File No. CI 22-01-38613

THE KING'S BENCH
WINNIPEG CENTRE

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 MANITOBA CLINIC MEDICAL CORPORATION AND THE MANITOBA CLINIC HOLDING CO. LTD.

(the **"Applicants"**)

APPLICATION UNDER: THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C., c. C-36, AS AMENDED

APPLICATION BRIEF
HEARING DATE: WEDNESDAY, NOVEMBER 30, 2022 AND THURSDAY, DECEMBER 1, 2022 AT 9:00AM
BEFORE THE HONOURABLE JUSTICE KROFT

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THE QUEEN'S BENCH
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I. LIST OF DOCUMENTS TO BE RELIED UPON

1. Notice of Application filed on November 29, 2022.

2. The Affidavit of Keith McConnell, affirmed November 28, 2022.

3. Consent of Alvarez & Marsal Canada Inc. to act as Monitor, dated November 25, 2022.

4. The Pre-Filing Report of the Proposed Monitor, Alvarez & Marsal Canada Inc., dated November 29, 2022;

5. Such further and other evidence as counsel may advise and this Honourable Court may deem just.

II. LIST OF AUTHORITIES

Tab #

1. *Court of King's Bench Rules,* Man. Reg. 553/88, as amended, Rules 1.04, 2.01(1), 2.03, 3.02, 14.05, 16.04, 16.08 and 38**.**
2. *The Court of King's Bench Act*, C.C.S.M. c. C280, section 38.
3. *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3*;* s. 2.
4. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 2(1), 3(1), 9(1), 11.02, 11.03 and 11.52.
5. *Target Canada Co*., *Re*, 2015 ONSC 303.
6. *Stelco Inc.*, *Re*, [2004] O.J. No. 1257.
7. *Wiebe v Weinrich Contracting Ltd.*, 2020 ABCA 396.
8. *Clover Leaf Holdings Company*, *Re*, 2019 ONSC 6966.
9. *Mountain Equipment Co-Operative* (Re), 2020 BCSC 2037.
10. *Timminco Ltd.*, *Re*, 2012 ONSC 506.
11. *Canwest Global Communications Corp., Re*, 2009 CanLII 55114 (ONSC).
12. *Jaguar Mining Inc.*, *Re*, 2014 ONSC 494.
13. *8440522 Canada Inc.*, *Re*, 2013 ONSC 6167.
14. *North American Tungsten Corp., Re,* 2015 BCSC 1376.
15. *Federal Gypsum Co., Re,* 2007 NSSC 347.
16. *Grant Forest Products Inc., Re,* 2009 O.J. No. 3344.
17. *Aralez Pharmaceuticals Inc., (Re)*, 2018 ONSC 6980.
18. *Just Energy Group Inc. et al.,* 2021 ONSC 7630.
19. *Futura Loyalty Group Inc., Re*, 2012 ONSC 6403.
20. Such further and other authorities as counsel may advise and this Honourable Court may permit.

III. OVERVIEW

1. The Applicants, Manitoba Clinic Medical Corporation ("**Medco**") and The Manitoba Clinic Holding Co. Ltd. ("**Realco**"), are seeking Court Orders under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

2. The Applicants together are the largest private clinic in the Province of Manitoba (the "Manitoba Clinic") and, as such, play a significant role in Manitoba's health care system.

3. The Applicants have suffered financial losses since 2018. In addition, they have faced liquidity challenges notwithstanding their efforts with the support of their primary secured creditor and lender, Canadian Imperial Bank of Commerce ("CIBC"), to restructure their debt and operations, the Applicants are now facing a severe liquidity crisis, have limited cash on hand and are generally unable to meet their obligations as they become due.

4. As a result of the Applicants' financial circumstances, they are in breach of the current credit facilities with CIBC and are no longer able to satisfy the conditions and obligations required under said facilities.

5. The Applicants urgently require the protections available under CCAA proceedings to obtain the breathing room and stability required to maintain the status quo and continue their business operations while the Applicants pursue a restructuring strategy with the assistance of a Court Appointed Monitor.

6. Absent access to the protections under the CCAA the Applicants will be forced to cease their operations.

7. As a result, the Applicants seek an Order (the "Initial Order") pursuant to the CCAA for relief including, *inter alia*:

a) Abridging the time for service, validating service or dispensing with service, if necessary, of the Notice of Application and the materials filed in support of the Application, such that the Application is properly returnable on the 30th day of November, 2022 at 9:00 a.m., and dispensing with further service thereof;

b) Declaring each of the Applicants to be a company to which the CCAA applies;

c) Authorizing the Applicants to carry on business in a manner consistent with the preservation of their business and property;

d) Appointing Alvarez & Marsal Canada Inc. as Monitor (the "Proposed Monitor");

e) Staying all proceedings, rights and remedies taken or that might be taken in respect of the Applicants, including their respective businesses and property, they directors and officers, and the Monitor for no more than 10 days (the "Stay of Proceedings")

f) Approving the following charges over the Applicants' property:

i. An Administrative Charge in favour of counsel to the Applicants, the Monitor and counsel to the Monitor (collectively, the "Professional Group") to secure payment of their professional fees

and disbursements to a maximum amount of $500,000 (the "Administration Charge") ; and

ii. A Directors' and Officers' Charge to the maximum amount of $350,000 (the "D&O Charge").

8. Due to the urgency as set out above, the Applicants have scheduled a comeback hearing for December 1, 2022. At that hearing the Applicants seek an Amended and Restated Initial Order (the "ARIO") pursuant to the CCAA for relief including, *inter alia*:

a) An extension of the Stay of Proceedings;

b) Providing the restructuring powers contemplated under the Model Order;

c) Approving a debtor-in-possession ("DIP") Term Sheet ("DIP Term Sheet"), approving a DIP Loan (the "DIP Loan") limited to $4,000,000;

d) A DIP Lenders Charge for a maximum amount of $4,000,000 (in an amount to be determined), with a super priority subject only to the Administration Charge;

e) Approving of a Key Employee Retention Plan and Charge;

f) Enhancing the Monitor's powers; and

g) Authorizing payment of the True-Up payments.

9. The Applicants have limited the relief sought in the proposed Orders to that which is reasonably necessary to maintain the *status quo* and continue its business in the ordinary course during the initial stay of proceedings and subsequent stay.

10. For the sake of efficacy the Applicants have prepared one brief to address both Orders sought in each hearing.

IV. FACTS

11. The facts underlying this Application are more fully set out in the Affidavit of Keith McConnell, sworn on November 28, 2022 and the Pre-Filing Report of the Proposed Monitor, Alvarez & Marsal Canada Inc.

