IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lemare Holdings Ltd. (Re),*
2012 BCSC 1591

Date: 20121026
Docket: S124409
Registry: Vancouver

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

And:

In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c. 57, As Amended

And:

In the Matter of a Plan of Compromise or Arrangement of Lemare Holdings Ltd., Lemare Lake Logging Ltd., Lone Tree Logging Ltd., C.&E. Roadbuilders Ltd., Coast Dryland Services Ltd., Dominion Log Sort Ltd., and Central Coast Industries Ltd.

Petitioners

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Petitioners on October 16, 2012: on October 18 and 19, 2012:	 K. Denhoff and D. Dahlke M. Buttery and L. Williams
Counsel for Her Majesty The Queen in Right of the Province of British Columbia on October 16, 2012: on October 18 and 19, 2012:	 R. Payne and M. Weintraub D. Hatter and S. Davis
Counsel for the Toronto-Dominion Bank and TD Equipment Finance Canada Inc.:	R. Morse
Counsel for the Monitor:	M. Verbrugge
Place and Date of Hearing:	Vancouver, B.C. October 16, 18 and 19, 2012
Place and Date of Judgment:	Vancouver, B.C. October 26, 2012

INTRODUCTION

[1] On June 21, 2012, on the *ex parte* application of the petitioners, I granted an Initial Order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the CCAA) granting relief that included a stay of proceedings until the comeback hearing, which I set for July 20, 2012, and appointing Alvarez & Marsal Canada Inc. as monitor on behalf of the Court.

[2] On July 20, 2012, the petitioners sought an extension of the stay, and the pronouncement of a claims process order (CPO). Counsel for Her Majesty The Queen in Right of the Province of British Columbia (the Province) advised that they wished to apply to set aside the initial order, but were not ready to proceed. They asked for an adjournment. Unhappy with their delay, I denied the adjournment, but as things turned out, that is what happened anyway. What was understood at the time was that the Province and the petitioners were to discuss a means of dealing with the Province's claim within the CCAA process. They were unable to come to an agreement.

[3] On September 6, 2012, we reconvened to hear the Province's application, but the petitioners objected to the admissibility of certain evidence that the Province sought to adduce. Counsel for the Province argued that he was not in a position to deal with that objection notwithstanding that the petitioners had raised their concern as soon as the affidavits in question were delivered. Still unhappy with the delay, I nevertheless granted the adjournment given the basis of the objection, and I directed the petitioners to put their objection into the form of an application.

[4] On October 16, 2012, I heard the petitioners' application to exclude evidence. I gave my ruling at the end of the day with reasons to follow. On October 18 and 19, 2012, nearly four months after my Initial Order, I heard the Province's application for an order setting that order aside, or alternatively terminating the stay. I also heard the petitioners' application for a further stay and a claims process order.

[5] What follows are my reasons on all three applications.

BACKGROUND

[6] The petitioners, whom I shall describe collectively as Lemare, constitute an integrated forestry business located on northern Vancouver Island, where they are a major employer.

[7] For some considerable time, Lemare has been at loggerheads with the Province, particularly what is now styled the Ministry of Forests, Lands and Natural Resource Operations (MOF), over stumpage that the Province claims Lemare owes and has not paid due to wilful under- and non-reporting. Nothing in these reasons addresses the merits of that claim.

[8] Various aspects of that dispute, other than its merits, have occupied a significant amount of Court time over the last several years, the circumstances of which have given rise to considerable acrimony between the parties. On three separate occasions, this Court has quashed warrants obtained by the Province pursuant to which, variously, logs, documents, items, computer disks, drives and data files and other information were seized from Lemare, and declared the seizures unlawful. I did so myself in March of 2009. So did Mr. Justice Ehrcke in July of 2011 and Mr. Justice Affleck in February of 2012[1]. Mr. Justice Affleck also struck out a civil claim alleging fraud that the Province had commenced against Lemare, on the basis that it was an abuse of process.

[9] At this point, there is not much trust left between the parties. Lemare feels persecuted. The Province feels cheated.

[10] In the meantime, Lemare went through a successful internal reorganization involving generational change that contributed to the viability of its core business. One cloud on the horizon was, and remains, a potential liability on the guarantee of a $10 million loan used to fund a Retirement Compensation Arrangements Trust (RCA trust) for the former principal shareholder.

[11] Then, in the latter part of May 2012, the horizon clouded up considerably. Lemare received a proposal letter from Jason Kruger CA, Audit Supervisor with the

Forest Revenue Audit Program (FRAP) of the Income Taxation Branch, Ministry of Finance.

