of options or share appreciation rights who has, prior to the Plan Application Date, brought an action against the Corporation in respect of such options or share appreciation rights, will be deemed in its capacity as such to have **forever released the Corporation**

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[7] *Algoma Steel Corp v Royal Bank*, 1992 CanLII 7413 (ONCA), 93 DLR (4th) 98, <https://canlii.ca/t/g1jlg>, leave to appeal to SCC refused [*Algoma*].
[8] *NBD Bank, Canada v Dofasco Inc, et al*, 15 CBR (4th) 67, 1999 CanLII 3826 (ONCA), <https://canlii.ca/t/1f9wx> at para 51.

> **from any and all suits, claims and causes of action it had or may have had against the Corporation or its directors, officers, employees and advisers, arising from any matter relating to such Senior Unsecured Debt, Debt Balances, Debentures, Shares, warrants, options and share appreciation rights**.[9] (Emphasis added).

In *Re Campeau Corp*,[10] the court confirmed its discretion to approve the proposed plan of arrangement including the above release and found that the Plan was fair and reasonable.[11] The same result occurred in *Olympia & York Developments Ltd v Royal Trust Co*.[12] where the CCAA plan that was sanctioned by the Court included a series of releases for third-parties from potential claims or rights of action that any of the debtor companies or their successors, assigns, trustees in bankruptcy could assert.[13] As was evident, the case law coming out of Ontario was trending towards the inclusion of certain third-party releases in CCAA Plans.

In contrast to the foregoing jurisprudence coming from Ontario, in Quebec, in *Michaud v Steinberg Inc*,[14] the Quebec Court of Appeal refused to sanction a CCAA plan that contained a release in favour of third parties. Justice Deschamps (as she then was) opined that the release provided in the arrangement went beyond what was permitted under the CCAA. The court held that while the CCAA allows a company the possibility of finding a compromise with its creditors, it should not

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[9] Mark E. Meland, "Extending "Protection" to Third parties in a Restructuring Plan — An Overview" (1993) 20 CBR-ART 61 Canadian Bankruptcy Reports (Articles) at para 25 [Meland].
[10] *Re Campeau Corp*., [1992] OJ No 237, 10 CBR (3d) 104 (Ct J (Gen Div)) [*Campeau*].
[11] *Campeau* at para. 13.
[12] *Olympia & York Developments Ltd v Royal Trust Co.,* 1993 CarswellOnt 182, [1993] OJ No 545 (ONSC) [*Olympia*].
[13] Meland, *supra* note 9 at para 19.
[14] *Michaud v Steinberg Inc.*, [1993] RJQ 1684, 1993 CanLII 3991 (CA), <https://canlii.ca/t/1pchz> [*Steinberg*].

"offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse".[15]

The Quebec Court of Appeal relied on the fact that release provisions in the CCAA Plan were extremely wide and could prevent a creditor from exercising recourse against one of the released parties even in respect of faults committed outside of the exercise of such party's functions on behalf of the debtor. Justice Deschamps further stated:

> If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the [CCAA], he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.
>
> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is.[16]

This variance in judicial interpretation among the Provinces resulted in the statutory reform that came in 1997 with the inclusion of section 5.1 of the CCAA.

(ii) Incorporation of section 5.1 of the CCAA – 1997

As demonstrated by the cases above, prior to 1997, the CCAA did not expressly address director releases, nor did the case law adequately consider and comment on the same. While third-party

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[15] *Steinberg*, *ibid*., at page 13.
[16] *Steinberg*, *ibid*., at page 14.

director and officer releases had been granted in Ontario, they were never the subject of a contested decision in that jurisdiction. Further, prior to 1997, the CCAA only expressly provided for the release of the debtor from the claims of its creditors as part of its compromise.

In 1997, the federal government enacted section 5.1 of the CCAA, which codified the limited release of directors of debtor companies from certain pre-filing claims as follows:

Claims against directors — compromise

- **5.1(1)** A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

- **(2)** A provision for the compromise of claims against directors may not include claims that
    - **(a)** relate to contractual rights of one or more creditors; or
    - **(b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

- **(3)** The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

- **(4)** Where 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 debtor company shall be deemed to be a director for the purposes of this section.

The purpose of the codification of this section was discussed in *Metcalfe* case (discussed below). In that case, Justice Blair, writing for the Ontario Court of Appeal, provided the following:

> [T]he 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; *Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte)*, [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.[17]

Based on the revisions to the CCAA, the debtors were continuing to get a clean start and directors who were responsible for the successful restructuring would obtain the release of certain pre-filing

[17] *Metcalfe*, *supra* note 6 at para. 99.

claims. This was certainly a fair and reasonable exchange for the directors, given they would have piloted the debtor company to a successful outcome.

(iii) Cases after the 1997 Amendments to the CCAA

Following the amendments in 1997, the release granted in Algoma was revisited by the courts in *NBD Bank, Canada v Dofasco Inc*.[18] In this case, NBD Bank, a large creditor of Algoma and other affiliates, had made claims against an officer of the CCAA debtor based on, *inter alia*, misrepresentation, fraud, and deceit. The officer unsuccessfully argued that the alleged claims were barred by the release granted in the Algoma plan. The Court recognized that the policy behind section 5.1 of the CCAA is to encourage directors to remain in office in order to help reorganize the affairs of the insolvent corporation, and not to immunize such directors from the consequences of their negligent statements, which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.[19] Ultimately, the court found that the same restrictions from section 5.1(2) should apply to the officer. Further, as the claims were based on allegations that were specifically carved out in section 5.1 of the CCAA, it would be contrary to the policy of Parliament to allow those claims to be barred against the officer.[20]

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[18] *NBD Bank, Canada v Dofasco Inc.,* 1999 CanLII 3826 (ONCA), 181 DLR (4th) 37, <https://canlii.ca/t/1f9wx> [*NBD Bank*].

[19] *NBD Bank* at 54.
[20] *NBD Bank* at 54.

In *Re Canadian Airlines Corp.*,[21] the judiciary opened the doors to additional third-party releases for parties other than directors and officers. In *Canadian Airlines*, the debtors sought court approval of a plan of arrangement that included the following:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the *CCAA* Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.[22]

The court was tasked with determining if the Plan, including this release, was fair and reasonable. A creditor challenged the release in the Plan arguing that it did not comply with section 5.1 of the CCAA as it was overly broad as it (i) applied to more than just directors and (ii) it released more

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[21] *Re Canadian Airlines Corp*., 2000 ABQB 442 [*Canadian Airlines*].
[22] *Canadian Airlines*, *ibid*., at para. 86.

than just claims for which their directors are by law liable.[23] The court ultimately found it appropriate to amend the proposed release to expressly comply with section 5.1(2) of the CCAA and clarify Section 5.1 of the Plan.[24] However, the most important development in this case was that the court noted that while it is true that section 5.1 of the CCAA does not authorize a release of claims against third-parties other than directors, it does not prohibit such releases either.[25] As stated above, it was really this language that opened the doors for the expansion of third-party releases.

In the same year, in *Re BlueStar Battery Systems International Corp.*,[26] Justice Farley examined the applicability of Section 5.1 of the CCAA and its potential applicability to claims of Revenue Canada. The issue was that the Revenue Canada was seeking to keep alive its claims against the directors, which claims were contingent uncrystallized claims. Revenue Canada was arguing that the claims were not released by section 5.1of the CCAA and in fact were not able to be compromised pursuant to 5.1(2) of the CCAA. Justice Farley concluded that the exception in section 5.1(2) did not apply to tax claims and that claims of Revenue Canada could be released under section 5.1 of the CCAA.[27]

In 2007, in *Re Muscletech Research and Development Inc*,[28] broader third-party releases in a CCAA Plan were introduced into the Canadian jurisprudence. Muscletech was a unique case in

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[23] *Canadian Airlines*, *ibid*., at para. 88.
[24] *Canadian Airlines*, *ibid*., at para. 20.
[25] *Canadian Airlines*, *ibid*., at para 92. Note, in the decision, the court referred to section 5.2 of the CCAA. However, there is and has never been a section 5.2 of the CCAA so this has been treated as a typo in the decision.

[26] *Re BlueStar Battery Systems International Corp.,* [2000] OJ No 4587, 2000 CanLII 22678 (Sup Ct J) [*BlueStar*].
[27] *BlueStar*, *ibid*., at paragraph 16.
[28] *Re Muscletech Research and Development Inc,* [2007] OJ No 695 [*Muscletech*].

that the Plan was not a restructuring plan but rather a liquidation plan, funded entirely by non-applicant parties.[29] The non-applicant parties contributed to the Contribution Funds that would be used to fund the payments under the Plan. The establishment of the Contribution Funds was contingent on the granting of the third-parties releases set out in the Plan. The third-parties to be released included (i) the directors and officers, and affiliates of the Applicants; and (ii) arm's length third-parties such as manufacturers, researchers and retailers of the debtor companies products.[30] The court also found that many, if not all, of the third-parties in this case had claims for contribution or indemnity against the Applicants or other third-parties relating to these actions.[31]

In determining if the Plan, and in particular the releases, were fair and reasonable, the Court noted that this was really about balancing the prejudices in the case.[32] Justice Ground found that not only was the release fair and reasonable, it was absolutely essential to the Plan.[33] Justice Ground further reviewed the reasoning of the U.S. court in accepting the releases and noted that the Plans were overwhelmingly supported by the claimants. In the circumstances, Justice Ground found that he had the jurisdiction to grant third-party releases (and that such jurisdiction was recognized in Canada and the United States).[34]

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[29] *Muscletech, ibid.,* at para. 2.
[30] *Muscletech, ibid.,* at para. 4.
[31] *Muscletech, ibid.,* at para. 4.
[32] *Muscletech, ibid.,* at para. 21.
[33] *Muscletech, ibid.,* at para. 23.
[34] *Muscletech, ibid.,* at para. 24-26.

(iv) Asset Backed Commercial Paper Case

All these early cases were really leading to the contested case from 2008, *Re Metcalfe & Mansfield Alternative Investments II Corp*.[35] This case marked the beginning of the most significant expansion of third-party releases in the face of opposition in Canada.

In *Metcalfe*, the CCAA proceedings commenced in response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("**ABCP**").[36] In this case, a creditor-initiated Plan of Compromise and Arrangement called for the release of third-parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud.[37] The breadth of the released parties and the scope of claims released was the broadest ever sought in a CCAA Plan to date. The "double majority" of creditors required by s. 6 of the CCAA approved the Plan.[38] As a result, the respondents sought court approval of the Plan under s. 6 of the CCAA.

The CCAA judge sanctioned the plan and granted the requested release based on the following: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not

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[35] *Metcalfe, supra* note 6.

[36] *Metcalfe, ibid.,* at para. 17-19.
[37] *Metcalfe, ibid.,* at para. 29.
[38] *Metcalfe, ibid.,* at para. 29.

only the debtor companies but creditor noteholders generally.[39] Certain holders of ABCP notes appealed the sanction of the Plan.

Ultimately, the foregoing test and the sanctioning of the Plan was upheld by the Court of Appeal. Given the potential ramifications of not obtaining the third-party releases in this case were so significant to the Canadian banking industry, the circumstances required the granting of the releases.

It should be noted that while Justice Blair agreed with the fact that third-party releases are permitted under the CCAA, he did not agree with the rationale in *Canadian Airlines* that they are permitted because they are not expressly prohibited. According to Justice Blair, on a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it.[40]

The interpretation from Justice Blair has formed the backbone for the development of third-party releases in Canada. It is the broad and purposive interpretation of the CCAA that has allowed for expanded releases to be granted where a going concern outcome can be achieved for businesses and industries.

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[39] *Metcalfe, ibid.,* at para. 71.
[40] *Metcalfe, ibid.,* at para. 43 and 78.

This case provided a massive expansion of to the scope of third-party releases in the Canada jurisprudence. Prior to this case, the courts struggled with the expansion of releases in light of the restrictions set out in section 5.1 of the CCAA. This case provided a test for the Courts. Where the releases were necessary and essential to the successful restructuring, without which the going concern restructuring would not occur, releases were going to be granted. On the back of *Muscletech*, this case also confirmed that the gates were open for more parties than just directors and officers to be released. Further, it broadened the scope of what kind of claims could be released in a Plan of Arrangement.

(v) Developments following *Metcalfe*

Following on the decision from *Metcalfe & Mansfield*, the courts initially seemed to be attempting to reign in the party releases granted in CCAA proceedings. The tone appeared to be that the release from *Metcalfe* was exceptional and would not just be the norm.

In *Canwest Global Communication Corp*.[41] the court noted:

> The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. There must be a reasonable connection between the third-party claim being compromised in the plan and

[41] *Canwest Global Communication Corp.*, 2010 ONSC 4209 [*Canwest*].

> the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. [42]

The court went on to apply the test from *Metcalfe* and granted the releases that were rationally connected to the Plan and full disclosure of such releases was made in the Plan and Information Circular.[43]

During the same period, in *Re Grace Canada Inc.*[44] and *Re Nortel Networks Corporation*,[45] the court expanded the *Metcalfe* factors to be considered when looking at releases to include that the release ought not be overly broad or offensive to public policy.[46] In both *Grace* and *Nortel*, the releases under review were contained in a Settlement Agreement versus a Plan. While restrictions were still being put in place, these cases really expanded the availability of releases from creditor approved Plans to Settlement Agreements.

In *Re Allen-Vanguard Corporation*,[47] the Court expressed the following view with respect to third-party releases, seemingly trying to put some restrictions on the granting of releases:

> The Court is put in a difficult position when asked in a very constrained timeframe to approve the restructuring with releases. It should certainly not be the expectation that in every instance, releases of the type here should be granted as a matter of course. Those

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[42] *Canwest, ibid.,* at para. 28.
[43] *Canwest, ibid.,* at para. 30.
[44] *Re Grace Canada Inc.,* 2010 ONSC 161.
[45] *Re Nortel Networks Corporation*, 2010 ONSC 1708 [*Nortel*].
[46] *Nortel, ibid.,* at para. 81-82.
[47] *Re Allen-Vanguard Corporation*, 2011 ONSC 5017 [*Allen-Vanguard*].

> with unpaid obligations of the company may assert that directors are liable if they fail to fulfill the company's obligation when they are legally bound to do so.
>
> I am of the view that third-party releases in particular should be the exception rather than the rule. There may very well be instances in which the releases are not integral or necessary to the restructuring and should not be approved. That was not suggested in the approval process here. There was no evidence presented at the time of the granting of the Sanction Order to suggest that directors were not important to the restructuring. Indeed, the only evidence before the Court was to the contrary: that the directors were integral to the Plan's success.[48]

Since ABCP, this was the first direct statement from the Court that there will be cases where releases should not be approved. In the years that followed, there were still several cases that applied the test from *Metcalfe* and approved of Plans with third-party releases.[49] In each case, the scope of the claims being released and the released parties continued to expand where the nexus test from *Metcalfe* was met. Even though the early decisions following *Metcalfe* attempted to restrict the access to third-party releases, as the jurisprudence developed, these releases continued to expand.

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[48] *Ibid*., at para. 60-61.
[49] *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2013 ONSC 1078, leave to appeal to CA refused, 2013 ONCA 456, leave to appeal to SCC refused, [2013] SCCA No 395, *Re 4519922 Canada Inc*, 2015 ONSC 4648, *Re The Cash Store Financial Services Inc*, 2015 ONSC 7538, and *Re Montreal, Maine & Atlantic City Canada Co*, 2015 QCCS 3235, *Cline Mining Corp*., 2015 ONSC 622; and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J.) [Commercial List]).