A. Corporate Structure and Business of the Applicants

12. Medco and Realco are incorporated under *The Corporations Act*, C.C.S.M. c. C225, as amended, with their respective registered offices and primary places of business located in Manitoba.[1]

13. Medco operates as a multi-specialty clinic offering diverse healthcare services in the largest private clinic in the province consisting of approximately 49,000 medical procedures per year including, *inter alia*, endoscopes, EKG's, visual field tests, x-rays, stress tests, ophthalmology laser procedures, obstetrical ultrasounds, EMG's and infusion of biologic medications.[2] As a result, Medco submits it plays a significant role in Manitoba's healthcare system.[3]

14. Realco holds title to the real property of the facility Medco operates out of, certain equipment of Medco and certain financial investments. Realco acts as landlord pursuant

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[1] Affidavit of Keith McConnell, affirmed November 28, 2022 ("McConnell Affidavit"), at paras. 13-15.
[2] McConnell Affidavit, para. 3.
[3] McConnell Affidavit, para. 2.

to a number of commercial leases including in respect of Medco (the "Medco Lease").[4] In addition to the Medco Lease, Realco leases space on the main floor of the Facility to commercial tenants.[5]

15. Together the two corporations make up the Manitoba Clinic.

16. In 2010, the facility in which Medco was operating required significant repairs, the costs of which were higher than the estimated value of the building. As a result, plans were made to construct a state of the art, ten story facility located at 790 Sherbrook Street, in Winnipeg, approximately 232,038 square feet in size and adding two floors to the existing parkade which is 99,596 square feet in size (the "**Facility**"). In 2017 the Facility became operational. Realco, as owner of the Facility, leased 124,038 square feet to Medco to operate the Manitoba Clinic.[6]

17. There the Applicants employ 170 support staff members. Payroll is the largest operating expense and it represents sixty-seven percent (67%) of the total recovered overhead in 2020.[7]

18. In addition to the staff, the Medco has entered into service agreements with 71 physicians to work out of the Facility.[8]

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[4] McConnell Affidavit, paras. 2, 4.
[5] McConnell Affidavit, para. 25
[6] McConnell Affidavit, paras. 5 and 7.
[7] McConnell Affidavit, para. 21.
[8] McConnell Affidavit, para. 3.

19. Ninety percent (90%) of the revenue for Medco comes from billing the Department of Health for services performed by the physicians.[9]

B. Asset and Liabilities

20. As a result of various challenges faced by the Applicants, the Applicants have suffered operating losses each year from 2018 to present.[10]

21. On a consolidated basis, as at December 31, 2021, total net book values of the assets and liabilities are approximately $84.3 million and $72.0 million, respectively (with current assets and current liabilities being approximately $1.7 million and $72.0 million, respectively).[11]

22. As of November 23, 2022, the indebtedness owed by the Applicants to their primary lender, CIBC, is as follows:

a) Medco is indebted to CIBC in the amount of $5,108,112.58; and

b) Realco is indebted to CIB Bin the amount of $59,683, 665.71.[12]

c) both Medco and Realco are also indebted to CIBC for each other's debt under their guarantees.

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[9] McConnell Affidavit, para 3.

[10] Pre-Filing Report of the Proposed Monitor, Alvarez & Marsal Canada Inc. dated November 29, 2022 ("Monitor Report"), para 23.

[11] Monitor Report para. 27.

[12] McConnell Affidavit, paras. 43 and 44.

V. ISSUES

23. The issues to be determined by this Honourable Court are whether:

a) This Court should abridge the time for service, validate service of the Notice of Application and materials filed in support;

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b) This Court has jurisdiction to hear this matter;

c) The Applicants are a "debtor company" or "debtor companies" to which the CCAA applies;

d) The Stay of Proceedings should be granted;

e) The Charges should be granted;

i. The Administration Charge

ii. The D&O Charge

f) The Proposed Monitor should be appointed as Monitor in these CCAA proceedings;

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g) the DIP Loan be approved and the DIP Charge be granted;

h) The Monitor should receive enhanced Powers;

i) The KERP Loan be approved and an extension of the Stay of Proceedings be granted; and

j) This Court should authorize payment of the True-Up Payments.

VI. ARGUMENT

Validation of Service

24. Notwithstanding the ordinary requirements of service, the Court has the authority to abridge the time requirements, validate defective service or even dispense with service where necessary in the interests of justice.[13]

25. Service of the Application and application materials was effected through email to the primary secured creditor and the Government statutory lien claimants and it is respectfully submitted that it is appropriate in the circumstances for this Honourable Court to validate service.

26. The Applicants submit that this matter is urgent given the serious liquidity issues and steps must be taken to maintain the status quo and ensure business operations continue. Delay in taking action in Court may jeopardize the chances of the Applicants to continue operations.

A. November 30, 2022 Hearing – Notice of Application

Jurisdiction of This Court

27. Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated.[14]

28. As set out in paragraph 12 above, the respective registered offices of the Applicants as well as the chief place of business of both companies is situated in Manitoba.

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[13] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rules 3.02, 16.04(3) and 16.08(1), **[Tab 1]**.
[14] *Companies' Creditors Arrangement Act*, R.S.C. 1985, C C-36 ("CCAA"), s. 9(1), **[Tab 4]**.

29. Accordingly, it is submitted that this Court has jurisdiction to hear this matter.

The Applicants are Debtor Companies

30. *The Companies' Creditors Arrangement Act* ("CCAA") applies in respect of a "debtor company" or "affiliated company" where the total claims against the debtor or affiliate exceeds $5,000,000.[15]

31. The term "company" is defined in the CCAA as "any company, corporation or legal person incorporated by or under an Act of Parliament or the legislature of a province…"[16] The term "debtor company" is defined in the CCAA as "any company that: (a) is bankrupt or insolvent…[17]

32. "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if the corporation is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[18] The BIA defines an "insolvent person" as follows:

> insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

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[15] CCAA, s. 3(1), **[Tab 4]**.
[16] CCAA, s. 2(1), **[Tab 4]**.
[17] CCAA, s. 2(1), **[Tab 4]**.
[18] *Target Canada Co., Re*, 2015 ONSC 303 (*"Target"*) at para. 26, **[Tab 5].**

> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.[19]

33. The definition under the BIA is disjunctive and the proposed insolvent person must only fit one of the definitions.[20]

34. Further, the insolvency of a debtor is determined as of the time the debtor files its CCAA application.[21]

35. The Applicants are "debtor companies" within the meaning of the CCAA:

a) Each of the Applicants were incorporated under the legislature of a province in Canada and are each a "company" within the meaning of the CCAA;

b) The Applicants have debt in excess of $5 million dollars;

c) Each of the Applicants are insolvent in that they are unable to meet their liabilities as they become due and they are facing a looming liquidity crisis; and

Stay of Proceedings Should be Granted

36. The paramount purpose of the CCAA is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.[22]

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[19] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B0-3 ("BIA"), s. 2, **[Tab 3]**
[20] *Stelco Inc., Re*, [2004] O.J. No. 1257 (*"Stelco"*), para. 28, **[Tab 6].**
[21] *Stelco*, para. 4, **[Tab 6].**
[22] *Wiebe v. Weinrich Contracting Ltd.,* 2020 ABCA 396 (*"Wiebe"*), para. 26, **[Tab 7].**

37. The purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.[23]

38. The CCAA provides "broad and flexible authority" permitting a court to make a wide range of orders necessary to support a company's reorganization.[24]

39. To achieve this, section 11.02 of the CCAA provides that a court may grant a stay of proceedings upon an initial application under the CCAA for a period of no more than ten (10) days, provided that the court is satisfied that circumstances exist that make the order appropriate.[25] A stay of proceedings is appropriate where it provides a debtor with breathing room required to restructure with a view to maximizing recoveries.[26]

40. Section 11.001 of the CCAA further provides:

> 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.