[12] This 10-page letter, dated May 23, 2012, supported by some 177 pages of documentation, proposed to adjust the total amount of stumpage payable by Lemare. A second proposal letter dated June 14, 2012, also supported by voluminous documentation, proposed the assessment of a further amount. Both letters proposed, in addition, the assessment of a penalty of 100% of the amounts said to be owing.

[13] The sum of the two proposed assessments against Lemare was $4,996,837, plus 100% penalty, plus interest, yielding a total in excess of $12,000,000.

[14] In these circumstances, Lemare appeared before me on June 21, 2012, without notice to any party other than its current operating lender, the Toronto-Dominion Bank (TD), asserting that it was insolvent within the meaning of the CCAA and that it required the Act's protection in order to facilitate a restructuring of its business enterprise and the continuation of its ability to carry on business. I granted the order.

THE APPLICATION TO EXCLUDE EVIDENCE

[15] The Province's application to set aside the Initial Order was based, as we shall see, principally on the argument that Lemare was not insolvent as at June 21, 2012, so that I had no jurisdiction under the CCAA to make the order.

[16] The Province also sought to rely on a number of alternative positions. Among them was the assertion that Lemare had not acted in good faith in its dealings with the Province. The Province filed affidavit material that included two paragraphs and a number of exhibits upon which it wished to rely in support of that assertion. Lemare advised the Province of its objection to the materials in question as soon as they were given copies of the affidavits, and before the affidavits were filed. The Province declined Lemare's invitation to withdraw the assertions.

[17] At the hearing on September 6, 2012, I, too, questioned the Province about withdrawing the two paragraphs in question on the ground that they appeared to be of marginal relevance given the principal basis of the Province's application, which was jurisdiction. The Province, however, wished to proceed on the full record. Hence the adjournment.

[18] The problem raised by Lemare was this. On July 7, 2011, Ehrcke J. quashed three search warrants and ordered the Province to return all items seized and all copies of such items to Lemare within 14 days, that time being intended to give the Province an opportunity to seize the items lawfully as it had indicated it could.

[19] For reasons that are not material, the time was extended until November 18, 2011. As the Province had by then neither re-seized the materials through lawful means nor returned all of them, Lemare returned before Ehrcke J. on March 26, 2012. At that time, Ehrcke J. ordered that his Order of July 7, 2011, be amended by replacing an earlier term with the following:

> The [Province] shall not use the information from the items seized or any copies of such items against Lemare in any manner, including, but not limited to, in any Court proceeding, administrative proceeding, audit or assessment, unless the [Province has] obtained that information lawfully.

[20] On February 17, 2012, two representatives of MOF attended at Lemare's office and, pursuant to Ehrcke J.'s order of July 7, 2011, returned five cardboard boxes. At the same time, Mr. Kruger and a colleague from FRAP attended and demanded an inspection of the same five boxes pursuant to sections 142.2 and 142.21(a) of the *Forest Act*, R.S.B.C. 1996, c. 157, asserting that the boxes contained scaling records. Scaling records are among the documents required to be kept by Lemare for audit or inspection, and which a forest revenue official such as Mr. Kruger is entitled to inspect.

[21] Mr. Eric Dutcyvich of Lemare advised Mr. Kruger and his colleague that he required a reasonable amount of time to review the contents of the cardboard boxes to determine whether they contained any items that Lemare was required to produce.

[22] On March 8, 2012, Mr. Kruger and his colleague returned and again demanded to inspect the five boxes that had been returned on February 17. Mr. Dutcyvich asked them on what basis they maintained that the contents of those boxes were subject to inspection. He deposed that Mr. Kruger and his colleague acknowledged they had reviewed the contents of the boxes. The boxes were not turned over for inspection, but a number of other documents were made available.

[23] The impugned paragraphs of Mr. Kruger's affidavit initially read as follows (I ordered the underlined portion to be deleted at the conclusion of the hearing):

> 25. On February 17, 2012, forest revenue officials attended the offices of Lemare and attempted to conduct an inspection under s. 142.21 of the Forest Act <u>of copied items that had been returned by MFLNR; Lemare refused to permit inspection of the returned items</u>. Attached to my Affidavit as **Exhibit "C"** is a true copy of the February 17, 2012 inspection demand letter delivered to Lemare at the time of the inspection.
>
> 26. On March 8, 2012, forest revenue officials again attended the offices of Lemare to perform an inspection <u>of the returned items. Lemare again refused to permit inspection</u>. Attached to my Affidavit as **Exhibit "D"** is a true copy of the March 8, 2012 inspection demand letter delivered to Lemare at the time of the inspection.