In 2016, the court again revisited the test for approving third-party releases in *Target Canada Co*.[50] In reviewing the test from *Metcalfe*, the court commented:

> There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.
>
> In considering whether to approve releases in favour of third parties, the factors to be considered by the court include:
>
> a. Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
>
> b. Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
>
> c. Whether the plan could succeed without the releases;
>
> d. Whether the parties being released were contributing to the plan;
>
> e. Whether the release benefitted the debtors as well as the creditors generally;
>
> f. Whether the creditors voting on the plan had knowledge of the nature and the effect of the releases or;
>
> g. Whether the releases were fair and reasonable and not overly broad. …

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[50] *Target Canada Co*., 2016 ONSC 3651

> In determining whether to approve a third-party release, the Court will take into account the particular circumstances of the case and the objectives of the CCAA. No single factor set out above will be determinative.[51]

Based on the application and assessment of the above factors, broad releases were granted to many third parties, including the plan sponsor. This case restated the test from *Metcalfe* and provided a list of factors that the courts could look to in applying the test for third-party releases. From 2016 to 2020, these factors were determinative as to when third-party releases would be granted as part of a plan. In 2020, the court again revisited the factors and slightly revised the language in *Re Lydian International Limited*,[52] but adopted the test articulated in *Metcalfe* and *Target*.[53]

(vi) Expansion of the Availability of Third-Party Releases outside of a Plan

At the same time the jurisprudence was evolving with respect to the scope and breadth of the available releases, the circumstances where third-party releases could be obtained was also developing and expanding.

As described above, from 1992 to 2015, court ordered third-party releases were restricted to court sanctioned plans and settlement agreements.

In 2015, in the *Nelson Education Ltd*.[54] the debtor company and the secured creditors sought an order that included a broad release in a sale approval order. In commenting on the ability to seek a third-party release outside of a Plan, the court found as follows:

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[51] *Ibid*., at para. 35-38.
[52] *Re Lydian International Limited,* 2020 ONSC 4006 [*Lydian*].
[53] Lydian at para. 54.
[54] *Nelson Education Ltd*., 2015 ONSC 5557 [***Nelson***].

> While there is no CCAA plan in this case, I see no reason not to consider the principles established in *Metcalfe* when considering a sale such as this under the CCAA, with any necessary modifications due to the fact that it is not a sale pursuant to a plan.[55]

While the court was willing to expand the availability of third-party releases to a sale under the CCAA, it was unwilling to grant them in the circumstances.[56] However, from 2015 to 2018, the Ontario and Quebec courts both found that the circumstances existed and granted orders (on consent) that approved of third-party releases without a plan or settlement agreement.[57]

Following on these cases, in *Wayland Group Corp. et al., Nemaska Lithium Inc. et al.* and *Re Beleave Inc.* while the law with respect to reverse vesting orders was developing, third-party releases were also granted in the approval orders.[58] In the *Nemaska Lithium* case, the court granted the third-party releases as part of the reverse vesting order and merely commented that the court was of the opinion that the exclusion in 5.1(2) adequately protected the shareholders and there was no need to elaborate further on this subject.[59]

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[55] *Nelson*, *ibid*., at para. 49.
[56] *Nelson*, at para. 49.
[57] CCAA Termination Order in the Matter of *Golf Town Canada Holdings Inc. et al*, dated March 29, 2018, Toronto, Court File No. CV-16-11527-00CL (ONSC); Order in the Matter of *Cinram International Inc. et al*, dated December 2, 2015, Toronto, Court File No. CV12-9767-00CL (ONSC); Distribution Order in the Matter of *RCR International Inc.*, dated May 9, 2018, District of Montreal, Court File No. 500-11-053555-179 (QCSC); *Re Stornoway Diamond Corp* (7 October 2019), Montreal 500-11-057094-191 (Qc Sup Ct) Approval and Vesting Order; *Re Comark Holdings Inc* (13 July 2020), Toronto CV-20-00642013-00CL (Ont Sup Ct [Comm List]) Approval and Vesting and CCAA Termination Order.
[58] Approval and Vesting Order and Endorsement of Justice Hainey in the Matter of *Wayland Group Corp. et al*., dated April 21, 2020, Toronto, Court File No. CV-19-006632079-00CL (ONSC); Approval and Vesting Order in the matter of *Nemaska Lithium Inc. et al.*, dated October 15, 2020, District of Montreal, Court File No: 500-11-057716-199 (QCSC).
[59] *Re Nemaska Lithium Inc. et al.*, 2020 QCCS 3218 at para. 106.

It wasn't until *Re Green Relief Inc.*[60] that the Ontario Court released a written decision expressly allowing third-party releases without requiring a court approved plan or settlement. In *Green Relief*, the court found as follows:

> While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.
>
> The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

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[60] *Re Green Relief Inc.*, 2020 ONSC 6837 [*Green Relief*].

> Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.
>
> At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release. [61]

In addition, in *Green Relief*, the court noted that the quality of the claims being released ought to be examined when determining if the releases were appropriate.[62] In that case, insulating the current directors, officers, advisors and other third-parties from frivolous claims in furtherance nuisance settlements by the objecting creditors was reason enough to grant the third-party releases in the circumstances.[63]

Since *Green Relief*, it has now become common place to see third-party releases granted outside of a plan and as part of a sale approval motion or distribution.[64] This is a marked change from the original position in 1992 where limited releases for directors and officers only were granted in CCAA Plans. As will be discussed and demonstrated below, in contrast to the ever evolving and expanding caselaw in Canada, in the United States, third-party releases are not granted as a matter of course and their availability differs depending on the state.

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[61] *Green Relief*, *ibid*., at para. 23-26.
[62] *Green Relief*, *ibid*., at para. 29.
[63] *Green Relief*, *ibid*., at para 48-49.
[64] See *Re Harte Gold Corp*., 2022 ONSC 653 and *Re Just Energy Group Inc. et al*, 2022 ONSC 6354 as a couple examples.

4. Third-party Releases in the United States

There are two types of third-party releases in insolvency cases in the United States – voluntary and involuntary. Voluntary third-party releases are those to which a releasing creditor has consented to the release in the Plan or Order. On the other hand, involuntary third-party releases release non-debtors without consent of the creditors.

Non-consensual third-party releases in the United States are controversial and the American cases released with respect to third-party releases during a similar time frame discussed in the Canadian jurisprudence section above had varying interpretations depending on the state and circuit.

(a) Cases Against Third-Party Releases

As will follow, many of the courts that deny third-party releases do so based on the interpretation of section 524 of the Bankruptcy Code. While 11 U.S. Code § 524(a) addresses what obligations of debtor can be discharged under the title, 11 U.S. Code § 524(e) expressly provides:

> 524(e)Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

Some United States courts have used this section of the Bankruptcy Code to deny the granting of third-party releases. This section was first examined in the case *In re W. Real Estate Fund, Inc*.[65] the United States Court of Appeal in the Tenth Circuit, which found that this section prevented the granting of third-party releases. The Court stated:

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[65] *In re W. Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990).

> Obviously, it is the debtor, who has invoked and submitted to the bankruptcy process, that is entitled to its protections. Congress did not intend to extend such benefits to third-party bystanders.

Similarly, in the case *In re Lowenschuss*,[66] the United States Court of Appeals, Ninth Circuit upheld a lower courts decision to deny third-party releases to non-debtors based on this same section.

In the case *In re Continental Airlines*,[67] the United States Court of Appeals, Third Circuit reviewed the various cases both for and against third-party releases and cited section 524(e) as the reason that many circuits had not grated third-party releases. In this case, however, the Court declined to decide the issue in ruling that a plan release provision did not pass muster under even the most flexible tests for the validity of non-debtor releases.[68]

In *Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*,[69] the United States Court of Appeals, Fifth Circuit banned non-consensual releases on the basis that they are prohibited by section 524(e) of the Bankruptcy Code, which provides generally that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

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[66] *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995).
[67] *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000).
[68] *Ibid*. at page 214.
[69] *Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.),* 584 F.3d 229 (5th Cir. 2009).

In *Stern v. Marshall*,[70] the United States Supreme Court found that Bankruptcy Courts (as non-Article III courts) lack the constitutional authority to enter a final order approving non-consensual third-party releases, even though they were incorporated into a proposed plan. While the case is short and the commentary in the case is limited, the *Stern* case is a material development as *Stern* is the only commentary that the United States Supreme Court has made on this issue. However, the Court did not comment on section 524(e) as it had found that the Bankruptcy Court lacked the jurisdiction to grant such releases (making it unnecessary to comment on the sections of the code).

In the case *In re Emerge Energy Servs. LP,*[71], the debtors argued that the third-party releases were in fact consensual, such that where a creditor or equity holder did not return a ballot, they were deemed to have consented. The Bankruptcy court disagreed and found that releases could not be obtained through an opt-out form or through acquiescence of the creditors.

In the case *In re Aegean Marine Petroleum Network Inc.*[72], the United States Bankruptcy Court, Southern District of New York, examined releases in a plan for the benefit of certain of the debtors' board of directors, the debtors' pre- and post-petition lender, and the purchaser of assets under the plan. The court, in denying the non-consensual third-party releases, noted numerous possible constitutional issues: the court's inability to exercise power over potential claims not yet a part of the bankruptcy proceedings; the court's lack of personal jurisdiction over non-debtor claims against other non-debtors; the inability of two parties to dispose of claims belonging to a third-party; a lack of due process; and the anomalous situation in which the beneficiary of a third-party release

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[70] *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) [*Stern*].
[71] *In re Emerge Energy Servs. LP,* 2019 WL 7634308 (Bankr. D. Del. Dec. 5, 2019)
[72] *In re Aegean Marine Petroleum Network Inc.,* 599 B.R. 717 (Bankr. S.D.N.Y. 2019)

asks for broader protection than he or she could have obtained in his or her own bankruptcy case. Notably, the opinion did not cite the *Stern* case noted above.

(b) Cases in Favor of Third-Party Releases

In contrast to the jurisdictions strictly relying on 11 U.S. Code § 524(e) to deny third-party releases, in other jurisdictions, the courts interpreted 11 U.S. Code § 105(a) as providing the jurisdiction to the Court to grant third-party releases. This section provides:

> 105(a)The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

This section has been interpreted as providing the jurisdiction to grant permanent injunctions of certain claims against non-debtor parties, which has the effect of granting third-party releases to non-debtor parties.

This was first demonstrated in the case *In re A.H. Robins Co., Inc.*,[73] where the United States Court of Appeals, Fourth Circuit found that the Bankruptcy Court had the power to institute a Plan that included injunctions of suits against certain entities other than the debtor where it involved one of the debtor's products. Bankruptcy courts are courts of equity and section 105(a) gives the court the power to issue any order, process or judgment that is necessary or appropriate to carry out the

[73] *In re A.H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir. 1989).

provisions of this title. This section confers equitable powers upon the bankruptcy court. In this case, this power supported the injunctive relief in the Plan.

In the case *In re Drexel Burnham Lambert Grp., Inc*.,[74] the United States Court of Appeals, Second Circuit also found that courts may enjoin creditors from suing third parties, provided the injunction plays an important part in the debtor's reorganization plan. This created a nexus test for the approval of third-party injunctions.

In *Re Monarch Life Ins. Co*.,[75] the United States Court of Appeals, First Circuit found a debtor's subsidiary was collaterally estopped by a plan confirmation order from belatedly challenging the jurisdiction of the bankruptcy court to permanently enjoin lawsuits against the debtor's attorneys and other non-debtors not contributing to the debtor's reorganization.

In the case *In re Dow Corning Corp*.,[76] the United States Court of Appeals, Sixth Circuit, really expanded the law in the United States. The case found that releases could be included in a Plan pursuant to section 1123(b)(6) of the U.S. Code. Further the court in this case enumerated seven factors to be examined in determining if non-consensual non-debtor injunctions should be granted as follows:

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third-party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of

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[74] *In re Drexel Burnham Lambert Grp., Inc*., 960 F.2d 285 (2d Cir. 1992) [*Drexel*].
[75] *Re Monarch Life Ins. Co*., 65 F.3d 973 (1st Cir. 1995).
[76] *In re Dow Corning Corp*., 280 F.3d 648 (6th Cir. 2002).

> the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions. *See In re A.H. Robins, 880 F.2d at 701–702; Johns–Manville, 837 F.2d at 92–94; In re Continental Airlines, 203 F.3d at 214.*

Interestingly, while finding the jurisdiction and setting the test for third-party releases, the court declined to uphold the finding of "unusual circumstances" in this case and remanded it back to the district court for further findings.

In the case *In re Metromedia Fiber Network*,[77] the United States Court of Appeals, Sixth District, found that non-consensual third-party releases would be permitted, where (i) the releases played an important part in the debtor's plan of reorganization, (ii) the released party has made a substantial financial contribution to the debtor's Chapter 11 case, or (iii) the released party provides substantial consideration. The court further found that under section 105(a) a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the

[77] *In re Metromedia Fiber Network*, 416 F.3d 136, 142 (2d Cir. 2005).

provisions of this title," but does not allow the bankruptcy court "to create substantive rights that are otherwise unavailable under applicable law."

There were various other cases following Dow and Metromedia in other circuits that continued to approve of the use of third-party releases in In the case *In re Airadigm Commc'ns, Inc*.,[78] United States Court of Appeals, Seventh Circuit examined the language of section 524(e) and found that because the section did limit the courts ability to release debtor claims because it did not include limiting language (e.g. shall not) but instead used definitional term "does". In the case *In re Genco Shipping & Trading Ltd*.,[79] non-consensual releases were approved with respect to claims that would trigger indemnification or contribution claims against the debtor and thus impact the debtor's reorganization. In *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*,[80] the United States Court of Appeals, Eleventh Circuit, similar to other circuits, found that section 105(a) of the Bankruptcy Code authorizes courts to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]. This included upholding non-debtor releases from settling defendants that would not have entered into the settlement without such releases.

In the case *In re Millennium Lab Holdings II LLC*,[81] the United States Court of Appeals, Third Circuit upheld a bankruptcy court decision confirming a chapter 11 plan containing non-

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[78] *In re Airadigm Commc'ns, Inc*., 519 F.3d 640 (7th Cir. 2008).
[79] *In re Genco Shipping & Trading Ltd*., 513 B.R. 233, 271 (Bankr. S.D.N.Y. 2014)
[80] *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070.
[81] *Re Millennium Lab Holdings II* LLC, 945 F.3d 126 (3d Cir. 2019) [*Millennium*].

consensual third-party releases. The opinion held that the bankruptcy court's order confirming the plan did not violate Article III of the U.S. Constitution.[82]

(c) Purdue Pharma L.P.

As is evident from the foregoing summaries, from the late 80s and early 90s up to 2019, there were cases that supported the granting of third-party releases and cases that strictly interpreted the code in order to deny the third-party releases (depending on the circuit). However, an important development occurred in 2021 in the case *In re Purdue Pharma, L.P.*,[83] the main manufacturer of oxycontin in the United States, and a party central to various class action lawsuits as the main cause of the opioid crisis in the United States. Purdue filed for Chapter 11 in September of 2019. The filing was in the Southern District of New York, in the Second Circuit where previously, third-party releases were included and upheld by the Court of Appeal.

In March of 2021, Purdue filed the first version of its chapter 11 plan of reorganization. The Plan, after various amendments, incorporated a settlement with the founding family of the company (the "**Sackler Family**"), pursuant to which the Sackler Family would contribute $4.275 billion to the Purdue estate in exchange for the release of third-party claims against them.[84] The Plan would, if confirmed, provide billions of dollars to resolve private and public claims and to fund various other initiatives, including educational programs for opioid relief.

The Plan was approved by a supermajority of votes by each class of creditors. Still, creditors (including eight states and the District of Colombia, certain Canadian municipalities and Canadian

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[82] *Millennium*, *ibid*. a para. 137.
[83] *In re Purdue Pharma, L.P.,* 635 B.R. 26 (S.D.N.Y. 2021) [*Purdue*].
[84] *Purdue*, *ibid*., at page 30.

indigenous tribes, and various personal injury claimants) voted against the Plan. On September 1, 2021, Judge Drain of the U.S. Bankruptcy Court, Southern District of New York confirmed the Plan, holding that the settlement with the Sackler Family was necessary to the Plan, the settlement was fair and reasonable and that it was necessary and appropriate to approve the non-consensual releases, even though the Sackler Family (and its affiliates) were not debtors.[85]

Judge Drain's decision was appealed, with the primary complaint being that the Plan provides the Sackler Family (and its affiliates) with releases that are impermissibly broad, and that the Bankruptcy Court lacked statutory authority to grant the third-party release. On December 16, 2021, U.S. District Judge Colleen McMahon of the Southern District of New York overturned the confirmation of Purdue's Plan.