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[23] *Wiebe,* para. 26, **[Tab 7].**
[24] *Wiebe*, para. 27, **[Tab 7].**
[25] CCAA, s. 11.02, **[Tab 4]**.
[26] *Target*, para. 8, **[Tab 5].**

41. The purpose of section 11.001 "is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process."[27]

42. Given the financial condition of the Applicants, a stay of proceedings (the "Stay of Proceedings") at this time is in the best interest of the Applicants and their stakeholders and is both necessary and appropriate.

43. The Applicants have limited the relief sought on this application to what is reasonably necessary to maintain the *status quo* while they develop a restructuring plan in consultation with their advisors and the Monitor.

44. The Applicants also request that the Stay of Proceedings extend to their directors and officers. Section 11.03 of the CCAA provides that an order made under section 11.02 of the CCAA may provide that no person may commence or continue any action against a director of the company or any claim against directors that arose before the commencement of proceedings under the CCAA and that relates to the obligations of the company.[28]

45. It is respectfully submitted that a stay of proceedings should be extended to the Applicants directors and officers and the current chief executive officer, Keith McConnell (collectively hereinafter referred to as the "Directors"), so that they may focus on the

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[27] *Clover Leaf Holdings Company, Re,* 2019 ONSC 6966, para. 13, **[Tab 8].**
[28] CCAA s. 11.03, **[Tab 4]**

CCAA proceedings, developing and implementing the necessary restructuring strategy and perform the ongoing obligations of the business.

The Administration Charge Should be Granted

46. The Applicants seek a first-ranking priority Administration Charge over the Applicants' Property (as defined in the Initial Order) in the maximum amount of $500,000 in favour of the Monitor, counsel to the Monitor, counsel to the Applicants and counsel to the Board, if any (collectively, the "Professional Group"), to secure payment of their professional fees and disbursements, whether incurred before or after the date of the Initial Order (the "Administration Charge").

47. The Court may grant an administration charge pursuant to section 11.52 of the CCAA:[29]

> Court may order security or charge to cover certain costs
>
> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[29] CCAA s. 11.52, **[Tab 4]**

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

48. In deciding whether to grant an administration charge, the courts have considered a number of factors including:

a) the size and complexity of the business being restructured;

b) the proposed role of the beneficiaries of the charge;

c) whether there is an unwarranted duplication of roles;

d) whether the quantum of the proposed charge appears to be fair and reasonable;

e) the position of the secured creditors likely to be affected by the charge; and

f) the position of the Monitor.[30]

49. Courts have recognized that, unless professional advisor fees are protected with the benefit of a charge over the assets of a debtor company, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services. The outcome of the failure to provide the requested protection would result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.[31]

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[30] *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037, para. 58, **[Tab 9].**
[31] *Timminco Ltd., Re*, 2012 ONSC 506, para. 66 **[Tab 10].**

50. These proceedings require the prompt and vigorous involvement of professional advisors to guide and/or complete a successful restructuring.[32]

51. The Professional Group has been and will continue to be actively involved during the CCAA proceedings and will play a critical role in assisting the Applicants with their restructuring efforts. Each have and will continue to perform a distinct function.

52. The quantum of the proposed Administration Charge is reasonable and necessary in the circumstances, having regard to the scale and complexity of the CCAA Proceedings, the services to be provided by the beneficiaries of the Administration Charge and the size of the similar charges approved in similar proceedings.[33]

53. Lastly, the Monitor supports the granting of an Administration Charge.[34]

Directors and Officer Charge ("D&O Charge")

54. Pursuant to section 11.51 of the CCAA, a court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considerers appropriate, in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

55. The purpose of a D&O Charge was described in *Canwest Global Communications Corp. (Re)*:

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[32] Monitor Report, para. 65.
[33] Monitor Report, para. 67.
[34] Monitor Report, para. 66.

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they incur during the restructuring….Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by the experienced senior management.[35]

56. In *Jaguar Mining Inc. (Re)*, the court set out the following factors to be considered with respect to the approval of a D&O Charge:

a) whether notice has been given to the secured creditors likely to be affected by the charge;

b) whether the amount is appropriate;

c) whether the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

d) whether the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or willful misconduct.[36]

57. The Applicants seek a D&O Charge to the maximum of $350,000 to secure the Applicants' obligation pursuant to the Initial Order to indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings.[37]

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[35] *Canwest Global Communications Corp. (Re),* 2009 CanLII 55114 (ONSC), para 48, **[Tab 11].**
[36] *Jaguar Mining Inc., (Re)*, 2014 ONSC 494, para. 45, **[Tab 12]**.
[37] McConnell Affidavit, para. 106.

58. The D&O Charge is vital to encouraging the continued participation of the directors and officers in these CCAA proceedings.[38]

59. The amount proposed was calculated in cooperation with the Proposed Monitor and CIBC and is appropriate.[39]

60. The directors will provide the necessary experience and stability to the Applicants' businesses and guide the restructuring efforts. It is important that continuity be maintained with the Applicants to ensure focus on achieving a restructuring plan that will benefit the Applicants stakeholders.

61. The D&O Charge is not intended to duplicate coverage already in place under the Applicants' existing directors' and officers' liability insurance policies, but rather to supplement such coverage if any claim is not insured under those policies. The proposed charge is intended to protect the directors against exposure only to the extent that it is not covered by the Applicants' current insurance policy.[40]

Appointing the Monitor

62. Section 11.7 of the CCAA requires that the court shall appoint a person to monitor the business and affairs of a debtor company granted relief under the CCAA.

63. Section 11.7 of the CCAA also includes restrictions on who may be appointed as a monitor.

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[38] McConnell Affidavit, para. 106.
[39] McConnell Affidavit, para. 106.
[40] McConnell Affidavit, para. 105-106.

64. The Proposed Monitor is a licensed trustee within the meaning of section 2 of the BIA and is not subject to any of the restrictions on who may be appointed as monitor set out in section 11.7(2) of the CCAA.

65. The Proposed Monitor has been intimately involved with this matter since the Fall of 2020. It would be reasonable and efficient for the Proposed Monitor to be appointed the Monitor, given its extensive knowledge of the Applicants and the challenges they have faced.[41] It is respectfully submitted that the Proposed Monitor is qualified to act as Monitor in these CCAA proceedings.

Notice to Secured Creditors

66. The Court has authority under the CCAA to, subject to the restrictions set out in the legislation, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.[42]

67. The Initial Order is being sought on notice only to CIBC as well as the Federal and Provincial statutory lien claimants. Two secured creditors have not been given notice of the November 30, 2022 Appearance, CSI Leasing Canada Ltd. and Pattison Sign Group.

68. The limited notice being provided with respect to this Application is necessitated by the urgency of the Applicants' need for relief and for the purposes of confidentiality so that notice of this Application does not become public prior to the Initial Order being granted. Public awareness could impact the effectiveness of the restructuring attempts of the Applicants.

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[41] McConnell Affidavit, para. 90.
[42] CCAA, s. 11, **[Tab 4].**

69. It is further submitted that the remaining two secured creditors will not be affected by the charges as the Initial Order does not grant the Charges in priority to the claims of the Unserved Secured Creditors. However, the Applicants, the Monitor and the Chargees (as defined in the Initial Order) reserve their rights to seek an Order from this Court to rank in priority to the Encumbrances of the Unserved Secured Creditors.