[24] Lemare took the position that the entirety of those two paragraphs, together with portions of the inspection demand letters marked as Exhibits "C" and "D", and portions of the two proposal letters annexed to Mr. Kruger's affidavits, were inadmissible as contravening the prohibition ordered by Ehrcke J. on March 26, 2012. The two proposal letters had, of course, already been admitted into evidence in support of Lemare's application for the Initial Order.

[25] Lemare argued that all of the impugned portions were based on knowledge that Mr. Kruger had only because of his review of the unlawfully seized materials, without which he would not have had any basis for believing that they were subject to seizure. Accordingly, Lemare submitted, although Mr. Kruger was certainly in a position to make a demand for inspection, he could not state that Lemare had failed to comply, because he could only assert a failure to comply on the basis of knowledge he was not entitled to have. Instead, he would have to accept whatever answer Lemare gave to the demand.

[26] The Province argued that Mr. Justice Ehrcke's order only prevented its officers from reaching into the box, so to speak, and withdrawing information to use against Lemare. It did not prevent them from knowing that Lemare had information and documents that it ought to have disclosed, yet had failed to do so.

[27] The Province conceded that if it used information from the seized boxes to assert non-compliance on the part of Lemare, then it would run afoul of Ehrcke J.'s order. It pointed out, however, that if Lemare's position was correct, then Lemare would be entitled to lie in response to the demand, and the Province would be powerless to do anything about it even though it knew that Lemare's answer was false.

[28] I confess to finding the situation rather surreal – one, indeed, that would have excited the admiration of Lewis Carroll. The Province, forced to return copies of documents it seized unlawfully, gives them over only to attempt immediately to seize them again pursuant to its *Forest Act* powers. But those powers entitle it to the production only of certain items; in asserting that the boxes contained such items, it seemed to be relying on information it obtained unlawfully. On the other hand, for Lemare to argue that the Province is accordingly obliged to accept Lemare's denials on their face though knowing them to be untrue, was hardly reassuring.

[29] The fact nevertheless remains that a real dispute exists between the parties as to what Lemare is obliged to produce and what it is not. That dispute should be resolved on bases that do not include unlawful seizure.

[30] In the circumstances, I concluded that the underlined portions in the two paragraphs in Mr. Kruger's affidavit, as set out above, did indeed depend upon the use of information from the unlawfully seized boxes, and should therefore be redacted. Although the Province submitted that Mr. Kruger had other sources of information on which to base his demand, I did not find that argument persuasive given the affidavit evidence both of Mr. Kruger and Mr. Dutcyvich.

[31] Mr. Kruger was certainly entitled to tell me that forest revenue officials attended on February 17 and March 8, 2012, to perform an inspection. I expect he could also have noted that Lemare produced nothing in response to the demand, although it was too late to redraft the paragraphs, and any revision would invite a response. What, in my view, he could not say in the circumstances was that the items he sought to inspect, and which he deposed that Lemare refused to permit him to inspect, were the very items he had just returned. This is because his entitlement to demand to inspect the specific contents of the boxes (as opposed to documents generally) depended upon his knowing their contents. Without that information, Lemare's refusal was of no relevance. Had his affidavit referred generally to a demand to produce documents that the Province sought, rather than the specific contents of the five returned boxes, I would not have found it objectionable.

[32] Although some small portions of both the inspection demand letters and the proposal letters also asserted facts that depended upon knowledge of what was in the boxes of unlawfully seized documents, I ruled them admissible in full. I did so on the basis that they were hearsay documents admitted for the purpose of proving that the Province had issued them, and establishing the positions the Province had taken. The Province did not seek to admit them as proof of the truth of their contents.

THE *FOREST ACT* SCHEME

[33] Before turning to the two remaining applications, it is helpful to review the applicable provisions of the *Forest Act* under which the Province's claim arises.

[34] The Province submits, and I accept, that the *Forest Act* creates a comprehensive code for the calculation, assessment and collection of stumpage in British Columbia. The payment of stumpage is based on a self-reporting system that is subject to compliance reviews and enforcement through audits and assessments.

[35] The recovery of money required to be paid under the *Forest Act*, including assessed stumpage, is governed by Part 11, and provides (section 130(1)(b)) that the amount will bear interest, in the case of an assessment for stumpage, from the

date determined by the commissioner to be the date that the stumpage would have been due, and (section 130(1)(c)) may be recovered in Court as a debt due to the government.