In the District Court decision, the Court found that the Bankruptcy court has subject matter jurisdiction under the law of the Circuit to impose releases of non-debtor claims.[86] However, the Court found that the Bankruptcy Code does not authorize a Bankruptcy Court to order the non-consensual release of non-derivative third-party claims against non-debtors in connection with confirmation of a Chapter 11 plan.[87] In coming to this conclusion, the Court found:

> The Confirmation Order fails to identify any provision of the Bankruptcy Code that provides such authority. Contrary to the bankruptcy judge's conclusion, Sections 105(a) and 1123(a)(5) & (b) (6), whether read individually or together, do not provide a bankruptcy court with such authority; and there is no such thing as "equitable authority"

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[85] *Purdue*, *ibid*., at page 32.
[86] *Purdue*, *ibid*., at page 37.
[87] Purdue, *ibid*.

> or "residual authority" in a bankruptcy court untethered to some specific, substantive grant of authority in the Bankruptcy Code. Second Circuit law is not to the contrary; indeed, the Second Circuit has not yet taken a position on this question.

This decision was contrary to the findings in *Drexel*, set out above, where the Second Circuit had found that in bankruptcy cases, a court may enjoin a creditor from suing a third-party, provided the injunction plays an important part of the debtor's reorganization plan. The Purdue case did not follow the long-established nexus test and as of the writing of this paper remains subject to appeal to the Second Circuit.

(d) Developments Since the Purdue Decision

Since the decision in Purdue, the cases have continued to volley back and forth between allowing and disallowing non-consensual third-party releases depending on the district.[88] Notably, in *Re Mallinckrodt PLC*, the opt-out provisions make such a release consensual and further, that non-consensual releases fall within the Bankruptcy Court's constitutional authority where the release is integral to the debtor-creditor relationship.[89] This interpretation of opt-out provisions making releases consensual was also adopted in *Re Boy Scouts of America*.[90]

Maybe most interestingly since the Purdue case is that the dispute over the propriety of non-consensual third-party releases has not been limited to caselaw and has also even reached the halls

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[88] Cases against third-party releases since Purdue include *Patterson v. Mahwah Bergen Retail Group*, 636 B.R. 641 (E.D. Va. 2022) and *Re Highland Cap. Mgmt.,* 2022 WL 4093167 (5th Cir. Sept. 7, 2022). Cases in favour of third-party releases include *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020), *In re Le Ctr. on Fourth, LLC*, 17 F.4th 1326 (11th Cir. 2021), *In re Fieldwood Energy LLC*, 2021 WL 2853151 (Bankr. S.D. Tex. June 25, 2021), *In re Mallinckrodt PLC*, 639 B.R. 837 (Bankr. D. Del. 2022) [*Mallinckrodt*], *Re Boy Scouts of America and Delaware BSA, LLC*, No. 20-10343, 2022 WL 3030138 (Bankr. D. Del. Jul. 29, 2022) [*Boy Scouts*].
[89] *Mallinckrodt*, *ibid*.
[90] *Boy Scouts*, supra note 88.

of Congress. Members of Congress introduced the *Nondebtor Release Prohibition Act of 2021*, which would amend the Bankruptcy Code to prohibit non-consensual third-party releases in Chapter 11 plans. It appears that the bill has few co-sponsors in Congress and may not become law. However, it demonstrates that the debate over these releases is not over, and it may not be strictly confined to the courts.

5. Comparison Between Canada and the United States

In Canada, courts now routinely grant full releases to a variety of third parties. These third parties have included directors, officers, shareholders, employees, independent contractors, monitors, counsel, financial advisors, plan sponsors and even lenders. In each case, the third-party must satisfy the current test from *Lydian*, as expanded in *Green Relief*.

In contrast, in the United States, releases of claims are not granted directly, rather, the courts grant permanent injunctions for third parties related to the restructurings. Similarly, a nexus test has been applied to third-party releases, as the beneficiaries must be related to the success of the Plan or the restructuring in general and there must also be extraordinary circumstances.

With respect to the injunctive relief versus a direct release, in the U. S., the courts implement injunctions pursuant to section 105 of the Bankruptcy Code to not offend the prohibitive language from section 524(e) of the Bankruptcy Code. This method appears to balance the debtor's fresh start with the statutory restrictions.

This requirement for injunctive language has, in cross border cases, lead to extensive language in Plans and Orders granting releases as they first include language granting the Canadian releases then continue with additional sections dealing the exculpatory and injunctive releases required to satisfy the United States requirements.

6. Chapter 11 versus Chapter 15/CCAA

Given the settled law in Canada, where releases may be granted, and the unsettled and conflicting law in the United States, a question arises as to whether third-party releases will be granted in Chapter 15 cases more readily than a Chapter 11.

The most notable recognition of third-party releases in a Chapter 15 in the United States was the *In re Metcalfe & Mansfield Alternative Investments*[91] case, where the releases granted in the ABCP case were recognized in the Chapter 15 proceedings. Under the Bankruptcy Code, recognition and enforcement of CCAA Orders is permitted pursuant to section 1507.[92] Section 1507 provides:

> 1507 (a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.
>
> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
>
> > (1) just treatment of all holders of claims against or interests in the debtor's property;
> >
> > (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

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[91] *In re Metcalfe & Mansfield Alternative Investments,* 421 B.R. 685, 695, 700 (Bankr. S.D.N.Y. 2010).
[92] 11 U.S. Code § 1507.

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Section 1506 of the Bankruptcy Code also provides that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[93]

In *Metcalfe & Mansfield*, the court found that the recognition of this Plan and the CCAA order complied with the requirements in 1507 and was not contrary to public policy. In doing so, the court approved of both non-consensual third-party releases and an injunction against certain proceedings against non-debtors.

In the case *In re Vitro S.A.B. de CV*,[94] the United States Court of Appeals, Fifth Circuit, reviewed the decision of the bankruptcy court where it had denied recognizing a judgment from the Mexican Court that not only modified debts owed by a foreign debtor, but novated and extinguished guarantees of the foreign debtor's indebtedness by its non-debtor subsidiaries. The Fifth Circuit found that, in exceptional circumstances, it is possible to recognize an Order that incudes extinguishing the obligations of non-debtor guarantors under Chapter 15.[95] The court continued

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[93] 11 U.S. Code § 1506.
[94] *In re Vitro S.A.B. de CV* , 701 F.3d 1031 (2012) [*Vitro*].
[95] *Vitro*, *ibid*., at page 10.

that in granting this type of relief, the bankruptcy proceedings do not need to be identical to the United States proceedings to be recognized, it is sufficient for the result to be "comparable".[96] The fact that the rules are not identical is insufficient to deny a request for comity.[97] The foreign laws merely must not be repugnant to the United States laws and policies.[98] Even though the Fifth Circuit provided a road map for when this type of relief can be sought, in the circumstances in this case, the exceptional circumstances did not exist in this case.

In considering seeking third-party releases in a cross-border plan, the issue with reliance on *Metcalfe* is that it predates the decision discussed above in *Stern v. Marshall*, discussed above, where the U.S. Supreme Court found that Bankruptcy Courts lacked the constitutional jurisdiction to grant third-party releases in a plan. Interestingly, though *Vitro* was decided after *Stern*, it has not been readily relied upon in the jurisprudence since.

Regardless, the *Stern* decision has not done away with the injunctive relief granted in many circuits in the United States. Given the developments since Purdue and the general trend in the United States to move away from non-consensual third-party releases, it remains open for the one of the U.S. Court's to deny recognizing third-party releases as they are void for public policy given the language in section 524(e) of the Bankruptcy code and the decision in *Purdue*.

7. Conclusion

Third party releases are broader in scope and availability and more certain in Canada versus those in the United States. In light of the recent decision in *Purdue*, it remains undecided if third-party

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[96] *Vitro*, *ibid*., at page 11.
[97] *Vitro*, *ibid*., at page 17.
[98] *Vitro*, *ibid*., at page 11.

releases will also be restricted in recognition orders. Further, if we do end up seeing different trends between the law on the recognition of releases between Chapter 11 cross-border cases and Chapter 15 cross-border cases, it may be that Canada will be viewed a jurisdiction that provides greater protections to its directors, officers and third parties based on the jurisprudence on Canadian third-party releases. This may result in increased Canadian headquartered multi-national companies seeking to avail themselves of our protections and increased insolvency filings in Canada.

TAB 10

Most Negative Treatment: Distinguished
Most Recent Distinguished: Arrangement de MPECO Construction inc. | 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 C.B.R. (6th) 87 | (Que. Bktcy., Feb 4, 2019)

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

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

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

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

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

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

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency
Related Abridgment Classifications
Tax
I General principles
I.7 Tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.12 Collection and remittance
III.12.b GST/HST held in trust
Headnote
Tax --- Goods and Services Tax — Collection and remittance — GST held in trust
Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute

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

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

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

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

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

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

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

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

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

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

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

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

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

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

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

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

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

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

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

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

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4).

TAB 11

2008 ONCA 587
Ontario Court of Appeal

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

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 AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

Counsel: Benjamin Zarnett, Frederick L. Myers for Pan-Canadian Investors Committee

d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. Law and Analysis

39 There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?

2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

> a) on a proper interpretation, the CCAA does not permit such releases;
>
> b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
>
> c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
>
> d) the releases are invalid under Quebec rules of public order; and because
>
> e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters," [2] and there was considerable argument on these issues before the application judge and

before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

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

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey*

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re*, *supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement. [4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party*. [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
>
> c) The Plan cannot succeed without the releases;
>
> d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the

> sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*, [7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.)

I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> **Resignation or removal of directors**
>
> (4) Where 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 debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted: [8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent

> right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with

a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

TAB 12

2016 ONSC 3651
Ontario Superior Court of Justice

Target Canada Co., Re

2016 CarswellOnt 21083, 2016 ONSC 3651, 274 A.C.W.S. (3d) 259, 42 C.B.R. (6th) 330

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

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

Morawetz J.

Heard: June 2, 2016
Judgment: June 2, 2016
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, John MacDonald, Shawn Irving, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz, for Target Corporation
William Sasso, Sharon Strosberg, Jacqueline Horvat, for Pharmacy Franchisee Association of Canada
Susan Philpott, for Employees of Applicants
Alan Mark, Melaney Wagner, Graham Smith, Francy Kussner, for Monitor, Alvarez & Marsal Inc.
Jane Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC
Andrew Hodhod, for Bell Canada
Harvey Chaiton, for Directors and Officers

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

30 I am satisfied that each of these factors supports approval of the Amended Plan.

31 In arriving at this conclusion, I have taken into account the following:

a. Classification and Creditor Approval: The Amended Plan was unanimously approved.

b. Recovery on Bankruptcy: The Monitor has expressed the view that recoveries under the Amended Plan are well in excess of those that would have been received on a bankruptcy of the Target Canada Entities. Recoveries against TCC in a bankruptcy would be 30%, as compared to the expected range of 71 to 80% under the Amended Plan.

c. Alternatives to the Amended Plan: The Amended Plan is the only alternative to bankruptcy.

d. No Oppression of Creditors: I am satisfied that the pre-insolvency rights and priorities of Affected Creditors are respected under the Amended Plan.

e. No Unfairness to Shareholders: Given that Affected Creditors are not being paid in full, there is no unfairness to shareholders in receiving no recovery.

f. Public interest: The Amended Plan resolves the Proven Claims against Target Canada Entities in a manner that is efficient and timely, and which avoids costly litigation.

32 Article 7.1 of the Amended Plan provides for full and final releases in favour of:

a. The Target Canada Released Parties;

b. The Third-Party Released Parties (which includes the Monitor and its affiliates, their directors, officers, employees, legal counsel, agents and advisors, as well as the Pharmacists' Representative Counsel and members of the Consultative Committee and their advisors;

c. It also provides a released in favour of the Plan Sponsor Released Parties, (Target Corporation and its subsidiaries other than the Target Canada Entities and the NE1, the HBC Entities and their respective directors, officers, employees, legal counsel agents and advisors), except in respect of the Landlord Guarantee Claims.

33 Finally, there is also release of the Employee Trust Released Parties.

34 It is accepted that Canadian courts have jurisdiction to sanction plans that containing releases in favour of third parties. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (Ont. C.A.) the Court of Appeal held that the CCAA Court has the jurisdiction to approve a plan of compromise or arrangement that includes third-party releases, stating that a release negotiated in favour of a third-party as part of the "compromise" or "arrangement" that reasonably relates to the proposed restructuring falls within the objectives and flexible framework of the CCAA.

35 There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.

36 In considering whether to approve releases in favour of third parties, the factors to be considered by the court include:

a. Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b. Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c. Whether the plan could succeed without the releases;

d. Whether the parties being released were contributing to the plan;

e. Whether the release benefitted the debtors as well as the creditors generally;

f. Whether the creditors voting on the plan had knowledge of the nature and the effect of the releases or;

g. Whether the releases were fair and reasonable and not overly broad.

37 (See *Metcalfe, Cline Mining Corp.*, 2015 ONSC 662; and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]).)

38 In determining whether to approve a third-party release, the Court will take into account the particular circumstances of the case and the objectives of the CCAA. No single factor set out above will be determinative.

39 (See *Skylink and Cline Mining*.)

40 Courts have approved releases that benefit affiliates of the debtor corporation where the *Metcalfe* criteria is satisfied. In Sino-Forest, the subsidiaries of the debtor company were entitled to the benefit from the release under the plan as they were contributing their assets to satisfy the obligations of the debtor company for the benefit of affected creditors. It is not uncommon for CCAA courts to approve third-party releases in favour of person, such as directors or officers or other third parties, who could assert contribution and indemnity claims against the debtor company.

41 (See *Skylink and Cline Mining.)*

42 In my view, each of the Released Parties has contributed in tangible and material ways to the orderly wind down the Target Canada Entities' businesses. I accept that without the Releases, it is unlikely that all of the Released Parties would have been prepared to support the Amended Plan. The Releases are a significant part of the various compromises that were required to achieve the Amended Plan. They are a necessary element of the global, consensual resolution of this CCAA proceeding.

43 In particular, the economic contributions by Target Corporation, as Plan Sponsor, have demonstrably increased the available recoveries for Affected Creditors, as attested by the Monitor. Target Corporation's material direct and indirect contributions as Plan Sponsor include:

a. subordinating a number of Intercompany Claims against TCC;

b. partially subordinating various other Intercompany Claims;

c. a cash contribution of approximately $25.45 million towards the aggregate Landlord Guaranteed Enhancement;

d. a net cash contribution of approximately $4.1 million to fund the Landlord Non-Guaranteed Creditor Equalization;

e. a cash contribution of $700,000 towards costs of certain Landlord Guaranteed Creditors;

f. funding the Employee Trust in the amount of $95 million.

44 I am satisfied that the Releases are appropriately narrow and rationally connected to the overall purposes of the Amended Plan. The Plan Sponsor Released Parties are not released from the Landlord Guarantee Claims, which are separately resolved in the Landlord Guarantee Creditors Settlement Agreement. Nor will Target Corporation be released under the Amended Plan from any indemnity or guarantee in favour of any Director, Officer or employee.

45 I am also satisfied that the Releases apply to the extent permitted by law and expressly do not apply to liability for criminal, fraudulent or other willful misconduct, or to other claims that are not permitted to be compromised or released under the CCAA.

46 Full disclosure of the Releases was made to the Affected Creditors in the Meeting Order Affidavit, in the Amended Plan and in the Letter to Creditors. The terms of the Release were also disclosed to creditors in the Original Plan. No party has objected to the scope of the Releases as contained in the Amended Plan.