B. December 1, 2022 – Hearing – Notice of Motion

Should the DIP Loan be Approved and the DIP Charge be Granted

70. The Applicants are seeking the approval of a DIP Loan and the second-ranking DIP Charge over the Applicants' Property in favour of the DIP Lender, to secure amounts borrowed by the Applicants under the terms of the DIP Loan.

71. Section 11.2(1) of the CCAA allows this Honourable Court to grant the DIP Loan and the DIP Lender's Charge that ranks in priority to the Applicants; secured creditors, on notice to those secured creditors that would be affected and in an amount that the Court considers appropriate having regard to the Applicants' Cash Flow Statement.

72. In considering whether the DIP Loan and DIP Lender's Charge is appropriate, a court is required to consider the following factors under section 11.2(4) of the CCAA:

a) the period during which the company is expected to be subject to proceedings under the CCAA;

b) how the company's business and financial affairs are to be managed during the proceedings;

c) whether the company's management has the confidence of its major creditors;

d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

e) the nature and value of the company's property;

f) whether any creditor would be materially prejudiced as a result of the security or charge; and

g) the monitor's report.

73. Section 11.2(5) provides that a court shall not grant an order for interim financing at the same time as granting an initial order under section 11.2 unless it is satisfied that the terms of the loan are limited to those terms that are reasonably necessary for the Applicants' continued operations in the ordinary course of business during the initial stay of proceedings.[43] What is considered "reasonably necessary" depends on the facts of each case.[44]

74. The Applicants do not have sufficient funds to get through the 10 day initial Stay Period without a draw under the DIP Loan and the DIP Lender's Charge being granted.[45]

75. As set out in the DIP Term Sheet, the Applicants are seeking a DIP Loan up to a maximum of $4,000,000, to be made available upon the issuance of the proposed Amended and Restated Order.[46]

76. The Applicants submit that this amount is reasonably necessary to allow the Applicants to meet critical payments and continue operations during the initial Stay of

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[43] CCAA, s. 11.2(5) **[Tab 4]**.
[44] *8440522 Canada Inc., Re*, 2013 ONSC 6167, para. 30, **[Tab 13]**.
[45] McConnell Affidavit, para. 95-96.
[46] McConnell Affidavit, para. 95 and Exhibit 24.

Proceedings while restructuring strategies are being pursued. The Proposed Monitor is of the view that the costs of this financing including the annual interest rate and the Lender's Charge are comparable to and within a reasonable range of interim financing loans in other recent Canadian CCAA filings.[47]

77. The following factors support the approval of the DIP Term Sheet and the granting of the DIP Lender's Charge:

a) The availability of the DIP Loan is contingent on an Order of this Court approving the DIP Term Sheet and the DIP Lender's Charge being granted;[48]

b) The necessity of the DIP Loan is demonstrated and supported by the Cash Flow Forecast;

c) The Applicants' business will be managed by its directors and senior management, in consultation with the Proposed Monitor;[49]

d) In the absence of the DIP Loan, the Applicants will be unable to continue to carry on business and may be faced with an immediate liquidation of their assets, to the detriment of their stakeholders;[50]

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[47] Monitor Report, para. 55.
[48] McConnell Affidavit, para. 97.
[49] Monitor Report, para. 36.
[50] Monitor Report, para. 54.

e) no creditor should be materially prejudiced as a result of the DIP Loan and the DIP Lender's Charge;[51]

f) The Proposed Monitor is supportive of the DIP Loan, the DIP Term Sheet and the DIP Lender's Charge[52];

g) The Applicants' primary creditor, CIBC, is supportive of the DIP Loan, the DIP Term Sheet and the DIP Lender's Charge; and

h) The benefits of such new financing to all stakeholders outweigh the potential prejudice to any particular creditor.[53]

Enhanced Monitor Powers

78. The Applicants submit that it is necessary for the Monitor to be granted enhanced powers in the CCAA proceedings.

79. The Applicants and their counsel and financial advisors, with the support of CIBC and its legal counsel and financial advisors, have been attempting to restructure the Companies' affairs for nearly 2 years without success.[54]

80. The Applicants, the Board of Directors of the Applicants and CIBC all agree that the Applicants now require more direct involvement of a seasoned, well-respected restricting professional services firm to assist the Companies in driving and directing a corporate restructuring for both Medco and Realco.[55]

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[51] Monitor Report, para. 57.
[52] Monitor Report, paras. 50-57.
[53] Monitor Report, paras. 54 and 57.
[54] Monitor Report, para. 33.
[55] Monitor Report, para. 34.

81. The enhanced powers for the Proposed Monitor found in the ARIO, if granted, would authorize the Proposed Monitor to do a number of things in addition to its powers set forth in the Initial Order, if also granted, including but not limited to the following:

a) in the Monitor's absolute discretion, paying the True-Up Payments as detailed in this Report to the Physicians who have not given notice terminating their Service Agreements with Medco;

b) assisting the Applicants, as required, in their dissemination to the Interim Lender and its counsel on a weekly basis of financial and other information as agreed to between the Applicants and the Interim Lender which may be used in the CCAA Proceedings;

c) advising the Applicants in the preparation of their cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the Interim Lender;

d) pursuing all avenues of refinancing of the Applicants' Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing;

e) potentially developing and executing a sales and investment solicitation process (the "SISP") in respect of the Applicants' Property including, the marketing of any and all Property and conducting, supervising, and directing the sale, conveyance, transfer, lease, assignment or disposal of any

Property of the Applicants or any part or parts thereof, whether or not outside of the ordinary course of business, subject to the approval of this Court;

f) exercising any shareholder, partnership, joint venture or other rights of the Applicants;

g) negotiating Service Agreements with Physicians, with the assistance of the Applicants (as required);

h) negotiating leases or subleases in respect of the real property ("Leasing");

i) with the assistance of the Applicants, as required, permanently or temporarily ceasing, downsizing or shutting down any of the Applicants' business or operations;

j) with the assistance of the Applicants, as required, relocating Physicians and employees within the real property;

k) disclaiming, in accordance with the CCAA, any contracts of the Applicants;

l) causing the Applicants to terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate;

m) executing, assigning, issuing and endorsing any agreement, amendment, document, lease, instrument or writing in the name of the Monitor or in the name of, and on behalf of the Applicants as may be necessary or desirable

in order to carry out the provisions of this Order, including in respect of a potential SISP, the Service Agreements, and Leasing;

n) advising the Applicants in their development of the Plan and any amendments to the Plan;

o) assisting the Applicants, as required, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan; and

p) holding funds in trust or in escrow, as required.[56]

82. The Supreme Court of Canada has emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the CCAA, in particular, the question is whether the order will be useful to further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company.[57]

83. It is submitted that given the Applicants' current financial and operational circumstances and lack of expertise in restructuring and the fact that the Proposed Monitor is prepared to accept the expanded role contemplated in the Amended and Restated Order, granting enhanced powers to the Proposed Monitor in these circumstances would further the efforts to achieve the remedial purpose of the CCAA.

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[56] Monitor Report, para. 35.

[57] *North American Tungsten Corp., Re,* 2015 BCSC 1376 ("*Tungsten*") at para. 25 citing *Ted Leroy Trucking Ltd. Re,* 2010 SCC 60 at para. 70, **[Tab 14]**.