[36] The assessment of stumpage falls under Part 11.1 of the *Forest Act*. Under section 142.51, if it appears to the commissioner, as is alleged here, that some or all of the Crown timber harvested was not reported in the scale, or was reported incorrectly, then the commissioner may make an estimate of the total amount of stumpage owing, and may assess the harvester or persons dealing in the timber harvested for the amount estimated. She may then assess the amount of interest payable on the amount assessed.

[37] Under section 142.61, the commissioner may assess a penalty that does not exceed 100% of the assessment if she is satisfied that the assessment is based upon the person's wilful contravention of the Act, or wilful provision of a false or deceptive statement. That was what was proposed here. Where the commissioner is satisfied that an assessment is based upon the person's contravention of the Act that is not wilful, she may assess a penalty that does not exceed 25% of the assessment.

[38] The practice of the FRAP, which carries out the assessment, is to provide foresters with an audit proposal letter in advance of the assessment, to which the forester is allowed 30 days to respond. The assessment will then follow. Thus, in this case, the Province provided the proposal letters of May 23 and June 14, 2012. No formal assessments were issued because of the intervention of the Initial Order's stay of proceedings.

[39] Once an assessment is issued, then by section 130(1)(d), the amount stated to be owing constitutes a lien in favour of the government against assets and chattels of the person owing the money, and has priority over all unsecured claims.

[40] That priority has not accrued to the Province because the stay prevented the proposed claim from becoming an assessment. Both Lemare and TD are anxious

that this remain the *status quo* in order to avoid the Province getting a leg up over other unsecured creditors.

[41] By section 142.81, evidence that an assessment has been made is proof, in the absence of evidence to the contrary, that the amount assessed is due and owing, and the onus of proving otherwise is on the person liable to pay the amount assessed. The Province places great emphasis on the advantages it stands to gain from this section, particularly given its belief that Lemare has been less than forthright in its disclosure. Moreover, unless varied on appeal, an amount assessed is valid and binding despite any error, defect or omission in the estimate or assessment or in procedure.

[42] Section 142.9 provides the person assessed the right to appeal either the assessment or any penalty to the Revenue Minister. An appeal does not operate as a stay. Under section 142.91, the Revenue Minister's decision may be appealed to this Court by way of petition, and the *Supreme Court Civil Rules* relating to petition proceedings apply. The appeal is a hearing *de novo*. Rule 18-3, governing appeals, does not apply.

[43] With this context in mind, I turn to consider the Province's application.

THE APPLICATION TO SET ASIDE THE INITIAL ORDER

[44] With respect to the Initial Order, the Province raises three issues. The first is whether Lemare met the criteria in subsection 3(1) of the CCAA so as to give the Court jurisdiction to proceed under that Act.

[45] The second issue, raised in the alternative, is whether the Court should decline to exercise its jurisdiction under the CCAA if that jurisdiction exists.

[46] The third is raised in the further alternative: if the Court has and chooses to exercise its CCAA jurisdiction, should it revise the terms of the stay of proceedings in order to permit an assessment to issue under Part 11.1 of the *Forest Act*?

1. Jurisdiction

[47] The Province submits that this Court lacked jurisdiction to make the Initial Order because the CCAA does not apply to the petitioners. The Province relies on subsection 3(1):

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

[48] On the evidence, there is no doubt that the petitioners are affiliated companies, and that the total of claims against them is more than $5,000,000. The issue, then, is whether they are "debtor companies". The CCAA defines "debtor company" as any company that is "bankrupt or insolvent". As none of the petitioners is bankrupt, the question turns on whether they are insolvent. That word is not defined in the CCAA.

[49] On June 21, 2012, I concluded that the test had been met. Since then, further evidence has been filed including an affidavit from a chartered accountant, Terrence MacDonald, and four reports from the monitor. Mr. MacDonald offers the opinion that it cannot be conclusively determined from the financial statements that were before me in June whether the petitioners are insolvent. It follows that the financial statements do not establish that the petitioners are not insolvent. What in my view did and still does establish that they are insolvent is the totality of the evidence. That view is supported by the monitor who has provided four reports and has raised no suggestion that this is not an appropriate case for relief under the CCAA. On the contrary, the monitor has very much supported the process, and advises that Lemare has set about it in good faith.

[50] The Province argues that I cannot rely on the amounts set out in its proposal letters as these were never crystallized as assessments and penalties. Consequently, the Province submits, they cannot be valued even as contingent claims, and the penalties cannot be taken into account at all because they do not

qualify even as a contingent obligation until the commissioner exercises her discretion to assess them.