47 Having considered the Record and the applicable law, I am satisfied that the Amended Plan represents an equitable balancing of the interests of all Stakeholders in accordance with the provisions and obligations of the CCAA and I find that the Amended Plan is both fair and reasonable to all Stakeholders. The Amended Plan is sanctioned and approved.

48 The Applicants have also requested an extension of the stay period to September 23, 2016. It is clear that the CCAA proceedings have to be extended so as to permit Plan Implementation to occur and to provide sufficient time to complete post implementation details. I am satisfied the parties are working in good faith and with due diligence in this matter and that there are sufficient resources available to fund the Applicants during the proposed extension period. The extension of the stay period is approved. In order to accommodate my schedule, the stay period is extended to September 26, 2016, being three days longer than the requested period. The Applicants also request an extension of the Notice of Objection Bar Date to the Plan Implementation Date. This request is reasonable in the circumstances and it is ordered that the Notice of Objection Bar Date expire on the Plan Implementation Date.

49 The motion is therefore granted and the Sanction Order has been signed by me.

50 In closing, I would like to thank all parties and their representatives for the manner in which this proceeding has been conducted. All parties and their counsel, by working in a constructive and cooperative manner, have made a contribution to the Amended Plan. It is very rare to have a CCAA plan of this magnitude supported by 100 percent of the affected creditors who voted at the creditors' meetings. This Sanctioned Amended Plan represents the best outcome from this unfortunate commercial venture.

Motion granted.

End of Document

TAB 13

2023 NLSC 134, 2023 CarswellNfld 254

2023 NLSC 134
Newfoundland and Labrador Supreme Court

Rambler Metals and Mining Limited, Re CCAA

2023 CarswellNfld 254, 2023 NLSC 134

IN THE MATTER OF an application of Rambler Metals and Mining Canada Limited and 1948565 Ontario Inc.

AND IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. 36, as amended (CCAA)

Alexander MacDonald J.

Heard: September 11, 2023
Judgment: September 11, 2023
Docket: 202301G0841

Counsel: Joseph J. Thorne, for Applicants
Alex MacFarlane, Phil Clarke, Liam Murphy, Jason Kanji, for Monitor
Kathryn Esaw, Allison Philpott, for Purchaser, AuTECO Minerals Ltd.
Meghan King, for Elemental Royalties Corp.
Maeve Baird, Deanna Frappier, K.C., for CRA
Monique Sassi, Peter Fraser, for DIP Lenders
Sean Pittman, for Krinor Resources
Michael Collins, Sean Collins, for International Royalty Corporation / Royal Gold
Brendan O'Neill, for Rambler Group Directors & Officers

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Headnote
Bankruptcy and insolvency
Business associations
Civil practice and procedure

***Alexander MacDonald J.*:**

INTRODUCTION

1 Rambler Metals and Mining Canada Limited (Rambler Canada), Rambler Metals and Mining PLC (Rambler UK), Rambler Mines Limited (Rambler Mines), and 1948565 Ontario Inc. (1948), applied for creditor protection and other relief under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA).

2 On February 27, 2023, I granted the Initial Order in favour of Rambler Canada and 1948 (Rambler Group) now filed in this Court. I appointed Grant Thornton Limited (GTL) to be the Monitor. I set the comeback hearing for March 6, 2023, and on that date, I granted an Amended and Restated Initial Order (ARIO) in which I provided for enhanced Monitor's powers. I approved the Sales and Investment Solicitation Process (SISP), and extended the stay until May 19, 2023.

3 On April 6, 2022, I granted an order pursuant to s. 5(5) of the Wage Earner Protection Program Act, S.C. 2005, c 47.

4 On May 16, 2023, I granted an amended ARIO and extended the stay until September 11, 2023. I also increased the maximum amount of the Debtor in Place financing (DIP) to US $8.3 million.

(a) provide for timely, efficient and impartial resolution of the Companies' insolvency;

(b) preserve and maximize the value of the Companies' assets;

(c) ensure a fair and equitable treatment of the claims against the Companies;

(d) protect the public interest and preserve employment and third-party suppliers and service providers; and

(e) balance the costs and benefits of Rambler Group's restructuring or liquidation.

82 I now turn to whether I should extend the stay.

Should I approve an Order Extending the Stay until December 31, 2023?

83 I extend the stay until December 31, 2023.

84 The current stay period expires September 12, 2023. Under s. 11.02 of the CCAA, I may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the Rambler Group satisfies me that it has acted and *is* acting in good faith and with due diligence.

85 The Rambler Group seeks to extend the stay to October 31, 2023, to allow it to proceed with the closing of the transaction, and resolve the issues associated with the RVO claims I referred to earlier.

86 I find that creditors will not suffer material prejudice because of the extension of the stay. Rambler Group's cash flow forecast shows sufficient liquidity to allow the Monitor to deal with the remaining tasks contemplated by the RVO. The Monitor has confirmed, and I find that the Rambler Group continues to act in good faith and due diligence. I now turn to whether I should grant an order expanding the Monitor's powers.

Should I approve an Order Expanding the Monitor's Powers for the Purposes of Implementing the Rambler Group's Proposed Restructuring?

87 The *CCAA* provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can, "carry out any other functions in relation to the [debtor] company that the court may direct." Section 11 authorizes me to make any order that is necessary and appropriate in the circumstances.

88 I grant the Monitor's enhanced powers provided in the draft Order. I do so because:

(a) the Monitor's expanded powers will allow it to administer the affairs of Newco, to wind down these *CCAA* proceedings, and deal with Newco through bankruptcy or otherwise following the close of the transaction; and

(b) The Monitor needs such powers to achieve the benefits of the transaction to stakeholders. No creditor suffers prejudice because of the Monitor's enhanced powers.

89 I now turn to whether I should approve a RVO providing for the releases.

Should I approve a RVO providing for the Releases?

90 I so order. The Monitor asked that I grant a court order releasing [1] :

(a) the present and former directors, officers, employees, legal counsel and advisors of the Rambler Group and Newco;

(b) the Monitor and its legal counsel and advisors, and their respective present and former directors, officers, partners, employees and advisors;

(c) the Purchaser, it's directors, officers, employees, legal counsel, and advisors; and

(d) the DIP Lenders, its counsel, and their respective present and former directors, officers, partners, employees, and advisors.

91 The Releases will cover any present and future claims against the Released Parties based on any fact, or matter, or occurrence in respect of the purchase transaction. It does not release any claim for fraud or willful misconduct. It does not release any claim that I may not release pursuant to s. 5.1(2) of the CCAA. It does not release any environmental liability to GNL.

92 I find that the Releases are reasonable and appropriate in the circumstances. I base my decision on an assessment of s. 5.1 of the CCAA and the factors taken from Lydian International Limited (Re),2020 ONSC 4006 (at para. 54), and from my decision in *Canadian Fluorspar (NL) Inc*.

93 Section 5.1 of the CCAA says, "A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."

94 Subsection 2 says, "A provision for the compromise of claims against directors may not include claims that relate to contractual rights of one or more creditors; or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors."

95 Finally, subsection 3 says, "The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances."

96 Chief Justice Morawetz said in *Lydian* (at para. 54) that I should consider the following factors:

(a) Whether the Released Parties from claims were necessary and essential to the restructuring of the debtor;

(b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

(c) Whether the plan could succeed without the Releases;

(d) Whether the Released Parties were contributing to the plan; and

(e) Whether the Releases will benefit the debtors as well as the creditors, generally.

97 Again, I need not consider all of these factors. Each need not support the issuing of the Releases. I use the factors to assist me in exercising the broad discretion I have under the *CCAA*.

98 I find the that:

(a) the Releases are fair and reasonable in the circumstances;

(b) the released claims rationally connect to the restructuring;

(c) the Released Parties are necessary and essential to the restructuring of the Rambler Group; and

(d) the Released Parties contributed to the restructuring.

99 The Released Parties' efforts directly lead to the RVO and the sale of the enterprise. The share purchase agreement provides that the Purchaser must be satisfied with the form of the RVO. Counsel tells me that the various internal versions of the RVO always contained the release in favour of the Purchaser.

100 Because of this sale and the efforts of the parties, there is cash available to satisfy some creditor claims. If I do not grant the Releases, there is a risk that the Purchaser might not proceed. If the Purchaser does proceed, it might reduce the purchase price.

101 The Mine will likely reopen. It will provide employment. It will provide benefits to suppliers, and to Baie Verte and the larger community. The Releases help achieve the purposes of a *CCAA* proceeding, which includes maximizing creditor recovery and preserving continued employment in a restructured enterprise. Therefore, I find that the Releases connect rationally to the restructuring.

102 Rambler Group was also a critical player in the processes leading to the *CCAA* filing.

103 Thus, I find that the Released Parties made significant contributions to the Rambler Group's restructuring, both prior to and throughout these *CCAA* proceedings.

104 The Monitor, the Purchaser, Rambler Group, and the DIP Lenders are unaware of any claims against them or their advisors related to these *CCAA* proceedings. Therefore, the Releases should not materially prejudice any stakeholders.

105 Furthermore, the Releases are sufficiently narrow. Any environmental liabilities to the GNL are unaffected. The Releases do not affect claims referred to in s. 5.1(2) of the CCAA or claims arising from fraud or willful misconduct.

106 The scope of the Releases is sufficiently balanced. It allows the Released Parties to move forward with the transaction and to conclude these *CCAA* proceedings. The Monitor, Rambler Group, and the Purchaser all take the position that the Releases are an essential component to the transactions.

107 The Monitor and its counsel served creditors with materials relating to this Motion in accordance with the process set out in the AIROs.

108 The Monitor included the form of the Releases in the draft RVO. This provided stakeholders with ample notice and time to raise concerns with Rambler Group or the Monitor. No creditor (or any other stakeholder) has objected to the Releases.

109 Thus, I find that the Releases are fair and reasonable. I now turn to whether I should grant the claims identification order.

Should I grant the claims identification order?

110 I hereby grant the order. The Monitor seeks a claims identification order setting out a process to resolve creditor claims. Detailed discussion of this process is set out in the Monitor's Sixth Report.

111 Courts commonly grant claims identification procedures under the authority of ss. 11 and 12 of the CCAA. I have done so in the Collins Contracting file 202001G1964. The Ontario Superior Court of Justice confirmed this authority in Re Toys "R" Us (Canada) Ltd., 2018 ONSC 609 when it said, "Claims procedure orders are routinely granted under the courts general powers under ss. 11 and 12 of the CCAA" (at para. 8 and 14).

112 In addition to my decision in *Collins Contracting*, claims procedure orders have been made in *Re Toys "R" Us* and *Cline Mining Corporation, Re,* 2014 ONSC6998. Courts can make such orders even when there is insufficient proceeds from the sale to pay the claims of unsecured creditors.

113 I find the claims procedure proposed by the Monitor is fair, reasonable, and appropriate in the circumstances. I find it will enable the Monitor to identify all potential claims, including all priority and secure claims against the Rambler Group and the directors and officers. I now turn to whether I should approve an order sealing the confidential supplement to the Monitor's Sixth Report and certain information on the other bids received under the SISP until the closing of the purchase as outlined in the share purchase agreement.

Should I approve an order sealing the confidential supplement to the Monitor's Sixth Report and certain information on the other bids received under the SISP until the closing of the purchase as outlined in the share purchase agreement?

TAB 14

2023 ONSC 3314, 2023 CarswellOnt 8791

2023 ONSC 3314
Ontario Superior Court of Justice

Acerus Pharmaceuticals Corporation (Re)

2023 CarswellOnt 8791, 2023 ONSC 3314

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 ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC., AND ACERUS PHARMACEUTICALS USA, LLC

Penny J.

Heard: May 30, 2023
Judgment: June 2, 2023
Docket: CV-23-00693595-00CL

Counsel: Elizabeth Pillon, Lee Nicholson, Philip Yang, for Applicants
Stuart Brotman, Mitch Stephenson, for Monitor
Mervyn D. Abramowitz, for United States of America
Alex MacFarlane, Xiaodi Jin, for First Generation Capital Inc.
D.J. Miller, Alexander Soutter, for Jones Day
Kristina Bezprozvannykh, for Canada Life Assurance Company
Troels Keldmann — as principal of Keldmann Healthcare and Keldmann Innovation
Brian Gilderman — as principal of Precision Clinical Research, Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency
Business associations
Civil practice and procedure

Table of Authorities

Cases considered by *Penny J.*:

Harte Gold Corp. (Re) (2022), 2022 ONSC 653, 2022 CarswellOnt 1698, 97 C.B.R. (6th) 202 (Ont. S.C.J. [Commercial List])

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al. (2022), 2022 ONSC 6354, 2022 CarswellOnt 16700, 6 C.B.R. (7th) 386 (Ont. S.C.J.)

Lydian International Limited (Re) (2020), 2020 ONSC 4006, 2020 CarswellOnt 9768, 81 C.B.R. (6th) 218 (Ont. S.C.J. [Commercial List])

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.)

Target Canada Co., Re (2015), 2015 ONSC 1487, 2015 CarswellOnt 3261, 23 C.B.R. (6th) 314 (Ont. S.C.J.)

Statutes considered:

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

Generally

s. 5.1(2) [en. 1997, c. 12, s. 122]

which FGC did. This was through a court approved process on notice to all stakeholders. In addition, notice of this motion was given to a broad spectrum of the applicants' stakeholders as well.

28 In this context, I will address three specific situations which arose before and/or during the hearing of the motion.

Jones Day has an existing action against APL in the U.S. for outstanding professional fees owed by an APL predecessor. One of the issues raised by Jones Day in this CCAA proceeding involved a potential challenge to FGC's security beyond the amount advanced in December 2022 and pursuant to the DIP, in respect of the Applicants other than APC. The applicants, FGC and Jones Day were able to negotiate a specific carve-out of the Jones Day claim from the proposed releases and agreed that the following language would be approved by the court in this endorsement:

> For greater certainty, in providing the releases as outlined in paragraph 31 of the proposed Approval and Reverse Vesting Order, such relief shall not be used or raised by APL or any individual defendants in the course of the Jones Day Litigation, to limit or adversely affect the Jones Day Litigation as against APL or any individuals that have been named as defendants.
>
> This language is so approved.

29 Dr. Troels Keldmann attended the hearing. He is a principal of Keldmann Healthcare and Keldmann Innovation which sold certain product rights to a predecessor of APL in 2009. Part of the payment to Keldmann Innovation A/S was to be in the form of royalties under the Amended Product Development Agreement between Trimel Biopharma SRL, Keldmann Healthcare A/S and Keldmann Innovation A/S dated December 30, 2009. This agreement, however, is one of the Excluded Contracts being transferred to a ResidualCo under the terms of the Subscription Agreement. Dr. Keldmann was concerned that, although the Keldmann counterparties would lose the right to any future payments, should the product sold to APL be successfully developed at some future point, they would remain subject to a non-compete provision embedded in that agreement. The applicants immediately made it clear that they had no intention of relying on enforcement rights under this excluded contract and proposed that they would issue a formal disclaimer of rights under that contract. This appeared to satisfactorily address Dr. Keldmann's concern.

30 Mr. Brian Gilderman also attended the hearing. Mr. Gilderman is a principal of Precision Clinical Research, Inc., which is conducting clinical trials on an APL product. Mr. Gilderman expressed concern about a potential mis-match between his obligation to continue to perform contractual services under the court's CCAA order while being at risk of not being paid for those services. This situation was complicated by the existence of "hold back" provisions in the service agreement. There was insufficient evidence before the court to address this issue properly. The applicants and the Monitor undertook to pursue the matter with Mr. Gilderman. If a satisfactory understanding cannot be reached, the parties may return to court for further direction.