Extension of the Stay of Proceedings

84. Subsection 11.02(2) of the CCAA provides that a court may extend the stay of proceedings granted under an Initial Order for such period of time as is deemed appropriate. That section provides the following:

> Stays, etc. — other than initial application
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.[58]

85. Subsection 11.02(3) of the CCAA establishes that the onus is on the debtor company in making such an application to establish that circumstances exist that make the order appropriate and that the applicant has also acted, and is acting, in good faith and with due diligence:

> Burden of proof on application
>
> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.[59]

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[58] CCAA, s. 11.02(2).**[Tab 4]**.

[59] CCAA, s. 11.02(2) **[Tab 4]**.

86. Courts have considered whether "circumstances exist that make the order appropriate". The Supreme Court of Canada has emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the CCAA, in particular, the question is whether the order will be useful to further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company. Appropriateness extends not only to the purpose of the order, but also to the means it employs.[60]

87. When granting an extension, it is a prerequisite for the moving party to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the CCAA. The debtor company must show that it has at least "a kernel of a plan".[61]

88. When CCAA proceedings are in their early stages, it is appropriate for courts to give deference when considering extension of the stay, provided the requirements of s. 11.02(3) have been met.[62]

89. The good faith and due diligence requirement of s. 11.02(3) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absences of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the CCAA process.[63]

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[60] *Tungsten,* para. 25 citing *Ted Leroy Trucking Ltd. Re,* 2010 SCC 60 at para. 70 [**Tab 14]**.
[61] *Tungsten*, para. 26 **[Tab 14]**.
[62] *Tungsten*, para. 28 **[Tab 14]**.
[63] *Tungsten*, para. 29 **[Tab 14]**.

90. Courts have also considered on applications for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension.[64]

91. In the present circumstances the CCAA proceeding is in its infancy. The Applicants have:

a) lined up interim financing that forms part of the relief sought in the motion before the Court today;

b) are exploring a potential sales and investment solicitation process;

c) Reviewing various liabilities including the True-Up Payments with the Monitor, discussed further below, to determine the total obligation for payment of that liability;

92. The Applicants and the Proposed Monitor have worked diligently with CIBC to prevent any material changes to the Applicants' cash flows.

93. It is submitted that the Applicants have expended significant efforts to stabilize their business and do, in fact, have a kernel of a plan.

94. The Applicants have focused on the existing cash flow problems and assessment of current liabilities and obligations. This review is intended to put the Applicants in a positon to enhance the prospects of a viable restructuring and/or a future SISP.

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[64] *Federal Gypsum Co., Re,* 2007 NSSC 347, paras. 24-29 **[Tab 15]**.

95. It is respectfully submitted that during this early in the proceeding, an amount of deference should be provided to the Applicants and the Proposed Monitor to continue their process with the appropriate protections.

96. The Applicants are seeking a stay until the end of the 13 week Consolidated Cash flow Forecast from November 30, 2022 to February 24, 203 as set out in the Monitor's Report at paragraph 38.

Approving the Key Employee Retention Plans ("KERP")

97. KERP have been described as plans that are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress.[65]

98. Whether KERP provisions should be ordered in a CCAA proceeding is a matter of discretion.[66]

99. Courts will look at:

a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor

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[65] *Grant Forest Products Inc., Re,* 2009 O.J. No. 3344 ("*Grant Forest*"), para. 8 **[Tab 16].**
[66] *Grant Forest*, para. 8 **[Tab 16]**.

be actively involved in all phases of the process — from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.

b) Necessity: Incentive programs, be they in the form of KERP are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.

c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives

created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.[67]

100. It is submitted that the KERP should be approved for the following reasons:

a) The Applicants' Board of Directors has identified a group of key personnel who are critical to the Applicants' restructuring efforts, supporting the potential SISP and managing the day-to-day operations.[68]

b) In order to retain and incentivize the Key Employees as full-time employees, the Applicants have developed the proposed KERP. The set amount is payable only once the Key Employee achieves its milestone and not payable upfront;[69]

c) The maximum amount of payments under the proposed KERP is $100,000 for three Key Employees, which represents a range of 23-29% of the Key Employees base salary for each individual;[70]

d) The KERP as developed by the Applicants in consultation with the Proposed Monitor, and is supported by CIBC;[71]

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[67] *Aralez Pharmaceuticals Inc., (Re)*, 2018 ONSC 6980 at para. 30 **[Tab 17]**.
[68] Monitor Report, para. 58.
[69] Monitor Report, para. 59.
[70] Monitor Report, para. 60.
[71] Monitor Report, para. 61.

e) The Proposed Monitor is of the view that the KERP is reasonable and appropriate in the circumstances;[72]

f) Certain Key Employees have indicated that they would consider alternative employment opportunities should there not be any material retention payment amounts made available;[73]

g) The quantum of the KERP payments and the terms of the KERP are commercially reasonable and are not "off-market" in the circumstances.[74]

Sealing Order

101. The Applicants are seeking that the Confidential Appendix 1 of the Monitor's Report be sealed.

102. The Supreme Court of Canada has set out the following conjunctive elements for deciding whether or not a sealing order should be granted:

a) court openness poses a serious risk to an important public interest;

b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

c) the benefits of the order outweigh its negative effects.[75]

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[72] Monitor Report, para. 61.
[73] Monitor Report, para. 61(d).
[74] Monitor Report, para. 61(f).
[75] *Just Energy Group Inc. et al.* 2021 ONSC 7630 at para 27 citing *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38 **[Tab 18]**.

103. It is respectfully submitted that all three factors are satisfied here.

104. The documents the Applicants seek to seal contain the names of the KERP recipients and the amounts each will receive. Publicly disclosing employee compensation violates the privacy interest of those employees. The employees themselves have not initiated any court proceeding that would require production of that information. The limitation on the open courts principle is minimal. The order is proportional. The benefits in protecting privacy interests of non-party employees outweigh the very limited impact on the open courts principle.[76]

True-Up Payments

105. At paragraphs 44-49 of the Proposed Monitor's Report, the Proposed Monitor sets out the details regarding the True-Up Payments.

106. It is respectfully submitted that these payments are unsecured and there is no obligation for the Applicants to make payment of these amounts at this time.

107. However, it is submitted that the True-Up payments are important aspects of the remuneration given to physicians working at the Clinic. The need to have the physicians continue to provide services is critical to the ongoing success of the Applicants' business. As stated previously, Medco generates 90% of its revenue by billing the Department of Health for service performed by the physicians.[77]

108. It is respectively submitted that the Court should view the physicians as analogous to critical suppliers as defined in the CCAA, critical to the company's continued operation.

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[76] This is analogous to the findings of the Court in *Just Energy* at paras. 28-29.

[77] Monitor Report, paras. 44 and 48.

> Critical supplier
>
> 11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

109. However, if the Court is unwilling to view the physicians as critical suppliers, then it is submitted that courts have allowed debtor companies in a CCAA proceeding to make payments to unsecured creditors when such payments are necessary to maintain the *status quo* and to ensure the continuous ongoing operations of the debtor company's business.[78]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2022

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[78] *Futura Loyalty Group Inc., Re*, 2012 ONSC 6403, ss. 7-11 and 14-15 **[Tab 19]**.