[51] In the particular situation before me, I am not persuaded by that argument. These parties have been battling over the issue of stumpage for three years. Their respective positions have become quite clear. The Province's proposals are set out in great detail, together with all of the assumptions upon which they are based, the reasons for the conclusions to which the Province has come, and the facts, assumptions and reasoning for the imposition of penalties. All of this is supported by hundreds of pages of documents annexed to these letters. The penalties are proposed to be assessed at 100% instead of 25% on the basis of Lemare's alleged wilful misconduct. Three years of interaction has yielded no hint of any suggestion that the Province would ever consider softening that position. No such hint emerged from the proceedings before me. An assessment of stumpage and penalties in the amount proposed, on all of the evidence, was not a mere possibility. It was a near certainty.

[52] In these circumstances, the suggestion that the proposed amounts of assessed stumpage and penalties do not constitute a valuation of a claim in the absence of an assessment, and therefore do not constitute contingent claims, does not accord with reality. The valuation of the proposed claims could hardly be clearer.

[53] In this way, I find the situation is distinguishable from that considered by this Court in *Thow (Re)*, 2009 BCSC 1176, where an administrative penalty issued by the B.C. Securities Commission after bankruptcy, based on the bankrupt's prior conduct, was held not to be a claim provable in bankruptcy. Key to that decision was that the penalty could not have been imposed prior to the bankruptcy because at that time the commission had still to conduct an investigation, hold a hearing, make findings and reach a decision. In this case, however, there had been a lengthy investigation, findings had been made and conclusions drawn. All that was necessary to complete the evolution from proposal to assessment was the formality

of issuing it – see, for instance, *Re Harvey (Bankrupt)*, 2004 ABQB 773, and note also *Re Air Canada* (2006), 28 C.B.R. (5th) 317 (Ont. Sup. Ct. J.). Although it is true that Lemare had an opportunity to respond to the proposal, the Province had already heard everything Lemare had to say, and was singularly unimpressed.

[54] Accordingly, I am satisfied that both the proposed assessed stumpage and the proposed penalties qualify as contingent claims.

[55] The question remains as to whether the existence of these contingent claims renders Lemare insolvent. The Province submits that the petitioners do not meet the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA), because at the time of the initial order they were not unable to meet their obligations as they generally became due, and it could not be said that their property if fairly disposed of would not be sufficient to enable payment of all obligations due and accruing due.

[56] Although courts have generally had regard to the BIA definition of "insolvent person" when dealing with insolvency under the CCAA, the modern trend is to take into account the different objectives of the CCAA. These address the interests of a broader group of stakeholders, and include a more comprehensive process to preserve the debtor company as a going concern.

[57] Thus in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at para. 21, the Supreme Court of Canada described the CCAA regime as a flexible, judicially supervised reorganization process that allows for creative and effective decisions. It noted that with reorganizations becoming increasingly complex:

> [61] ...*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.*
>
> ...
>
> [70] ... 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.

[58] In *Re Stelco Inc*. (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J.); leave to appeal refused: 2004 CarswellOnt 2936 (C.A.), the Court dealt with a submission, like the Province's here, that the Initial Order should be reversed on the ground that Stelco was not a "debtor company" because it was not "insolvent" as defined by the BIA.

[59] Mr. Justice Farley, whose views in this area do not bind me but are entitled to the highest respect, made the following observations, which I have taken the liberty of paraphrasing:

- *On timing*: the usual problem is leaving the application for an Initial Order too late. CCAA should be implemented at a stage prior to the company's death spiral. Thus objections in the reported cases have been based not on an absence of insolvency, but on the proposed plan being doomed to failure as coming too late. [Paras. 13-15]
- *On stakeholders*: these include not only the company and its creditors, but also its employees and their interest in a viable enterprise. Thus there is an emphasis on operational restructuring so that the emerging company will have the benefit of a long-term viable fix, to the advantage of all stakeholders. [Paras. 17-20]
- *On the test for insolvency*: given the time and steps involved in a reorganization, the condition of insolvency perforce requires an expanded meaning under the CCAA. What the debtor must do is meet the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in the context and within the purpose of that legislation. The BIA definition of insolvent person is

> acceptable with the caveat that under the first branch (unable to meet obligations as they generally become due), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. Considering the notion of 'insolvent' contextually and purposively, the question is whether, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by Court authorization pursuant to a CCAA order. [Paras. 26 and 40]

[60] There is, of course, no precise and invariable formula. This is not a "cookie cutter" exercise. As Farley J. pointed out, the matter must be decided on the basis of credible evidence and common sense, employing a principled, purposive and contextual approach.