The Subscription Agreement and the Proposed Transactions Allow Various Stakeholders to Maintain their Rights

31 As noted earlier, the analysis of the applicants and the Monitor is that none of the applicants' creditors will be materially disadvantaged by the Subscription Agreement and the proposed transactions relative to any other viable alternative. In addition, the Subscription Agreement maintains many of the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the proposed transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the applicants. The contracting parties, therefore, have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so. While the Subscription Agreement does not require FGC to cure pre-filing arrears under the Retained Contracts, all contract counterparties have also been served with the applicants' motion record to provide them with notice that their contracts are either being retained or excluded as part of the proposed transactions.

32 While the Excluded Contracts, Assets and Liabilities will be vested out into Residual Cos in this structure, this outcome is no different from the result that would obtain if the proposed transactions had been carried out using a typical asset purchase structure. Nor will there be any inter-company transfer of assets and liabilities among the existing applicants prior to closing.

Therefore, the proposed transactions will not result in any material prejudice or impairment of any creditors' rights which might have been avoided in an asset purchase transaction.

Sufficient Effort has been Made to Obtain the Best Price and the Applicants have not Acted Improvidently

33 The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investment or sale opportunities beginning in March 2022 and a robust sales process conducted by the applicants and E&Y from September 2022, both privately and under a court approved SISP post-filing. There is no evidence, or suggestion, that the process was less than fair and robust. Nor is there any prospect that a "better deal" was somehow available but not pursued.

The Share Transactions

34 Consistent with ARVOs previously granted by this court, the proposed order in this case will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of APC. APC, previously publicly traded on the TSX, will be taken private as a result of the proposed transaction. The purchaser, FGC, currently holds approximately 89% of the issued and outstanding shares of APC. The other shareholders have been notified of the CCAA proceedings and the proposed transactions by way of various press releases and notices issued by the applicants and/or the Monitor.

35 The jurisdictional and legal basis for these orders has been canvassed extensively in prior decisions of this court so I will not repeat that analysis here: Harte Gold (Re), 2022 ONSC 653; Just Energy Group Inc. v. Morgan Stanley Capital Group Inc., 2022 ONSC 6354. In essence, equity claims must be subordinate to the claims of creditors. In no possible scenario, on the record before me, would there be any recovery for the shareholders of APC. The OBCA provides the relevant authority to order the restructuring of the shares and the articles as contemplated in the proposed Approval and Reverse Vesting Order.

The Releases

36 The Release covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the transactions or the applicants, its assets, business or affairs or administration of the applicants, except any claim that is not permitted to be released under s. 5.1(2) of the CCAA. For avoidance of doubt, as noted above, the Releases will not release APL or the individuals named as defendants in the Jones Day litigation from liability in respect of that action.

37 A non-exhaustive list of relevant factors to consider in determining court approval of proposed releases was laid out by Chief Justice Morawetz in Lydian International Limited (Re),2020 ONSC 4006 at para. 54.

38 Considering those factors, I conclude the Release is reasonable and appropriate in the circumstances and that they should be granted for the following reasons:

(a) The claims released are rationally connected to the applicants' restructuring. The Release will have the effect of diminishing claims against the Released Parties, which in turn will diminish indemnification claims by the Released Parties against the Administration Charge and the Directors' Charge. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the applicants' restructuring.

(b) The Released Parties made significant contributions to the applicants' restructuring, both prior to and throughout the CCAA proceedings. Among other things, the extensive efforts of the directors and management of the applicants were instrumental to the conduct of the pre-filing strategic process, the pre-filing SISP, the court-approved SISP and the continued operations of the applicants during the CCAA proceedings. The proposed transactions will maintain the applicants as a going concern; in this sense at least, the CCAA proceedings have had a successful outcome for the benefit of at least some of the applicants' stakeholders. This is an outcome which is, as discussed above, better than any other reasonably available alternative. The Released Parties have contributed time, energy and resources to achieve this outcome; they are deserving of the Release.

(c) The Release is fair and reasonable. The applicants, for example, are unaware of any statutory liabilities in respect of the Released Parties (particularly, the directors and officers of the applicants) and to date, no stakeholder of the applicants have made the applicants or the Monitor aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release. Further, the Release is sufficiently narrow in circumstances as the Release carves out and preserve claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA, claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced to allow the applicants and the Released Parties to move forward with the Subscription Agreement and the transactions and work to conclude the CCAA proceedings.

(d) The Release will bring certainty and finality for the Released Parties. Additionally, the applicants, the Monitor, and FGC all believe that the Release is an essential component to the transactions.

(e) The Release benefits the applicants' creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the applicants, thus minimizing further claims against the applicants.

(f) Creditors had knowledge of the nature and effect of the Release. All creditors on the Service List were served with materials relating to this motion. The applicants also made additional efforts to serve all parties with excluded claims under the transactions. To date, no creditor has objected to the Release. At this point, and in these circumstances, requiring a specific claims process for claims against the Released Parties would only result in additional costs and delay without any apparent corresponding benefit.

Sealing Order

39 The applicants seek a limited sealing order regarding the results of the bids under the SISP. Preservation of the confidentiality of bid information is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate*. It is in the public interest that the ability of the applicants and the Monitor to maximize value be preserved until the transactions contemplated by the Subscription Agreement have closed. The request for a sealing order of the bid information is granted.

Extension of the Stay

40 The applicants need further time to close the proposed transactions and implement the remaining steps to bring these proceedings to their conclusion. As detailed in Updated Cash Flow Forecast at Appendix B to the Third Report of the Monitor, the applicants are expected to maintain liquidity to fund operations up to July 2, 2023. The stay is extended to June 30, 2023.

Monitor Support

41 I will say, in summary fashion to the extent not specifically mentioned in connection with the issues addressed above, that the Monitor has deep familiarity and experience with the applicants and their circumstances, dating back to March 2022. The Monitor has worked closely with the stakeholders, the CRO and other players. The Monitor, appointed by the court and answerable to the court, fully supports all the relief being sought by the applicants and has explained the basis for its support in detail in its Third Report.

Conclusion

42 For the forgoing reasons, the motion is granted. The Subscription Agreement and proposed transactions, including the ARVO, are approved. The sealing order regarding the bid summary is granted. The stay of proceedings is extended to June 30, 2023.

End of Document

TAB 15

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Edward Collins Contracting Limited (Re) | 2023 NLSC 139, 2023 CarswellNfld 267 | (N.L. S.C., Oct 3, 2023)

2020 ONSC 4006
Ontario Superior Court of Justice [Commercial List]

Lydian International Limited (Re)

2020 CarswellOnt 9768, 2020 ONSC 4006, 321 A.C.W.S. (3d) 618, 81 C.B.R. (6th) 218

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 LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: June 29, 2020
Judgment: July 10, 2020
Docket: CV-19-00633392-00CL

Counsel: Elizabeth Pillon, Maria Konyukhova, Sanja Sopic, Nicholas Avis, for Applicants
D.J. Miller, Rachel Bergino, for Alvarez & Marsal Inc.
Robert Mason, Virginie Gauthier, for Osisko Bermuda Limited
Pamela Huff, Chris Burr, for Resource Capital Fund VI L.P.
David Bish, Michael Pickersgill, for Orion Capital Management
Alexander Steele, for Caterpillar Financial Services (UK) Limited
Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)
John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen, Atilla Bozkay, for themselves

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.iv Length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

37 The Applicants submit that the monetization of Treaty Arbitration is also not open to the Applicants at this time, and if initiated would require an extended period to litigate and significant additional financial resources.

38 The Applicants submit that for the purposes of valuing an estate at a plan sanction hearing, the "value has to be determined on a current basis. [...] It is inappropriate to value the assets on a speculative or (remote) possibility basis." A relevant consideration in this analysis is the scope and extent of previous sale or capital raising efforts undertaken by the company and any financial advisors. In support of this submission, the Applicants reference: *Anvil Range Mining Corp., Re*, 2002 CanLII 42003, para 36 (*CanLII*); *Philip Services Corp., Re* [1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List])], 1999 CanLII 15012 at para 9 (*CanLII*) *1078385 Ontario Ltd., Re*, 2004 CanLII 55041 at paras 30-31 (*CanLII*), affirming *1078385 Ontario Ltd., Re*, 2004 CanLII 66329 (*CanLII*).

39 The Applicants submit that the outcome of the Plan, that being the distribution of the Applicants' estates to the Senior Lenders, is essentially identical to what would be achieved with any other options available in the circumstances. Without the Plan, the Senior Lenders could (a) privatize the Applicants' assets through the enforcement of share pledges and other security, or (b) could credit bid their debt to acquire the shares or assets; or (c) enforce their secured positions following the Applicants filing for bankruptcy, administration, or liquidation proceedings across multiple jurisdictions. In each scenario (as with the Plan), the Applicants' assets are transitioned to the Senior Lenders.

40 The foregoing submissions were not challenged.

41 The Monitor supports the Plan. As noted in the Monitor's Seventh Report, "it is the Monitor's view that the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable."

42 I am aware that concerns with respect to the fairness of the Plan have been raised by numerous shareholders of Lydian International and oral submissions were made by John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay.

43 In addition, a number of emails were sent directly to the court, which were forwarded to counsel to the Monitor. In addition, certain emails were sent to the Monitor. None of the emails were in a proper evidentiary form.

44 The concerns of the shareholders included criminal complaints of activities in Armenia, the content of certain press releases and the impact of the COVID-19 pandemic. Some shareholders requested a delay of three months in these proceedings.

45 As previously noted, equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan. Simply put, the shareholders of Lydian International will not receive any compensation for their shareholdings. This is a reflection of the insolvency of the Applicants and the priority position afforded to shareholders by the CCAA.

46 I recognize that the shareholders' monetary loss will be crystalized if the Plan is sanctioned. However, a monetary loss resulting from the ownership, purchase or sale of their equity interest is an "equity claim" as defined in s. 2(1) of the CCAA. This definition is significant as s. 6(8) of the CCAA provides:

> 6(8) Payment - equity claims - No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

47 The Plan does not provide for payment in full of claims that are not equity claims. Consequently, equity claimants are not in the position to receive any compensation.

48 The economic reality facing the shareholders existed prior to the COVID-19 pandemic. The Applicants were insolvent when they filed these proceedings on December 23, 2019. The financial situation facing the Applicants has not improved since the filing. In fact, it has declined. The mine is not operating with the obvious result that it is not generating revenues and interest

continues to accrue on the secured debt. The fact that shareholders will receive no compensation is unfortunate but is a reflection of reality which does not preclude a finding that the Plan is fair and reasonable for the purposes of this motion.

49 The Senior Lenders have voted in sufficient numbers in favour of the Plan. I am satisfied that there are no viable alternatives, and, in my view, it is not feasible to further delay these proceedings.

50 Section 6.6 of the Plan provides for full and final releases in favour of the Released Parties, who consist of (a) the Applicants, their employees, agents and advisors (including counsel) and each of the members of the Existing Lydian Group's current and former directors and officers; (b) the Monitor and its counsel; and (c) the Senior Lenders and each of their respective affiliates, affiliated funds, their directors, officers, employees, agents and advisors (including counsel) (collectively, the "Ancillary Releases"). A chart setting out the impact of the releases is attached as Schedule "A" to these reasons.

51 The Applicants submit that the releases apply to the extent permitted by law and expressly do not apply to, among other things:

a) Lydian Canada's, Lydian UK's or the Senior Lenders' obligations under the Plan or incorporated into the Plan;

b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;

c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and

d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

52 Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

53 The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan (see: *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para 92 (*CanLII*) CCAA at s. 5(1); *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at paras 61 and 70 (*CanLII*); *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]) at para 28-30 (*CanLII*); and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) at paras 85-88 (*CanLII*).

54 The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

55 The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

56 The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

57 The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

58 The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at paras 71 (*CanLII*); and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) at paras 80-82 (*CanLII*).

59 The Applicants submit that this Court has exercised its authority to grant similar releases, including in circumstances where the released claims included claims of parties who did not vote on the plan and were not eligible to receive distributions (*Target Canada Co. et al*. (2 June 2016), Toronto CV-15-10832-00CL (Ont. Sup. Ct. [Comm. List]) Sanction and Vesting Order at Schedule "B" art. 7 (*Monitor's website*); *Rubicon Minerals Corporation et al*. (8 December 2016), Toronto CV-16-11566-00CL (Ont. Sup. Ct. [Comm. List]) Sanction Order at Schedule "A" art. 7 (*Monitor's website*); and *Nortel Networks Corporation et al*. (30 November 2016), Toronto 09-CL-7950 (Ont. Sup. Ct. [Comm. List]) Plan of Compromise and Arrangement at art. 7 (*Monitor's website*)).

60 Full disclosure of the releases was made in (a) the draft Plan that was circulated to the Service List and filed with this Court as part of the Applicants' Motion Record (returnable June 18, 2020); and (b) the Plan attached to the Meeting Order. The Applicants also issued the Press Releases. This notification process ensured that the Applicants' stakeholders had notice of the nature and effect of the Plan and releases.

61 The foregoing submissions with respect to the releases were not challenged.

62 In my view, each of the Released Parties has made a contribution to the development of the Plan. In arriving at this determination, I have taken into account the activities of the Released Parties as described in the Reports of the court-appointed Monitor. I am satisfied that it is appropriate for the Plan to include the releases in favour of the Released Parties.

63 The development of this Plan has been challenging and as the Monitor has stated, "the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable".

64 I accept this assessment and find that the Plan is fair and reasonable in the circumstances.

DIP Charge

65 The terms of the DIP Exit Facility Amendment are described in the Sellers Sanction Affidavit. The DIP Exit Facility Amendment provides for exit financing totalling $1.866 million to assist in implementing the Plan and taking the necessary ancillary steps to terminate the CCAA Proceedings and support the J&E Process.

66 This Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

67 The Applicants submit that, based on the following, the DIP Amendment should be approved and the increase to the DIP Facility should be secured by the DIP Charge:

TAB 16

2020 ONSC 6837
Ontario Superior Court of Justice [Commercial List]

Re Green Relief Inc.

2020 CarswellOnt 19933, 2020 ONSC 6837, 331 A.C.W.S. (3d) 419, 88 C.B.R. (6th) 305

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 GREEN RELIEF INC. (the "Applicant")

Koehnen J.

Heard: November 2-3, 2020
Judgment: November 9, 2020
Docket: CV-20-00639217-00CL

Counsel: C. Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell, for Applicant
Peter Osborne, Christopher Yung, for Directors, Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel
Mark Abradjian, for Tony Battaglia in his capacity as shareholder and creditor
David Ward, for 2650064 Ontario Inc.
Alex Henderson, for Susan Basmaji
Gavin Finlayson, for Auxley Cannabis Group Inc. and Kolab Project Inc.
Anton Granic, for himself
Rory McGovern, for Steve LeBlanc
Alan Dick, Adrienne Boudreau, for Thomas Saunders
Steven Weisz, Amanda McInnis, for Lyn Mary Bravo
Brian Duxbury, for Warren Bravo
Robert Kennaley, Joshua W. Winter, for Henry Schilthuis and Mark Lloyd
Danny Nunes, for Monitor

Subject: Insolvency
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XIX.3.e Miscellaneous

the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

9 No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

10 The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

11 There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

12 The Objectors argue that I should reject the release because:

(i) It was improper to include it as a condition precedent to the Transaction.

(ii) I have no jurisdiction to approve the release.

(iii) The release fails to meet the test set out in case law concerning releases.

(iv) The release is too broad in scope.

(i) Release as a Condition Precedent

13 The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

14 Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

15 That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

(ii) Jurisdiction to Grant Release

16 The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

17 The Objectors begin their analysis with section 5.1 (1) ofthe CCAA which provides:

> 5.1 (1) **A compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).

18 The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to prefiling claims

19 The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

20 The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

21 Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put $3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

22 Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

23 While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

24 The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In largepart I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

25 Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court undersection 11 of the CCAA to make any order that it considers appropriate in the circumstances.

26 At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.*, 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

27 In *Lydian International Limited (Re)*, 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

> (a) Whether the claims to be released are rationally connected to the purpose of the plan;
>
> (b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

28 As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

29 In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.

30 The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

31 As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

32 On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

33 This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

34 This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

35 The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected $20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had $20,000,000 available.