Court of King's Bench Rules
Manitoba Regulation 553/88

PART I
GENERAL MATTERS

RULE 1
CITATION, APPLICATION AND INTERPRETATION

INTERPRETATION

General principle

1.04(1)

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

1.04(1.1)

In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:

(a) the nature of the proceeding;

(b) the amount that is probably at issue in the proceeding;

(c) the complexity of the issues involved in the proceeding;

(d) the likely expense of the proceeding to the parties.

M.R. 130/2017

Matters not provided for

1.04(2)

Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

Party acting in person

1.04(3)

Where a party to a proceeding is not represented by a lawyer but acts in person in accordance with subrule 15.01(2) or (3), anything these rules require or permit a lawyer to do shall or may be done by the party.

RULE 2
NON-COMPLIANCE WITH THE RULES

EFFECT OF NON-COMPLIANCE

Not a nullity

2.01(1)

A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

COURT MAY DISPENSE WITH COMPLIANCE

2.03

The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

RULE 3
TIME
EXTENSION OR ABRIDGMENT

General powers of court

3.02(1)

The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

Expiration of time

3.02(2)

A motion for an order extending time may be made before or after the expiration of the time prescribed.

Consent in writing

3.02(3)

A time prescribed by these rules for serving or filing a document may be extended or abridged by consent in writing.

PART III
COMMENCEMENT OF PROCEEDINGS

RULE 14
COMMENCEMENT AND TRANSFER OF PROCEEDINGS
APPLICATIONS — BY NOTICE OF APPLICATION

Notice of application

14.05(1)

The originating process for the commencement of an application is a notice of application (Form 14B or such other form prescribed by these Rules).

Proceedings which may be commenced by application

14.05(2)

A proceeding may be commenced by application,

(a) where authorized by these rules;

(b) where a statute authorizes an application, appeal or motion to the court and does not require the commencement of an action;

(c) where the relief claimed is for,

(i) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust,

(ii) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible,

(iii) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation,

(iv) the determination of rights which depend upon the interpretation of a deed, will, agreement, contract or other instrument, or upon the interpretation of a statute, order in council, order, rule, regulation, by-law or resolution,

(v) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges, or

(vi) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust; or

(d) in respect of any matter where it is unlikely there will be any material facts in dispute.

Injunction, declaration, receiver

14.05(3)

Where the relief claimed in a proceeding includes an injunction, declaration or the appointment of a receiver, the proceedings shall be commenced by action; but the court may also grant such relief where it is ancillary to relief claimed in a proceeding properly commenced by application.

PART IV
SERVICE

RULE 16
SERVICE OF DOCUMENTS

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where order may be made

16.04(1)

Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Exception

16.04(1.1)

Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

M.R. 11/2018

Effective date of service

16.04(2)

In an order for substituted service, the court shall specify when service in accordance with the order is effective.

Service dispensed with

16.04(3)

Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date the order is signed, for the purpose of the computation of time under these rules.

VALIDATING SERVICE

16.08(1)

Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

M.R. 11/2018

Exception

16.08(2)

Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

M.R. 11/2018

RULE 38
APPLICATIONS — JURISDICTION AND PROCEDURE

APPLICATION OF RULE

38.01

This Rule applies to all proceedings under rule 14.05 which are commenced by a notice of application.

ISSUING OF NOTICE OF APPLICATION

38.02

A notice of application (Form 14B) shall be issued and filed as provided by rule 14.05, before it is served; and may be issued and filed in any administrative centre.

APPLICATIONS — TO WHOM TO BE MADE

38.03

All applications shall be made to a judge.

PLACE AND DATE OF HEARING

Place

38.04(1)

The applicant shall name in the notice of application as the place of hearing the judicial centre in which the applicant proposes the application to be heard.

Hearing date

38.04(2)

The notice of application must name as the hearing date any date on which a judge sits to hear applications.

M.R. 130/2017

38.04(3)

[Repealed]

M.R. 130/2017

SERVICE OF NOTICE

Generally

38.05(1)

The notice of application shall be served on all parties and, where it is uncertain whether anyone else should be served, the applicant may, without notice, make a motion to a judge for an order for directions.

Where notice ought to have been served

38.05(2)

Where it appears to the judge hearing the application that the notice of application ought to be served on a person who has not been served, the judge may,

(a) dismiss the application or dismiss it only against the person who was not served;

(b) adjourn the application and direct that the notice of application be served on the person; or

(c) direct that any order made on the application be served on the person.

Time for service

38.05(3)

Unless the court abridges the time for service, where an application is made on notice, the notice of application must be served at least 14 days before the date on which the application is to be heard.

M.R. 130/2017

38.05(4)

[Repealed]

M.R. 130/2017

AMENDMENTS

When amendments may be made

38.05.1(1)

The applicant may amend a notice of application

(a) on filing the written consent of all parties and, if a person is to be added as a party, with the written consent of that person;

(b) at any time on requisition to correct clerical errors; or

(c) with leave of the court.

M.R. 130/2017

When court may grant leave

38.05.1(2)

The court may grant leave on motion at any stage of an application to amend a notice of application on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment.

M.R. 130/2017

Application

38.05.1(3)

Rules 26.04 and 26.05 apply, with necessary changes, to amendments to a notice of application.

M.R. 130/2017

TRANSFER OF APPLICATION

By registrar

38.06(1)

Where a notice of application is issued in a centre other than the judicial centre in which it is to be heard, the registrar shall forthwith forward the court file to the judicial centre named as the place of hearing.

Rule 14.08, excepting subrule (1), applies

38.06(2)

Rule 14.08, excepting subrule (1) thereof, applies with necessary modification to the transfer of an application.

CONTESTED APPLICATION

To be adjourned for a hearing date

38.07(1)

Subject to subrule (2), where a notice of application has been served under subrule 38.05(3) and it transpires that the application is to be contested, the judge shall adjourn the application and the applicant may obtain a hearing date.

M.R. 130/2017

Immediate hearing where urgent, etc.

38.07(2)

In case of urgency or where otherwise appropriate, the judge may proceed to hear the application.

Applicant's brief

38.07(3)

Where the application is to be contested, the applicant shall, at the time of obtaining a hearing date, file in the judicial centre in which the application is to be heard and serve on all other parties, a brief consisting of

(a) a list of any documents, specifically identified, including filing date, filed in court to be relied on by the applicant, unless the court orders that copies of all documents be filed as part of the brief;

(b) a list of any cases and statutory provisions to be relied on by the applicant; and

(c) a list of the points to be argued.

Respondent's brief

38.07(4)

A respondent party who has been served with a brief under subrule (3) shall file in the judicial centre in which the application is to be heard and serve on all other parties, a brief consisting of:

(a) a list of any documents described in clause (3)(a), not included in the applicant's brief and to be relied on by the respondent; and

(b) a list of items described in clauses (3)(b) and (c), not included in the applicant's brief, to be relied on by the respondent.

M.R. 12/92; 17/2015; 130/2017

Bilingual statutory provisions in brief

38.07(4.1)

If a party relies on a statutory provision that is required by law to be printed and published in English and French, their brief must contain a bilingual version of that provision.

M.R. 44/2022

Waiver

38.07(5)

A judge may, either before or at the hearing of the application waive or vary the requirements of this rule where there is insufficient time to comply or where, due to the nature of the application, a brief is not justified.