[61] The Province argues that the *Stelco* case is wrongly decided, or in the alternative, that it must be confined to its particular facts which are distinguishable from those before me. I consider it, with respect, to be correctly decided. While the facts are quite different, the principles are not.

[62] As I see this case, given the context of Lemare's operations, including the admittedly highly contingent liability for the RCA trust loan, the Province's proposal letters setting forth a fully articulated and documented claim for over $12,000,000 that would, once formalized, lead to statutory lien rights, gave rise to a reasonably foreseeable expectation of a looming liquidity crisis that would deprive Lemare of the ability to pay its debts as they generally became due without the benefit of a stay. Thus this Court had jurisdiction. Having regard to the interests of the stakeholders, including the Province, other unsecured creditors, Lemare, its employees, and the North Island economy to which Lemare is such a contributor, the situation cries out

for the protection of the CCAA. To delay action until Lemare had been fatally wounded would have served the interests of no one.

2. Discretion

[63] The careful reader may discern from the preceding paragraph that I do not agree with the Province's alternative submission that if this Court has CCAA jurisdiction it should decline to exercise it.

[64] The Province argued first that I should not accept as credible Lemare's plea of insolvency due to the proposed assessments when Lemare has vigorously contested them. Having found that the assessment of stumpage and penalties in the amount proposed was a near certainty, and given the single-mindedness with which the Province has pursued its claims against Lemare, I do not find this argument persuasive. Lemare is entitled to dispute claims, which is one of the reasons that a CCAA Court normally provides for a claims process.

[65] The Province then argues that there is no pressing need for Lemare to restructure. I disagree, as indicated above. As counsel for TD points out, the prospect of Lemare obtaining financing to deal with its liability is vanishingly small. Moreover, that the *Forest Act* provides Lemare with appeal rights likely to occupy a good deal of time, first to the Minister and then to this Court, does not relieve the pressure, particularly when those appeals do not stay the claims.

[66] The Province submits that its response cannot be known. It may well reduce the claims, or voluntarily stay its claims during the appeal process, or come to some agreement with Lemare about repayment that would relieve these pressures. I do not doubt the sincerity of counsel, but given the history of acrimony between the parties, this is at best speculation. It would be unfair either to expect such accommodation from the Province, or to require Lemare to order its affairs as if it were forthcoming. If the Province should indeed decide to alter its position in a manner that significantly changes Lemare's financial prospects, then that can be taken into account through subsequent applications. The process is a flexible one.

[67] The Province next asserts that since its claim is in connection with the harvesting of Crown timber, a public resource, it would be an injustice and contrary to the public interest to thwart the statutory scheme, particularly the commissioner's entitlement to rely on assumptions and place the onus of proof on Lemare.

[68] The public interest, I think, cuts both ways. The public certainly has an interest in the Crown recovering stumpage and penalties owed to it. The public also has an interest in seeing enterprises such as these, being major employers and economic contributors, continue in business. I agree with the Province, particularly in view of past dealings between the parties, that in this case both the public interest and fairness support maintaining its statutory advantages concerning the ability to rely upon assumptions, and putting the onus of proof upon Lemare. These, however, may be adequately addressed in the claims process part of this proceeding.

[69] The Province then turns to the nature of its dispute with Lemare, relying on its allegation of wilful misconduct. This, it submits, is not appropriate for determination through a CCAA claims process, and relies in particular on subparagraphs 19(2)(c) and (d) of the CCAA:

> **19.** (2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:
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> ...
>
> (*c*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
>
> (*d*) any debt or liability resulting from obtaining property or services by false pretenses or fraudulent misrepresentation, other than a debt or liability of the Company that arises from an equity claim....

[70] These are issues that arise at a later time in this process, when a proposed compromise or arrangement falls to be considered. The Province argues, however,

that its penalty claim will be caught by these provisions and therefore, as a matter of discretion, the CCAA process should not be initiated.

[71] I am not presently convinced that either subparagraph will prove to be applicable, although I do not decide that issue. It was not fully argued. For present purposes, I do not see this contingency tipping the balance of all of the other factors and interests that must be weighed, and accordingly I decline to refuse CCAA protection because of it.

[72] I take the same view of the Province's final point, which is that FRAP proposes to assess portions of the assessments against Lemare against two of its principals, who are also licensees. These total some $563,000. Although no proposal letters have yet been issued in this regard, the Province argues that they give rise to the risk of duplicative proceedings as they will be dealt with under the *Forest Act*, and may lead to inconsistent results.