36 The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the $20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.

37 If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.

38 At the outset of the proceeding, 265 Co. proposed to extend a $5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.

39 The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected $20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.

40 It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.

41 With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject $5,000,000 of which $1,500,000 would be for operating purposes and $3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional $7,000,000 for distribution to creditors. While I agree that it does not offer $20,000,000, the reality is that $20,000,000 was not on the table.

42 Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.

43 On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.

44 Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.

45 First, the Vercouteren proposal did not stop 265 Co. from making its $5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal

TAB 17

2022 ONSC 653
Ontario Superior Court of Justice [Commercial List]

Harte Gold Corp. (Re)

2022 CarswellOnt 1698, 2022 ONSC 653, 343 A.C.W.S. (3d) 284, 97 C.B.R. (6th) 202

THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (Applicant) and A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP. (Applicant)

Penny J.

Heard: January 28, 2022
Judgment: February 4, 2022
Docket: CV-21-00673304-00CL

Counsel: Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais, for Applicant
Joseph Pasquariello, Chris Armstrong, Andrew Harmes, for Court appointed Monitor
Leanne M. Williams, for Board of Directors of the Applicant
Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji, for 1000025833 Ontario Inc.
Stuart Brotman, Daniel Richer, for BNP Paribas
Sean Collins, Walker W. MacLeod, Natasha Rambaran, for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited
David Bish, for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates
Orlando M. Rosa, Gordon P. Acton, for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)
Timothy Jones, for Attorney General of Ontario

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.g Monitor

potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

69 The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

70 As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

71 The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

72 It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

73 The position of the purchaser is, not unreasonably, that it will not *both continue* to fund ongoing operations and the CCAA process *and* undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

74 The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

75 In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

76 For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

77 In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well

over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

78 Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

79 CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

80 I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from Lydian International Limited (Re), 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

81 *Whether the claims to be released are rationally connected to the purpose of the restructuring*: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

82 *Whether the releasees contributed to the restructuring:* The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

83 *Whether the Release is fair, reasonable and not overly broad*: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

84 *Whether the restructuring could succeed without the Release*: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

85 *Whether the Release benefits Harte Gold as well as the creditors generally*: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

86 *Creditors' knowledge of the nature and effect of the Release*: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

87 The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

88 Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

89 No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

90 For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

91 The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

92 The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

93 I approve the grant of the requested powers to the Monitor.

Conclusion

94 For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Motion granted.

Footnotes

1 The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

TAB 18

Most Negative Treatment: Distinguished
Most Recent Distinguished: Shermag Inc., Re | 2009 QCCS 537, 2009 CarswellQue 2487, [2009] R.J.Q. 1289, EYB 2009-156550, J.E. 2009-897, 51 C.B.R. (5th) 95 | (C.S. Qué., Mar 26, 2009)

2000 ABQB 442
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, [2000] A.W.L.D. 654, [2000] A.J. No. 771, 20 C.B.R. (4th) 1, 265 A.R. 201, 84 Alta. L.R. (3d) 9, 98 A.C.W.S. (3d) 334, 9 B.L.R. (3d) 41

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as Amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Paperny J.

Heard: June 5-19, 2000
Judgment: June 27, 2000 *
Docket: Calgary 0001-05071

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, *R.B. Low, Q.C.*, and *L. Goldbach*, for Petitioners.
S.F. Dunphy, *P. O'Kelly*, and *E. Kolers*, for Air Canada and 853350 Alberta Ltd.
D.R. Haigh, Q.C., *D.N. Nishimura*, *A.Z.A. Campbell* and *D. Tay*, for Resurgence Asset Management LLC.
L.R. Duncan, Q.C., and *G. McCue*, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midiaty.
F.R. Foran, Q.C., and *P.T. McCarthy, Q.C.*, for Monitor, PwC.
G.B. Morawetz, *R.J. Chadwick* and *A. McConnell*, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.
C.J. Shaw, Q.C., for Unionized Employees.
T. Mallett and *C. Feasby*, for Amex Bank of Canada.
E.W. Halt, for J. Stephens Allan, Claims Officer.
M. Hollins, for Pacific Costal Airlines.
P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.
J. Thom, for Royal Bank of Canada.
J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.
R. Wilkins, Q.C., for Calgary and Edmonton Airport Authority.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court

it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of *Re Royal Oak Mines Inc.* (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) and *T. Eaton Co.*, *supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

78 Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

79 In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

80 The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) aff'd (1988), 70 C.B.R. (N.S.) xxxii (S.C.C.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

82 The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

83 These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

84 To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

85 Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

86 The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

87 Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

88 Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on *Crabtree (Succession de) c. Barrette*, [1993] 1 S.C.R. 1027 (S.C.C.) at 1044 and *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

89 With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words "*excluding the claims excepted by s. 5.1(2) of the CCAA*" immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

90 In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

91 Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

92 While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

93 Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

94 In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia & York Developments Ltd. v. Royal Trust Co.*, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

95 The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566 (Alta. Q.B.) at 574; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 (B.C. C.A.) at 368.

96 The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;

b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

TAB 19

2022 ONSC 6354
Ontario Superior Court of Justice

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.

2022 CarswellOnt 16700, 2022 ONSC 6354, 2022 A.C.W.S. 5355, 6 C.B.R. (7th) 386

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., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA 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) and MORGAN STANLEY CAPITAL GROUP INC. (Respondents)

McEwen J.

Heard: November 2, 2022
Judgment: November 14, 2022
Docket: CV-21-00658423-00CL

Counsel: Jeremy Dacks, Marc Wasserman, for Just Energy Group
Tim Pinos, Ryan Jacobs, Alan Merskey, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
David H. Botter, Sarah Link Schultz, for LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP and CBHT Energy I LLC
Heather L. Meredith, James D. Gage, for Agent and the Credit Facility Lenders
Howard A. Gorman, Ryan E. Manns, for Shell Energy North American (Canada) Inc. and Shell Energy North America (U.S.)
Danielle Glatt, for U.S. Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in Donin et al. v. Just Energy Group Inc. et al. and Counsel to U.S. Counsel for Trevor Jordet, in his capacity as proposed class representative in Jordet v. Just Energy Solutions Inc.
David Rosenfeld, James Harnum, for Haidar Omarali in his capacity as Representative Plaintiff in Omarali v. Just Energy
Robert Kennedy, for BP Energy Company and certain of its affiliates
Jessica MacKinnon, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
Bevan Brooksbank, for Chubb Insurance Co. of Canada

57 As discussed, the Transaction does not provide any recovery for unsecured creditors or shareholders. I accept the submissions of the Just Energy Entities, however, that this is not a result of the RVO structure. Rather, this reflects the fact that the Just Energy Entities' value, as tested through the market through the SISP and through previous marketing attempts over three years, is not high enough to generate value for the unsecured creditors and shareholders. This was also the situation in *Black Rock Metals Inc.* (see paras. 109, 120). I agree with the comments in *Black Rock Metals Inc.* wherein Chief Justice Paquette stated that the unsecured creditors and shareholders are therefore not in a worse position with the reverse vesting order than they would have been under a traditional asset sale. Either way, they have no economic interest because the purchase price would not generate any value for the unsecured creditors and shareholders.

58 There is no other viable option being presented to this court. Further, it bears noting that the shareholders' interests amount to claims in equity. As noted in *Harte Gold Corp. (Re)* , at para. 64, shareholders have no economic interest in an insolvent enterprise and therefore they are not entitled to a vote in any plan. The portion of the order requested relating to the cancellation of the existing shares is, therefore, justified in the circumstances.

59 The consideration to be received for the assets is fair and reasonable. The Just Energy Entities' business was extensively marketed both prior to and during the *CCAA*. There have been no offers, except that put forth by the Purchaser. Therefore, I accept that the consideration is fair and reasonable.

60 While it is unfortunate that there is no recovery for unsecured creditors or shareholders, this is a function of the market. In this regard, it is noteworthy that PIMCO holds over U.S. $250 million in unsecured debt that it will not recover.

61 There is also evidence above that the purchaser is paying more than the Just Energy Entities would be worth in a bankruptcy. Furthermore, the Monitor is satisfied that the consideration is fair in the circumstances.

Other considerations

62 Based on the foregoing analysis of the s. 36(3) provisions, I am also satisfied that the criteria set out above in *Soundair* have been met: there has been a sufficient effort to obtain the best price; the debtor has not acted improvidently; the interests of the parties have been properly considered; the process has been carried out with efficacy and integrity; and there is no unfairness in the circumstances.

63 The Transaction will provide for a fair and reasonable resolution of the Just Energy Entities' insolvency and obtain the best value for its assets. In sum, employment is preserved for most employees and energy will continued to be provided for approximately 950,000 customers.

Related relief

64 With respect to the shareholdings in the Just Energy Entities, it is reasonable to cancel the existing shares and issue new common shares to the Purchaser via JEUS. Similar approaches have been used in other reverse vesting order transactions: see *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)* , at paras. 59-64. Since the existing shareholders have no economic interest in the company, there is no entitlement to recovery unless all creditors are paid in full: *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, 70 C.B.R. (5th) 1.

65 The *CBCA* provides that the share conditions of a *CBCA* corporation under *CCAA* protection can be changed by articles of reorganization. Section 191(1) of the CBCA recognizes that a "reorganization" includes a court order made under any Act of Parliament that affects the rights among the corporation, its shareholders and other creditors (see s. 191(1)(c)). This includes the *CCAA*: see *Canwest*, at para. 34; *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)* , at para. 61 (dealing with the equivalent provision of Ontario's Business Corporations Act, R.S.O. 1990, c.B.16. (*OBCA*)).

66 Pursuant to ss. 173, 176(1)(b) and191(2) of the *CBCA* , courts have accepted that, under a *CCAA* proceeding, they can approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a *CCAA* restructuring

transaction and that the shareholders are not entitled to vote: see *Harte Gold Corp. (Re)*, at para. 62; *Black Rock Metals Inc.*, at para. 122; *Canwest*, at para. 34.

67 There are also a number of other orders requested in the RVO that I have approved. I will briefly deal with the noteworthy ones below, as follows:

• It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the Wage Earner Protection Program Act,S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.

• The releases sought are proportional in scope and consistent with releases granted in other similar *CCAA* proceedings. I have analyzed the factors set out by Penny J. in *Harte Gold Corp. (Re)* , at paras. 81-86. As in that case, the releases are rationally connected to the purposes of the restructuring; the releasees contributed to the restructuring; the releases are not overly broad; the releases will enhance the certainty and finality of the Transaction; the releases benefit the Just Energy Entities, its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification; and all creditors on the service list were made aware of the releases sought and the nature and effect of the release.

• The specific relief in the RVO concerning the ongoing litigation with the Electric Reliability Council of Texas Inc. ("ERCOT") is fair and reasonable. The wording was negotiated with ERCOT and preserves the Just Energy Entities' and ERCOT's rights in the ongoing litigation between them as set out para. 11.

• Similarly, the paragraphs of the RVO concerning the Omarali Class Action are fair and reasonable and have been negotiated with the Omarali Class Action solicitors and are not prejudicial to the insurers noted therein.

• All remaining ancillary relief is fair and reasonable. I have simply touched upon the most significant ancillary relief above.

THE MONITOR'S ORDER

68 As outlined, I granted the Monitor'sOrder.

69 First, it is necessary that the Monitor carry on in order to implement the steps required with respect to the Residual Cos. in Canada and the U.S. and to implement the provisions of the RVO.

70 Second, the stay extension to January 31, 2023 is also necessary given the steps that must be undertaken.

71 I have reviewed the activities of the Monitor's reports and fees and they are fair and reasonable.

72 Last, I agree that a sealing order should be issued with respect to confidential Exhibit "F" of Mr. Caiger's affidavit. Exhibit "F" is comprised of the four NOIs received by the Just Energy Entities. The NOIs contain confidential, commercially sensitive information regarding the identities of the four participants and their respective corporate, operational and financial information disclosed in support of the requirement of each NOI. Additionally, the NOIs contain confidential and commercially sensitive information regarding the scope and subject matter of each proposed bid. Dissemination of this information at this time, would pose a legitimate risk to the commercial interests of the SISP participants and the Just Energy Entities and their stakeholders should the Transaction fail to close. Thus, the public's interest in maintaining the confidentiality of this commercially sensitive information creates an important commercial interest. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as recast in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38, has been met. The sealing order is being made on an interim basis pending further order of the court.

CLAIMS OF BP ENERGY COMPANY

73 At the request of the Just Energy Entities and the BP Energy Company, I will now turn to agreed-upon terms as between the Just Energy Entities and the BP Energy Company.

74 The Just Energy Entities and BP Energy Company and certain of its affiliates (collectively "BP") and the Just Energy Entities have reached an agreement, which is not opposed by any other stakeholders, that BP, being beneficiaries of the Priority Commodity/ISO Charge in these proceedings, are not opposing this motion on the basis that the New Intercreditor Agreement will be on terms consistent with those set forth in the term sheet included in Exhibit "I" to the Affidavit of Mr. Carter sworn August 4, 2022 (the "ICA Term Sheet").

75 To the extent that the terms of the New Intercreditor Agreement are inconsistent with the ICA Term Sheet or contain material changes to the current Intercreditor Agreement that are not specifically set forth in the ICA Term Sheet, BP is reserving its rights to return to this Court to (a) oppose the future release of the Priority Commodity/ISO Charge contemplated by the Reverse Vesting Order and (b) take such action as it reasonably deems necessary to assure its future extensions and credit and accommodations are terminated.

76 I have reviewed this agreement with counsel and find it to be fair and reasonable in the circumstances of the Transaction.

THE OPPOSING STAKEHOLDERS

77 As noted, two stakeholders raised objections to the orders sought by the Just Energy Entities. I will deal with each in turn.

Ganesh Yadav

78 Mr. Yadav is a shareholder.

79 Mr. Yadav did not file any affidavit evidence or any other evidence in a proper form. Rather, he filed what he described as a "motion record" in which he attached various documents relating to the Just Energy Entities' financial performances and outlined his objections.

80 Essentially, he submits that the Just Energy Entities have significant liquidity, far in excess of the stalking-horse bid and the calculations performed by the Just Energy Entities and the Monitor. He primarily submits that the Just Energy Entities have significant future equity in its hedges, that energy prices are increasing and that the hedges are placed at very attractive prices. To support this argument, he relies upon the Just Energy Entities' 2022 annual report describing the derivative instruments. Mr. Yadav stresses that there are significant cash flows and that the future value of the Just Energy Entities is very promising.

81 The difficulty with Mr. Yadav's submissions, however, is the fact that there is no evidentiary basis for these submissions other than a loose connection of documents that, in and of themselves, do not support his argument.

82 More importantly, the Just Energy Entities' business was marketed for over three years and was widely canvassed during the SISP. During this entire time period there has not been a single offer in excess of the stalking-horse offer. Further, Mr. Yadav's submissions concerning value run contrary to the Just Energy Entities and the Monitor's valuation of the company and are unsupported by any other stakeholder.

83 Based on the foregoing, there is no cogent evidence in the record to support Mr. Yadav's submissions, nor has he adduced proper evidence to this court by way of affidavit or expert's report.

84 As a shareholder, he has an equity claim for which there is no recovery in the Transaction.

Mohammad Jaafari

85 Mr. Jaafari also did not file any affidavit evidence at this motion. He, too, simply provided a number of documents. [2]

TAB 20

2022 QCCS 2828
Quebec Superior Court

Arrangement relatif à Blackrock Metals Inc.