SCHEDULING OF CONTESTED APPLICATIONS

Schedule

38.07.1(1)

Subject to subrules (2) to (4), preliminary steps in an application must be completed in accordance with the following schedule:

(a) the applicant must file and serve all supporting affidavits within 30 days after the notice of application was filed;

(b) the respondent must file and serve all supporting affidavits within 30 days after service of the applicant's affidavits or the expiry of the deadline for doing so, whichever is earlier;

(c) the applicant must file and serve any affidavits in response to affidavits filed by the respondent within 20 days after service of the respondent's affidavits;

(d) cross-examination on affidavits must be completed by all parties within 20 days after the service of all affidavits or the expiry of the deadline for doing so, whichever is earlier;

(e) the applicant may file and serve any additional brief within ten days after cross-examinations on affidavits have been completed or the expiry of the deadline for doing so, whichever is earlier;

(f) the respondent must file and serve a brief within 20 days after the applicant serves an additional brief or the expiry of the deadline for doing so, whichever is earlier.

M.R. 130/2017

Scheduling agreement

38.07.1(2)

The parties may establish their own schedule by filing a written agreement that sets out specific deadlines for completing preliminary steps in the application.

M.R. 130/2017

Motion to set schedule

38.07.1(3)

If a party objects to the schedule under subrule (1) but is unable to reach a scheduling agreement with the other party, the party may bring a motion to a judge to establish a schedule for completion of the preliminary steps in the application.

M.R. 130/2017

Amending schedule by agreement

38.07.1(4)

The parties may amend a schedule established under subrule (1), (2) or (3) by filing a written agreement that sets out new deadlines for completing preliminary steps in the application.

M.R. 130/2017

Filing deadline

38.07.1(5)

No agreement may permit the filing of materials less than seven days before the hearing of the application.

M.R. 130/2017

Sanctions for failure to comply with schedule

38.07.1(6)

If a party has failed to comply with a schedule established under this rule, a judge may do one or more of the following:

(a) strike out the application, if the offending party is the applicant;

(b) adjourn the hearing of the application;

(c) order costs against the offending party;

(d) direct the hearing to proceed on the scheduled date without allowing the offending party to

(i) file or rely on any affidavit, transcript or brief that was not filed or served in accordance with the schedule, or

(ii) conduct a cross-examination on an affidavit after the expiry of the scheduled deadline for cross-examinations to occur;

(e) make any other order or give any other direction that he or she considers appropriate in the circumstances.

M.R. 130/2017

Who may impose sanctions

38.07.1(7)

The sanctions set out in subrule (6) may be imposed

(a) on motion to a judge; or

(b) by the judge presiding at the hearing of the application.

M.R. 130/2017

Exception

38.07.1(8)

This rule does not apply to urgent applications.

M.R. 130/2017

HEARING BY TELEPHONE, VIDEO CONFERENCE OR OTHER MEANS OF COMMUNICATION

Consent

38.08(1)

If all the parties to an application consent and the court permits, an application may be heard by telephone, video conference or other means of communication.

M.R. 121/2002

Order, no consent

38.08(2)

If not all the parties consent, the court may, on motion, make an order directing the manner in which the application is to be heard.

M.R. 121/2002

Motion to determine manner

38.08(3)

The motion under subrule (2) to determine the manner of hearing an application may be held

(a) without the necessity of filing a notice of motion or evidence; and

(b) by telephone, video conference or other means of communication.

M.R. 121/2002

Arrangements

38.08(4)

Where an application under subrule (1) or a motion under clause (3)(b) is to proceed by telephone, video conference or other means of communication, the applicant or the moving party, as the case may be, shall make the necessary arrangements and give notice of those arrangements, including the date, time and manner of hearing, to the other parties and to the court.

M.R. 121/2002

DISPOSITION OF APPLICATION

38.09

On hearing an application, a judge may,

(a) allow or dismiss the application or adjourn the hearing, with or without terms; or

(b) where satisfied that there is a substantial dispute of fact, direct that the application proceed to trial or direct the trial of a particular issue or issues and, in either case, give such directions and impose such terms as may be just, subject to which the proceeding shall thereafter be treated as an action.

SETTING ASIDE OR VARYING ORDER WITHOUT NOTICE

Motion to set aside or vary

38.10(1)

A person affected by an order made without notice, or a person who has failed to appear on an application due to accident, mistake or insufficient notice, may, by notice of motion filed, served and made returnable promptly after the order first came to the person's notice, move to set aside or vary the order.

To original judge

38.10(2)

Where practicable, a motion under subrule (1) shall be made to the judge who made the order.

ABANDONMENT OF APPLICATIONS

Abandonment of applications, where not served

38.11(1)

Where a party makes an application by filing a Notice of Application (Form 14B) in accordance with this rule and has not served the Notice of Application, the party may abandon the application by filing a Notice of Abandonment of Application (Form 38A) and an affidavit deposing that the Notice of Application has not been served.

M.R. 25/90

Abandonment of applications, where served

38.11(2)

Where a party makes an application by filing and serving a Notice of Application (Form 14B) in accordance with this rule, the party may abandon the application

(a) by serving a Notice of Abandonment of Application on the parties who were served with the Notice of Application; and

(b) by filing the Notice of Abandonment of Application along with proof of service of the Notice of Abandonment of Application.

M.R. 25/90

Deemed abandonment of applications

38.11(3)

Where a party files and serves a Notice of Application (Form 14B) and does not appear at the hearing of the application, the party is deemed to have abandoned the application, unless the court orders otherwise.

M.R. 25/90

Costs on abandoned applications

38.11(4)

Where an application is abandoned by a Notice of Abandonment of Application under subrule (2) or is deemed to be abandoned under subrule (3), a party on whom the Notice of Application (Form 14B) is served is entitled to the costs of the application, unless the court orders otherwise.

M.R. 25/90

DISMISSAL OF APPLICATION FOR DELAY

Motion

38.12(1)

The court may on motion dismiss an application for delay.

M.R. 26/97

Grounds

38.12(2)

On hearing a motion under this rule, the court may consider,

(a) whether the applicant has unreasonably delayed in obtaining a date for a hearing of a contested application;

(b) whether there is a reasonable justification for any delay;

(c) any prejudice to the respondent; and

(d) any other relevant factor.

M.R. 26/97

Dismissal not a defence to subsequent application

38.12(3)

The dismissal of an application for delay is not a defence to a subsequent application unless the order dismissing the application provides otherwise.

M.R. 26/97

Failure to pay costs

38.12(4)

Where an applicant's application has been dismissed for delay with costs, and another application involving the same subject matter is subsequently brought between the

same parties or their representatives or successors in interest before payment of the costs of the dismissed application, the court may order a stay of the subsequent application until the costs of the dismissed application have been paid.

M.R. 26/97

Stay of proceedings

38

The court, on its own initiative or on motion by a person, whether or not a party, may stay a proceeding on such terms as are considered just.

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

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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.

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.

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

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

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

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

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

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) 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.

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).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

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

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

An Act to facilitate compromises and arrangements between companies and their creditors

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Interpretation

Definitions

2 (1) In this Act,

aircraft objects [Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

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

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Titre abrégé

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies*.

S.R., ch. C-25, art. 1.