[73] I do not see that the possibility that the Province will proceed in this way alters the balance, with or without the other factors argued by the Province.

[74] It follows that, having found that this Court has jurisdiction under the CCAA, I decline as a matter of discretion to refuse to exercise that jurisdiction.

3. The Scope and Effect of the Stay

[75] The Province accepts that, pursuant to section 11.02 of the CCAA, a stay can properly prevent the Revenue Minister from taking enforcement action under section 130 of the *Forest Act* in order to collect an amount owing pursuant to an assessment. The Province argues, however, that the exception set out in section 11.1(2) means that it cannot be stayed from making an assessment or taking any steps to obtain information relevant to the proposed assessment.

[76] According to section 11.1(2):

> (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the

> regulatory body, other than the enforcement of a payment ordered by the regulatory body or the Court.

[77] On the evidence, it is clear that the Province has already carried out its investigation. The only step left was to review any response to the proposal letters forthcoming from Lemare, which Lemare has indicated that it waives, viewing it as an exercise in futility.

[78] For the reasons discussed above, I have concluded that the proposed assessments and penalties set out in the proposal letters qualify as contingent claims. They are therefore claims that may be dealt with by a compromise or arrangement under section 19(1), subject to s. 19(2). I further conclude that under the *Forest Act* scheme, in the circumstances of this case, the issuing of an assessment, which gives rise to lien rights and recovery rights, constitutes a step in "the enforcement of a payment ordered by the regulatory body" within the meaning of section 11.1(2) of the CCAA. What we are concerned with here are the financial consequences of past actions, not the regulation of ongoing conduct. See, for instance, *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1261, 68 C.B.R. (5^{th}) 1. If I had concluded otherwise, then the situation would likely have qualified for the exception set out in section 11.1(3).

[79] Finally, the Province submits that if the other relief it seeks is denied, it would nevertheless be just and equitable to lift or amend the stay of proceedings in order to permit the commissioner to make an assessment against Lemare, thus crystallizing the claim in relation to both stumpage and penalty. Mr. Hatter assured me that in seeking this, the Province was in no way attempting to gain a priority advantage in relation to other unsecured creditors.

[80] I propose to consider this aspect of the matter in relation to Lemare's application for a claims process order.

[81] The application to set aside or terminate the Initial Order is dismissed.

THE APPLICATION FOR A CLAIMS PROCESS ORDER

[82] Lemare has submitted a CPO in what is a substantially standard form. One portion that departs from standard terms deals with claims by the Province:

> **CROWN CLAIMS**
>
> 29. In the event the Crown wishes to assert a Crown Claim against the Petitioners and/or any Director and/or any Officer, the Crown shall file and serve on the relevant parties an application before the Court prior to the Claims Bar Date setting out the amount of the Crown Claim, the basis therefore and any other information necessary for the Court to determine the Crown Claim ("**Adjudication Application**").
>
> 30. The Petitioners and/or any Directors and/or any Officers, as applicable, shall file and application response to any Adjudication Application within 15 days from the Claims Bar Date.
>
> 31. Any Adjudication Application shall be heard as soon as practicable by the Court, and any party may apply for directions setting a date therefore [*sic*].
>
> 32. If the Crown fails to file a Crown Claim as provided herein, or as the Court may otherwise direct it shall:
>
> (a) be and is hereby forever barred, stopped and enjoined from asserting or enforcing any Crown Claim against any of the Petitioners and/or any of the Directors and/or Officers and all such Crown Claim(s) shall be forever extinguished;
>
> (b) not be permitted to vote on any Plan, if applicable, on account of such Crown Claim(s);
>
> (c) not be permitted to participate in any distribution under any Plan from the proceeds of any sale of the Petitioners' assets, or otherwise, on account of such Crown Claim(s); and
>
> (d) not be entitled to receive further notice in respect of these CCAA proceedings.
>
> 33. If the Petitioners fail to respond to the Adjudication Application as provided herein, or the Court may otherwise direct, the Crown Claim(s) as set out in the adjudication application shall be Allowed Claims.
>
> 34. The hearing of an Adjudication Application shall be heard as if it were an appeal to the Court under Section 142.9(1) [*sic*] of the *Forest Act*, R.S.B.C. 1996, c. 157, and all onuses or other evidentiary standards contained in the said Act shall apply to the hearing of the Adjudication Application.