2022 CarswellQue 10503, 2022 QCCS 2828, 2022 A.C.W.S. 5339, 2 C.B.R. (7th) 214, EYB 2022-458285

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36 OF: BLACKROCK METALS INC., BLACKROCK MINING INC., BRM METALS GP INC. AND BLACKROCK METALS LP. (DEBTORS) and DELOITTE RESTRUCTURING INC. (MONITOR) and INVESTISSEMENT QUÉBEC AND OMF FUND II H LTD. (SECURED CREDITORS) and 13482332 CANADA INC. (Shareholder Bidder) and WINNER WORLD HOLDINGS LIMITED, 4470524 CANADA INC., GOLDEN SURPLUS TRADING AND PROSPERITY STEEL (INTERVENORS)

Paquette C.J.Q.

Heard: May 30-31, 2022
Judgment: July 8, 2022 *
Docket: C.S. Montréal 500-11-060598-212

Proceedings: leave to appeal refused *Arrangement relatif à Blackrock Metals Inc.* (2022), EYB 2022-462867, 2022 QCCA 1073, 2022 CarswellQue 11443, Patrick Healy J.C.A. (C.A. Que.)

Counsel: Me Jean Legault, Me Jonathan Warin, Me Ouassim Tadlaoui, for Debtor
Me Jean-Yves Simard, Laurent Crépeau, for the Shareholder Bidder
Me Alain Riendeau, Me Brandon Farber, for the Monitor
Me Luc Morin, Me Guillaume Michaud, Me Noah Zucker, for the Secured Creditor, Investissement Québec
Me Doug Mitchell, for the Intervenor
Me David Bish, Me Julie Himo, for the Secured Creditor, OMF fund ii h ltd. (orion)
Me Brendan O'Neill, for the Special Committee of The Board Of Blackrock
Me Geneviève Cloutier, Me François Dandonneau, for The Grand Council Of The Crees And The Cree Nation Government
Me Gilles Robert, Me Kloé Sévigny, for The Canada Revenue Agency

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

120 In any case, the shareholders and unsecured creditors of BlackRock are not in a worse position with an RVO than they would be under a traditional asset sale. Either way, they would have no economic interest because the purchase price paid would not generate any value for the unsecured creditors (and even less so for the shareholders).

121 This is consistent with the conclusions of the Ontario Superior Court of Justice in *Harte Gold Corp.*:

> [59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.
>
> [60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.
>
> [61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the Bankruptcy and Insolvency Act or an order made under the Companies Creditors Arrangement Act approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.
>
> [62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.
>
> [. . .]
>
> [64] [. . .] In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders [. . .]. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances. [48]

[Emphasis added]

122 In particular, paragraphs 61 and 62 of the above excerpt answer the Intervenors' argument about the jurisdiction of the Court to cancel their shares under *the Canada Business Corporations Act* [49] (*CBCA*). The same logic applies with sections 173 and 191 of that statute. The power to cancel and issue shares in the context of an RVO is captures by the possibility for an court order to "change the designation of all or any of [the corporation's] shares, and add, change or remove any rights, privileges, restrictions and conditions [. . .] in respect of all or any of its shares, whether issued or unissued", pursuant to 191(2) and 173(1)(g) of the CBCA.

123 It should also be noted that the Intervenors' opposition to the RVO structure in particular appears to be new. Canada Inc.'s non-binding LOI had already conceded on March 9, 2022 that its proposed bid could itself "take the form of a reverse vesting order". [50] Ultimately, it seems that the Intervenors are not objecting to the use of an RVO *per se*, but only to the extinguishment of their equity interests, which would occur irrespective of the use of an RVO structure or of a traditional vesting order.

124 Therefore, the fact that the transaction is structured as an RVO only has benefits and does not prejudice any of the stakeholders. The Court finds that in the specific circumstances of the present case, the proposed RVO is an appropriate arrangement.

7.3 Discussion on the releases

125 The Proposed Transaction contemplates releases for various parties, including Orion and IQ, from all claims relating to, in particular, BlackRock, its restructuring or the Proposed Transaction.

126 While the Intervenors do not object to a release being granted to BlackRock directors or to the Monitor, they argue that Orion and IQ's actions constitute an abuse of both their rights as shareholders and of the CCAA process. Thus, the effect of the requested releases in favour of Orion and IQ would be to dismiss the Intervenors' potential claims without the benefit of hearing any evidence allowing for the determination of their potential liability.

127 For the reasons below, the Court holds that the releases in favor of Orion and IQ will form part of the Proposed Transaction.

128 It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction.[51] In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in *Nemaska Lithium*.[52]

129 This being said, the courts should not grant releases blindly and systematically.

130 In *Harte Gold Corp.,* the Court approved releases in favor of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Lydian International Limited (Re)*[53] and elsewhere[54]. They are the following:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.[55]

131 In the present file, IQ's and Orion's participation was obviously instrumental to the restructuring of BlackRock's business. Considering the SISP and the opportunity given to BlackRock's stakeholders to participate in the process, it is reasonable for IQ and Orion to now start with a clean slate and not to be under the threat of potential claims as they will be leading BlackRock's efforts with Project Volt. The release will provide more certainty and finality.

132 The release is thus reasonably connected and justified as part of the Proposed Transaction,[56] and it is to the benefit of BlackRock and its stakeholders generally as it will allow BlackRock to emerge as a solvent entity and be in the best possible position to, hopefully, secure financing for Project Volt. They are also fair and reasonable in the present circumstances.

133 The eventual claims for which Orion and IQ should not be released, according to the Intervenors, are based on allegations of abuse related solely to Orion's and IQ's Stalking Horse Bid and their conduct during the SISP.

134 The Court was sensitive to the shareholders' submissions initially and extended the SISP delays to ensure that the process was as fulsome and fair as possible. Still, and in spite of all the efforts made over the years, IQ and Orion remain the only entities who are ready to take over the development of BlackRock and to further invest in same.

135 In the process leading to the Bidding Procedures Order, to the refusal of the Bid Extension Application and to the approval of the Proposed Transaction (Reverse RVO), the Court was able to appreciate the context leading up to the final outcome ordered as per the present judgment and also found the Proposed Transaction, as proposed by Orion and IQ, to be fair and reasonable. The Court sees little to no room for a finding of abuse in the events leading to the CCAA proceedings, to the SISP or to the approved transaction.

136 To the contrary, there is no good reason to leave the door open to the Intervenors' potential claims against Orion and IQ, to BlackRock's detriment.

137 Therefore, the release provided for in the Proposed Transaction will be granted.

FOR THESE REASONS, THE COURT:

138 *DECIDES* in accordance with the attached orders.

Bidder's motion dismissed; debtors' motion granted.

Footnotes

* A corrigendum issued by the Court on July 13, 2022 has been incorporated herein.

1 Reasons in support of orders issued on May 31, 2022 and rectified on June 1, 2022

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

3 Fifth Report, par. 27.

4 Exhibits A-2, R-3.

5 Exhibit R-2.

6 Exhibits A-2, R-3.

7 Exhibit R-5.

8 See par. [68] and following of the present judgment.

9 Exhibit R-6.

10 Exhibit R-7.

11 Exhibit A-3.

12 Exhibit A-4, filed under seal.

13 *Royal Bank v. Soundair Corp.* [1991 CarswellOnt 205 (Ont. C.A.)], 1991 CanLII 2727; *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.); *Bank of Montreal v. Maitland Seafoods Ltd.* (1983), 46 C.B.R. (N.S.) 75 (N.S. T.D.).

14 Exhibit R-11.

15 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), par. 14-15.

16 *Canada v. Canada North Group Inc.*, 2021 SCC 30 (S.C.C.), par. 21; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.), par. 48-51.

TAB 21

2020 ABQB 751
Alberta Court of Queen's Bench

ENTREC Corporation (Re)

2020 CarswellAlta 2318, 2020 ABQB 751, [2021] A.W.L.D. 4, 325 A.C.W.S. (3d) 460, 84 C.B.R. (6th) 195

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

And In the Matter of the Compromise or Arrangement of ENTREC Corporation, Capstan Hauling Ltd., ENTREC Capital Corp., ENTREC Cranes & Heavy Haul Inc., ENTREC Holdings Inc., ENT Oilfield Group Ltd., and ENTREC Services Ltd. (Applicants)

B.E. Romaine J.

Heard: November 24, 2020
Judgment: December 3, 2020
Docket: Calgary 2001-06423

Counsel: Rick T.G. Reeson, Q.C., for Applicants
Kelsey J. Meyer (agent), for Wells Fargo Capital Finance Corporation Canada
Howard A. Gorman, Q.C., for Monitor
Kent A. Rowan, Q.C., for Directors and Officers

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Parties were involved in proceedings under Companies' Creditors Arrangement Act — Hearing was held regarding termination of proceedings under Act — Proceedings terminated, including release of all third party claims against applicants' current and former directors and officers, except for claims covered by applicable insurance policy of applicants and claims that could not be released under s. 5.1(2) of Act — Reasons for order included directors and officers provided critical direction leading up to filing of present proceedings were instrumental in administering sale and investment solicitation process for benefit of stakeholders, and played integral role in identifying and facilitating potential transactions — Transactions approved by court resulted in sale of substantially all of applicants' assets and preservation of significant number of jobs both in Canada and United States — Releases would facilitate monetary distribution of up to $1.5 million to applicants' major secured creditor, which funds would otherwise be held back for charge to secure indemnity in favour of directors and officers — Endorsement served to place particular emphasis on fact that release of claims against directors and officers was granted in specific circumstances of present case.
Table of Authorities
Cases considered by *B.E. Romaine J.*:
In the Matter of Companies' Creditors Arrangement Act (March 29, 2019), Doc. CV-16-11527-00CL (Ont. S.C.) — considered
In the Matter of the Companies' Creditors Arrangement Act (May 9, 2018), Doc. 500-11-053555-179 (C.S. Que.) — considered
In the Matter of the Companies' Creditors Arrangement Act (September 18, 2020), Doc. CV-20-00642097-00CL (Ont. S.C.) — considered

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 5.1 [en. 1997, c. 12, s. 122] — considered

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 11 — considered

HEARING regarding order under *Companies' Creditors Arrangement Act*.

***B.E. Romaine J.*:**

I. Introduction

1 On November 24, 2020, I issued an oral decision granting an order terminating the *Companies' Creditors Arrangement Act* ("CCAA") proceedings of the Applicants (the "CCAA termination order"). The CCAA termination order allowed, among other relief, the release of all third party claims against the Applicants' current and former directors and officers, except for claims covered by an applicable insurance policy of the Applicants and claims that cannot be released under section 5.1(2) of the CCAA.

2 Given that a release of third party claims against directors and officers in a situation where there will not be a plan of arrangement arising from the CCAA proceedings is unusual, I take this opportunity to give written reasons on that issue, and emphasize that the relief with respect to the directors and officers was granted in the specific circumstances of this case.

II. Analysis

3 While section 11 of the CCAA confers on this Court broad discretionary power to grant a variety of orders, the breadth of this authority is not without limits. With the remedial objectives of the CCAA in mind, the Court must determine whether the applicant has demonstrated the three baseline considerations: namely, (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence: *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para 49.

4 Appropriateness is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA: *Callidus* at para 50. Due diligence, in turn, stipulates that to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights: *Callidus* at para 51.

5 The Applicants submitted that there are no provisions within the CCAA that expressly limit this Court's jurisdiction to grant the release of third party claims against the directors and officers. In fact, section 5.1 of the CCAA contemplates the possibility of provision for the compromise of claims against directors of a company in the context of a compromise and arrangement of the company.

6 Further, the Applicants indicated that there is a recent judicial trend in which CCAA courts have exercised their discretion to grant a release of claims against directors and officers of a debtor company in the absence of a plan of arrangement. More specifically, they directed me to three orders from Ontario and Quebec: *In the Matter of Companies' Creditors Arrangement Act* (Mar 29, 2019), CV-16-11527-00CL (Ont. S.C.) [*Golf Town*]; *In the Matter of the Companies' Creditors Arrangement Act* (May 09, 2018), 500-11-053555-179 (C.S. Que.) [*RCR International*]; and *In the Matter of the Companies' Creditors Arrangement Act* (Sep 18, 2020), CV-20-00642097-00CL (Ont. S.C.) [*Beleave*].

7 In *Golf Town*, *RCR International*, and *Beleave*, the courts involved granted the release of claims against directors and officers because the applicants successfully demonstrated that the release was in the best interests of the debtor company and its stakeholders. In particular, in each case, the Court was satisfied that the directors and officers had acted in good faith, the release would facilitate the distribution of the applicants' remaining estate, the release would enhance the efficiency of the CCAA proceedings, and the release was nevertheless restricted by section 5.1(2) of the CCAA.

8 The Applicants' position is that the evidence and reasons in support of the release of claims against directors and officers in these three cases are substantially identical to the ones put forward in the present case. Specifically, the Applicants advanced the following factors that support the relief sought:

(a) The directors and officers provided critical direction leading up to the filing of the present CCAA proceedings;

(b) They were instrumental in administering the sale and investment solicitation process ("SISP") for the benefit of the Applicants' stakeholders;

(c) The directors and officers played an integral role in identifying and facilitating potential transactions to explore during the SISP process;

(d) The transactions approved by this Court resulted in the sale of substantially all of the Applicants' assets;

(e) The transactions approved by this Court resulted in the preservation of a significant number of jobs both in Canada and the U.S.;

(f) The releases will facilitate a monetary distribution of up to $1.5 million to the Applicants' major secured creditor, which funds would otherwise be held back for the charge to secure indemnity in favour of the directors and officers;

(g) The key employee retention and incentive plan approved by this Court contemplated that the Applicants would seek a Court-ordered release of claims against the directors and officers;

(h) Creditors and stakeholders of the Applicants were put on notice of the Applicants' intention to apply for a release of claims against the directors and officers;

(i) The Applicants implemented enhanced notice provisions with respect to the release, which included mailing two letters to all known creditors of the Applicants as well as their current and former employees in both Canada and the U.S.;

(j) The releases will not affect claims against directors and officers that are covered by an applicable insurance policy of the Applicants;

(k) The releases are subject to limitations under section 5.1(2) of the CCAA, which provides for an exception to the release of claims that relate to contractual rights of creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors;

(l) The releases would provide certainty and finality of the CCAA proceedings in the most efficient manner;

(m) A syndicate of lenders, as the Applicants' senior secured creditor, will suffer a substantial shortfall on the amounts owing to it, and as a result, a claims bar process and plan of arrangement would be cost-prohibitive;

(n) The CEO of the Applicants is not aware of any claim or proceeding in either Canada or the U.S. with respect to the directors or officers;

(o) The CEO is not aware of any party who has opposed or expressed an intention to oppose the releases and no one appeared at the hearing to oppose the releases;

(p) The Applicants' stakeholders had nearly two months to consider the terms of the release;

(q) Throughout the CCAA proceedings, the directors and officers acted in good faith and with due diligence; and

(r) The Monitor and agent in the present CCAA proceedings support the release.

9 In granting the CCAA termination order, I accepted these as valid reasons to grant the releases, despite the fact that they would not be subject to a vote by creditors as part of a plan of arrangement. In the specific factual matrix of the case at hand, I am satisfied that the release of third party claims against the directors and officers, subject to certain limitations, will further the policy objectives underlying the CCAA.

III. Conclusion

10 While the CCAA termination order was granted, this endorsement serves to place a particular emphasis on the fact that the release of claims against the directors and officers was granted in the specific circumstances of the present case.

Order accordingly.

End of Document

TAB 22

2021 BCSC 1819
British Columbia Supreme Court

In the Matter of a Plan of Arrangement of UrtheCast Corp.

2021 CarswellBC 2886, 2021 BCSC 1819, 336 A.C.W.S. (3d) 20, 92 C.B.R. (6th) 294

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 and Arrangement of UrtheCast Corp., UrtheCast International Corp., UrtheCast USA Inc., 1185729 BC Ltd. and Those Other Petitioners Set Out on the Attached Schedule "A"

Sharma J.

Heard: January 6-7, 2021
Judgment: January 7, 2021
Docket: Vancouver S208894

Counsel: D.E. Gruber, J. Mighton, B. Reedijk, for Petitioners, UrtheCast Corp.
C. Brousson, J. Bradshaw, for Monitor, Ernst & Young
M. Nowina, for Land O'Lakes and WinField
I. Aversa, for 1262743 BC Ltd.
S. Collins, R. Richardson, for Antarctica Capital and UrtheDaily

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Parties were involved in proceedings under Companies' Creditors Arrangement Act — Debtor brought petition for extension of stay to conclude transactions necessary to effect two asset sales, one of which was not controversial between parties and other involving weather imagery technology — Debtor also sought assignment of contract regarding weather imagery technology — Petition granted — Monitor approved of proposed assignment — Reasonable to assume that sophisticated financial entity debtor-in-possession (DIP) facilitator would not be involved if it did not have confidence that it could raise required money, and considerable amount had already been spent and advanced under DIP facility — Although DIP facilitator had no experience in satellite imagery, it had retained experts to assist it — Assignment was necessary for asset sale to go forward because it was vital to successful restructuring — Not shown that non-monetary default under agreement had occurred regarding launch of satellites — There was strong enough case presented that potential of existing default did not outweigh benefits of restructuring — Release of third-party claims against former directors and officers granted.
Table of Authorities
Cases considered by *Sharma J.*:
Dundee Oil and Gas Limited (Re) (2018), 2018 ONSC 3678, 2018 CarswellOnt 9960, 61 C.B.R. (6th) 68 (Ont. S.C.J. [Commercial List]) — considered
ENTREC Corporation (Re) (2020), 2020 ABQB 751, 2020 CarswellAlta 2318, 84 C.B.R. (6th) 195 (Alta. Q.B.) — referred to
In the Matter of a Plan of Arrangement of UrtheCast Corp. (2020), 2020 BCSC 2024, 2020 CarswellBC 3289, 84 C.B.R. (6th) 255 (B.C. S.C.) — referred to

of 2021. It is clear now that this will not happen. Land O'Lakes submits that I am therefore being asked to approve of a plan of a company that is already effectively in default.

71 The other parties do not agree with that characterization. They submit, on the evidence before me, I should not be satisfied that there has been a default.

72 Land O'Lakes is correct when it says that the legislation does not contemplate that the court approve of restructuring in any event or that saving jobs or the continuity of the business necessarily overrides the contractual rights of a party who does not want its contract assigned. Were that the case, there would be nothing to weigh under this section. They also point out that the Monitor's approval cannot be determinative because if that were the case, it would render the other two factors redundant. I agree that under 11.3(c), I am engaged in a weighing of factors.

73 However, it is unclear if I have to, or should, make a specific finding of fact about the non-monetary default under the contract. Instead, the question must be whether I am satisfied on the evidence that there has been a strong enough case presented that the potential of an existing default outweighs the benefits that come from the restructuring. With regard to the benefits of the restructuring, I am satisfied that those are outlined by the Monitor in the 6th Report. I have to be satisfied that what Land O'Lakes puts forward is enough to outweigh those benefits.

74 I am not convinced of this for a number of reasons. I do not find on the evidence a strong enough case that there is a term in the contract about the timing of the launch that the petitioner breached.

75 The parties referred to minutes from a particular committee meeting, where the timing issue was mentioned. In that context, parties also addressed the availability of other possible remedies, and whether the timing issue had been escalated or not. I acknowledge that Land O'Lakes' position is that I have inconsistent evidence on these points. It submits I should not make a decision in that context. It says that it would be better to let an arbitrator in New York decide the issue, as the parties agreed to.

76 The issue is whether Land O'Lakes has established a concern that is significant enough to outweigh the benefits. I find that it has not because there is a process that could have been invoked to escalate the issue of the timing of the launch. That could have happened in July before the stay was entered, but it was not done. The fact that it was not done is more consistent with a conclusion that no one at that time considered the delay in launch to amount to a breach. While this is not determinative, I find it is significant.

77 Land O'Lakes also submits that it was not presented with any alternative to simply agreeing to the assignment (its consent was sought before the petitioner applied for the assignment).

78 The parties disagree as to whether the evidence of the affiants on this point was directly at odds. This brings up again the issue of whether I have to resolve that inconsistency. It is not clear to me there is an inconsistency, but I do not criticize the affiants or parties for suggesting there was. The evidence to which they refer demonstrates that there was a clear breakdown in the good-will relationship that the parties had previously enjoyed. The parties focus on a particular communication (a November email). I do not think that Land O'Lakes would disagree that when that email was sent, it was described by the other parties as a "threat". Land O'Lakes might not accept that characterization, but it agrees that the email would have been a shock or at least a large surprise.

79 In other words, there was a definitive moment when these parties became at odds. It is not surprising that the evidence about that moment may be conflicting.

80 When I look at the evidence as a whole, taking into account the relationship between the parties, the agreements that were entered into, and what has happened throughout these proceedings, I am satisfied that I can infer that in the context of what was going on, it was very clear within the proposal for the stalking horse bid and the SISP that the assignment of the Servicing Agreements was vital.

81 Land O'Lakes submits that it does not bear the burden of establishing that more could have been done, in the sense of seeking its consent to the assignment and when that was not obtained, applying to court. It submits that the court should not be satisfied with the other parties' position, which it characterizes as an "all or nothing" proposal: assign the contract or the restructuring fails.

82 With respect, that characterization implicates the good-faith efforts of the petitioner and Antarctica Capital. The dispute on this particular issue ultimately boils down to a challenge based on the conduct of the parties. However, I did not understand either party to accuse the other of bad faith.

83 Land O'Lakes' position is that something more should have happened, or at least, the court should be satisfied that other things should have taken place before forcing the assignment. In framing it that way, there is the underlying suggestion that the petitioner and others were trying to take advantage of what is available under the legislation and essentially make the court force an assignment. Alternatively, one might suggest that Land O'Lakes is trying to better its position by disagreeing to the assignment and hoping to extract through this process an ability to achieve things it could not under the contract.

84 I am not convinced that either is the case.

85 There was a breakdown in the ongoing discussions and negotiations amongst the parties. I am not satisfied that anyone can be blamed for that.

86 I do not find that any of the parties acted in bad faith. I am also satisfied based on everything I have seen that the Monitor's view is accurate: there is nothing else that could have been done. This is the only deal available that gives the company a chance to continue.

87 Accordingly, it is appropriate to assign the contract.

88 I am mindful that the court has been given extraordinary powers under the *CCAA*, which must be exercised with care. This is a case involving a very complex company and a complex group of agreements and arrangements. There are multiple subsidiaries across the world. It involves emerging technology. The petitioner's product is unique. It was unknown if there would be anybody interested in it. All of those circumstances complicated this proceeding. I recall that the Monitor noted this at the very beginning of this process.

89 Having reviewed what has happened, my perspective is that this has been a remarkably successful restructuring. There was an auction for the SAR assets, and although not an auction, there was interest expressed in Geosys. While the Hale interim lender had a dispute, that has settled; however, it is significant that there was another potential deal even if that did not ultimately pan out.

90 Given the nature of the business and all the complications I have referred to, I am satisfied that it is appropriate and in keeping with the purposes of the legislation to assign the contract.

V. OTHER ORDERS

91 The petitioner also seeks a release of third-party claims against the company and its former directors and officers, as well as the extension of the stay to February 15.

92 I am granting those. The petitioner clarified that the directors and officers were asking for that order in the context of everything that has happened in this case. I understood there to be some anxiety about liability after the stay was lifted and the insurance had run out. However, that is not reason enough to grant the orders. I have to be satisfied that it is appropriate in the overall context.

93 I rely on the *ENTREC Corporation (Re)*, 2020 ABQB 751, which had similarities to what is in front of me. A similar order was granted in that case, even where there was no plan of arrangement being put to the creditors. I am satisfied that the

directors and officers themselves have acted in food faith throughout. There was no suggestion otherwise. They have remained closely involved throughout the negotiation and execution of the various agreements that are being approved today. I accept that they were playing an essential role in effecting the restructuring. In light of the benefits from the restructuring, it is appropriate to grant the relief as sought.

94 I also note that all parties were put on notice that this relief would be sought at the hearing and no objection was raised. That, too, is not determinative.

95 I am satisfied that it is appropriate to grant this order to provide certainty and finality to the proceedings. In particular, I rely on the fact that the Monitor supported the release, noting that the petitioners have acted in good faith throughout.

VI. FORM OF ORDER

96 Land O'Lakes made submissions in the alternative regarding the form of the order, in the event that I did grant the order sought. [Please note that references to paragraph numbers in these reasons refer to the draft order that was before the Court. The Order that was eventually entered may have different paragraph numbering. To avoid confusion, I have removed some references to specific paragraph numbers].

97 Paragraph 8 of the draft order seeks a declaration that the invoice amount is due and payable by WinField for the services provided. I understand that this paragraph is in response to a dispute at one point in time regarding the statement of worth and invoices; the parties disagreed as to what was required by the contract and by what was required by past practice.

98 However, my understanding is that Land O'Lakes has agreed to pay the amount. While there may still be a disagreement about what the contract requires in terms of statement of work and/or the amount of the invoices, counsel for Land O'Lakes stated the amount will be paid. That is a representation made to me by counsel as an officer of the court and, as a result, I am satisfied that paragraph 8 does not need to be included in the order.

99 Land O'Lakes also raised a question about paragraph 13. It says that the Purchasers, the petitioners, and the Monitor shall be at liberty to apply for further advice, assistance, or direction. It raised a concern about why the Purchasers would be included, but I am satisfied that it is appropriate because after the transactions close, the petitioners might not exist as corporate entities. Therefore, the Purchasers need to have the ability to come to court if there is an issue about this order.

100 I did not understand anybody to object to also including the Land O'Lakes entities in para. 13. I agree that those entities also have liberty to come back to this Court. I understood that Land O'Lakes wanted to add a clause to clarify that nothing about the term in the order purported to impact future disagreements about the agreements between WinField and the Purchasers. While I did not understand there to be objection to that, I am not convinced that it is necessary to include such a term. I am satisfied that the term as written is clear. The intention, obviously, is if there is something that the parties are unclear of or need advice or direction about the orders this Court has granted, they may come back here. However, I cannot see why that would possibly be interpreted to include anything other than what I have addressed.

101 Land O'Lakes had a concern about why para. 14 also referred to the Purchasers, but for the same reasons I have just indicated, it is appropriate to do so.

102 The more substantive objection was to paras. 6(d) and 11, which I will address together. Land O'Lakes, for many of the same reasons that it raises in its substantive objections to granting the assignment itself, asked the court not to include those paragraphs. I do not agree with Land O'Lakes. Those subparagraphs are, in fact, necessary in the context of the facts of this particular proceeding.

103 As I have already indicated, there is a potential dispute amongst the parties about whether the delay in the timing of the launch amounts to a breach of the contract. I have already indicated my view that I am not convinced that it would amount to a breach. In light of that, I am also satisfied that given what I have seen in the correspondence in the evidence, the Purchasers are entitled to the protection that para. 6(d) gives them.

104 I rely specifically on the order that was granted in *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586. I appreciate that it was a different context in terms of who was objecting to the assignment, but the principle remains the same: is the term something necessary and appropriate to grant in the context of this restructuring? I am satisfied that it is.

105 I note specifically the evidence in the material that Land O'Lakes has, in the past, expressed its intention to terminate the agreement to rely on its rights as soon as it can. While that position was not taken before me, there is the risk that Land O'Lakes might do so. Antarctica Capital and the Purchasers are putting forward not only significant money, but also the effort to carry forward and to make this restructuring successful. It would be imprudent for this Court to approve their going out in the market to try to raise a significant amount of money, having already spent a significant amount of money, while preserving Land O'Lakes' ability to terminate an agreement once the stay is lifted. That would give rise to the possibility of the order being a hollow remedy. Therefore, I am satisfied that it is appropriate to include paras. 6(d) and 11 in the order.

106 Land O'Lakes also objects to the set-off. Land O'Lakes objects to this on the basis that there is no provision in the contract itself to allow for a set-off, so the court would be overstepping its necessary task in allowing for that.

107 Antarctica Capital appears to suggest that in order to address that in part, it could be a mutual ability. Of course, the amount it owes to cure the monetary defects in this case is significantly higher than the $2 million that Land O'Lakes had indicated they are going to pay.

108 Again, I rely on the evidence in front of me. I am not suggesting that Land O'Lakes would do anything inappropriate or act with mal-intent. However, I am satisfied that there has been a disruption to the early discussions and relationship amongst the parties such that Antarctica Capital and the Purchasers are entitled to this particular remedy in the unique circumstances of this case. Therefore, I am granting and approving of the set-off.

109 Land O'Lakes raises a concern, although not strenuously, about the wording of para. 5, but I am satisfied that it is appropriate. My understanding is that the objection is related more to some of the other arguments that were raised with regard to both paras. 6(d) and 11. For the same reason as I allowed those, I am satisfied that para. 5 is also acceptable.

110 In their alternative submission, Land O'Lakes also objects to para. 10. I understand that the Purchasers requested this for the same reason as para. 8 and that they would still prefer to keep it in for a number of reasons. However, as mentioned, counsel for Land O'Lakes, as an officer of the court, said that the payment will be made. I am not inclined to tell people to comply with the legal duties that they already have. Accordingly, I am not satisfied that going forward, Land O'Lakes would do anything that is contrary to the orders that are granted. For that reason, para. 10 does not add anything that is necessary and may be removed.

Petition granted.

TAB 23

R.S.A. 2000, c. T-4, s. 20

s 20. Liability of directors for failure to remit

Currency

20.Liability of directors for failure to remit

20(1) Where a corporation has failed to remit tax collected by that corporation, the directors of the corporation at the time the corporation was required to remit the tax collected are jointly and severally liable, together with the corporation, to pay that tax collected and any interest or penalties relating to it.

20(2) A director is not liable under subsection (1) unless

(a) a certificate for the amount of the corporation's liability referred to in subsection (1) has been filed in the Court under section 18(2) and execution for that amount has been returned unsatisfied in whole or in part,

(b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within 6 months after the earlier of the date of commencement of the proceedings and the date of dissolution,

(c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* (Canada) and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within 6 months after the date of the assignment or receiving order, or

(d) a compromise or arrangement has been proposed under the *Companies' Creditors Arrangement Act* (Canada) in respect of the corporation.

20(2.1) Notwithstanding subsection (2), a director is not liable under subsection (1) if the director exercised due diligence in attempting to ensure the corporation remitted the tax.

20(2.2) The Minister shall not take action to collect an amount owed by a director under this section until

(a) all reasonable efforts to collect an amount from the corporation have been made by the Minister, and

(b) the director has been notified in writing of the director's liability under this section.

20(3) A notice under subsection (2.2)(b) may not be sent more than 2 years after the director last ceased to be a director of the corporation.

20(4) Where execution referred to in subsection (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

20(5) Where a director pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that the Crown would have been entitled to had that amount not been so paid, and where a certificate that relates to that amount has been filed, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Minister is hereby empowered to make.

20(6) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

Amendment History
2003, c. 47, s. 8; 2007, c. 43, s. 9; 2009, c. 33, s. 24

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

TAB 24

Most Negative Treatment: Distinguished
Most Recent Distinguished: Party A v. The Law Society of British Columbia | 2021 BCCA 130, 2021 CarswellBC 872, 48 B.C.L.R. (6th) 238, 83 Admin. L.R. (6th) 250, [2021] 9 W.W.R. 379, 329 A.C.W.S. (3d) 457, 458 D.L.R. (4th) 77 | (B.C. C.A., Mar 29, 2021)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35

(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

TAB 25

Most Negative Treatment: Distinguished
Most Recent Distinguished: Party A v. The Law Society of British Columbia | 2021 BCCA 130, 2021 CarswellBC 872, 48 B.C.L.R. (6th) 238, 83 Admin. L.R. (6th) 250, [2021] 9 W.W.R. 379, 329 A.C.W.S. (3d) 457, 458 D.L.R. (4th) 77 | (B.C. C.A., Mar 29, 2021)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35

(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