[83] “Crown Claim” is defined as meaning "any claim of the Crown relating to unpaid stumpage or any other claim pursuant to the *Forest Act...”.*

[84] I agree with the submissions of Mr. Verbrugge on behalf of the monitor that what I have to consider is whether these sections accomplish the goals of the CCAA with fairness to the Province. This requires a balancing of the need to deal with the Province's claim and all others within the CCAA proceedings to protect everyone equally and allow the company to survive, with the Province's ability to quantify its claim and preserve its advantages concerning the onus of proof.

[85] The Province submits that to accomplish this, it is necessary to carve out of the claims process the entire assessment and appeal process from the *Forest Act*. This would contemplate the commissioner making her assessment and assessing a penalty under sections 142.51 and 142.61, Lemare appealing to the Minister under section 142.9, and then appealing further to this Court by way of petition under section 142.91. Only then would whatever is left of the Province's claim be submitted to the claims process under these CCAA proceedings.

[86] With respect, that seems to me to be an enormously cumbersome procedure. It would add very little to the notion of fairness while detracting greatly from an orderly, timely process that preserves the goals of the CCAA. All that the Province really loses by what is proposed in the CPO is the rather time-consuming step of an appeal by Lemare to the Minister. That is no prejudice to the Province. Whether under the CPO or the *Forest Act*, the matter ultimately ends up in this Court. The sooner that happens, the better.

[87] I also agree with Mr. Verbrugge that fairness does not require a modification of the stay to permit the Province to proceed to an assessment. It is for the Province to crystallize its claim, as it is for any creditor with a contingent claim. I am satisfied that within the claims process, appropriate provision can be made to facilitate this crystallization in a manner that preserves to the Province the ability to take full advantage of the onus and proof provisions that it would have under the *Forest Act* process.

[88] In these circumstances, I am inclined to direct that sections 29 and 34 of the draft CPO be modified so that they read as follows:

> 29. In the event the Crown wishes to assert a Crown Claim against the Petitioners and/or any Director and/or any Officer, the Crown shall file and serve on the relevant parties an application before the Court prior to the Claims Bar Date ("**Adjudication Application**"). The Adjudication Application shall be in the form of an assessment as if made under sections 142.51 through 142.61 of the *Forest Act*, R.S.B.C. 1996, c. 157, and will constitute proof, in the absence of evidence to the contrary, that the amounts assessed are due and owing. The onus of proving otherwise shall be on the Petitioners.
> ...
>
> 34. The hearing of an Adjudication Application shall proceed as if it were an appeal under section 142.9(1) of the *Forest Act,* taken to the Court instead of the revenue minister, directly from assessments made under sections 142.51 through 142.61 of the said *Act* as set out in the Adjudication Application pursuant to section 29 of this Order, and subject to the further direction of the Court.

[89] Because this wording was not the subject of any discussion or submissions during the hearing, the parties have leave to return before me for further brief submissions concerning this modification if they find it necessary to do so.

[90] There are two other modifications that the Province submits should be made, with which submission I agree. The first is to paragraph 19(a) of the draft CPO, which deals with creditors who do not file a Proof of Claim within the time limited, and goes on to provide that any such person:

> (a) be and is forever barred, stopped and enjoined from asserting or enforcing any Claim against any of the Petitioners and/or any of the Directors and/or Officers and all such Claims shall be forever extinguished.

[91] Although this is hardly unusual wording, the Province points out, and I agree, that the extinguishment of claims properly occurs at the later Plan and Sanction Order stage, and should not properly be part of the CPO. What the CPO can properly accomplish is preventing creditors who have not submitted claims in accordance with the process from asserting or enforcing any claim. Accordingly,

paragraphs 19(a) and 32(a) should be amended by striking out the words "and all such [Crown] Claims shall be forever extinguished".

[92] The Province also objects, properly, to the overly broad definition and treatment of directors and officers. Accordingly the definition of "Directors/Officers Claim" in Schedule "B" to the draft CPO will be amended by deleting the words "or in any other capacity" from the end of the definition. This will limit the definition to claims against directors or officers in their capacity as such.

[93] Apart from these modifications, the form of the draft CPO is satisfactory. The stay is extended until November 30, 2012.

[94] I remind the parties that the interpretation of the CPO and the administration of the claims process remain subject to the provisions of the CCAA.

"GRAUER, J."

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[1] *Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests and Range*, 2009 BCSC 909 and 2009 BCSC 902; *Lemare Lake Logging Limited v. British Columbia (Forests and Range)*, 2011 BCSC 903; *British Columbia v. Lemare Lake Logging Ltd*., 2012 BCSC 193. See also *Lemare Lake Logging Limited and Arsenault v. Minister of Forests and Range*, unreported, 23 November 2010, B.C. Prov. Ct. Vancouver No. 209979-1.