Définitions et application

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

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

court means

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

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

(b) in Quebec, the Superior Court,

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

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

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

debtor company means any company that

(a) is bankrupt or insolvent,

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

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

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

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

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

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

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Définition de *personnes liées*

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

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

Application

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

Application

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

Affiliated companies

(2) For the purposes of this Act,

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

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

Application

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

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

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

PART II

Jurisdiction of Courts

Jurisdiction of court to receive applications

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

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Form of applications

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

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

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

PARTIE II

Juridiction des tribunaux

Le tribunal a juridiction pour recevoir des demandes

9 (1) Toute demande prévue par la présente loi peut être faite au tribunal ayant juridiction dans la province où est situé le siège social ou le principal bureau d'affaires de la compagnie au Canada, ou, si la compagnie n'a pas de bureau d'affaires au Canada, dans la province où est situé quelque actif de la compagnie.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Forme des demandes

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

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

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

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.

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.

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.

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.

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.

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.

Rights of suppliers

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

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

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

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

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

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

Suspension : demande initiale

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

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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

Stays, etc. — other than initial application

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

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

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

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

Stays — directors

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

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

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

Suspension : demandes autres qu'initiales

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

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

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

Preuve

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

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

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

Restriction

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

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

Suspension — administrateurs

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

Exception

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

Persons deemed to be directors

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

2005, c. 47, s. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

2005, c. 47, s. 128, 2007, c. 36, s. 64.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

Exclusion

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

Présomption : administrateurs

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

2005, ch. 47, art. 128.

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la personne — autre que la compagnie visée par l'ordonnance — qui a des obligations au titre de lettres de crédit ou de garanties se rapportant à la compagnie.

2005, ch. 47, art. 128.

11.05 [Abrogé, 2007, ch. 29, art. 105]

Membre de l'Association canadienne des paiements

11.06 Aucune ordonnance prévue par la présente loi ne peut avoir pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

2005, ch. 47, art. 128; 2007, ch. 36, art. 64.

11.07 [Abrogé, 2012, ch. 31, art. 420]

Restrictions : exercice de certaines attributions

11.08 L'ordonnance prévue à l'article 11.02 ne peut avoir d'effet sur :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

Negligence, misconduct or fault

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

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

Court may order security or charge to cover certain costs

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

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

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

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

Négligence, inconduite ou faute

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

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

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

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

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priorité

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

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

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

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

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

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

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

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

Morawetz R.S.J.

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

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

Subject: Insolvency; Property

APPLICATION for relief under *Companies' Creditors Arrangement Act*.

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

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

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

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

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

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

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

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

> a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
>
> b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;
>
> c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
>
> d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

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

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

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

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

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy,

Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

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

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

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

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

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

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

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

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

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

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

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

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined

that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

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

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

a) Should the stay be extended to the Partnerships?

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

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

d) Should the Court approve protections for employees?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Publications Canwest Inc., Re, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) Logistics and supply chain providers;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Whether there is an unwarranted duplication of roles;

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

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

f. The position of the Monitor.

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

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

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

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

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

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

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

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

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

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

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

Application granted.

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

"debtor company" means any company that:

(a) is bankrupt or insolvent;

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

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

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

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a

continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust

deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .
>
> > "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
> >
> > (a) who is for any reason unable to meet his obligations as they generally become due,
> >
> > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> >
> > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> Today there is only one principle or approach, namely 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.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), 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. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In

addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past*. I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;
>
> (e) developing restructuring alternatives; and
>
> (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco

realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> > (a) the ability to meet liabilities as they fall due; and
> >
> > (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) 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 say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis

would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would

refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount

claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:

> A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.

Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all

transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.
>
> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

Motion dismissed.

APPENDIX

2020 ABCA 396
Alberta Court of Appeal

Wiebe v. Weinrich Contracting Ltd.

2020 CarswellAlta 2082, 2020 ABCA 396, [2021] A.W.L.D. 713, 17 Alta. L.R. (7th) 11, 327 A.C.W.S. (3d) 489

Roy Wiebe and Parkland Aerospace Corp (Appellants / Defendants) and Weinrich Contracting Ltd (Respondent / Plaintiff) and Parkland Airport Development Corporation, Deloitte Restructuring Inc, and 2155734 Alberta Ltd (Not Parties to the Appeal)

Peter Martin, Ritu Khullar, Dawn Pentelechuk JJ.A.

Heard: October 6, 2020
Judgment: November 9, 2020
Docket: Edmonton Appeal 1903-0139-AC

Counsel: R.B. Hajduk, for Appellants
K.P. Chapotelle, R.L. Graham, for Respondents

Subject: Civil Practice and Procedure; Insolvency

Headnote

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

Plaintiff was retained to construct runway at airport — Plaintiff brought action against defendants based on misrepresentation — Action was also brought against plaintiff and others — Airport successfully applied for protection under Companies' Creditors Arrangement Act and stay of proceedings was granted — Tolling order was granted suspending and tolling limitation periods to commence actions in relation to certain transactions at issue, which arguably affected plaintiff's claim — Action against plaintiff was discontinued — Vesting order regarding assets of airport was granted — Defendants appealed — Appeal allowed — It was impossible to discern whether plaintiff's action was contemplated at initial hearing, and whether tolling order was broad enough to capture plaintiff's actions — Impossible to discern whether supervising judge intended to merely clarify initial stay and/or tolling order, believing they already encompassed plaintiff's entire action, or whether intention was to retroactively expand terms of those orders to preserve entirety of plaintiff's action — Defendants did not receive sufficient notice that supervising judge might grant order preserving plaintiff's action against them and were unable to effectively respond to that issue — Issue should have been adjudicated on notice to affected parties, and with benefit of full argument.

APPEAL by defendants from vesting order.

***Per curiam*:**

1 This appeal explores the tension between the principles of procedural fairness and the broad jurisdiction afforded a supervising judge in a reorganization under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*).

2 The appellants challenge provisions of a vesting and sale order granted by the supervising judge that arguably result in the retroactive expansion of either (or both) of (1) an order staying Weinrich Contracting Ltd's action against the *CCAA* debtor Parkland Airport Development Corp. and (2) an order tolling the limitation periods applicable to the commencement of certain creditors' actions against Parkland Airport Development Corp.

3 For the reasons that follow, we find that the impugned provisions were granted in circumstances that denied procedural fairness to the appellants and appellate intervention is warranted.

Background

4 Weinrich Contracting Ltd (Weinrich) was retained to construct a runway at the Parkland Airport. This appeal concerns Weinrich's action, commenced in July 2014, in relation to that contract. The action named Parkland Airport Development Corp (Parkland Airport), CPL6 Holdings Ltd, the appellant Roy Wiebe (Wiebe) and two other directors of Parkland Airport. The action alleged negligent and fraudulent misrepresentations leading up to the contract.

5 Wiebe is the sole director of the appellant Parkland Aerospace Corp (Parkland Aerospace) which holds 50% of the voting shares in Parkland Airport.

6 In March 2015, Wiebe and Parkland Aerospace filed a statement of claim against Weinrich, directors and employees of Weinrich and other directors of Parkland Airport alleging misconduct in the prosecution of Weinrich's action, unauthorized settlement discussions, and a conspiracy preventing Wiebe from engaging a third-party construction company to fund and complete the runway. The action also challenged an equitable mortgage granted to Weinrich and the caveat it filed against land owned by Parkland Airport.

7 In April 2015, Weinrich filed an amended statement of claim to name additional defendants, including Parkland Aerospace. The amended claim alleged two undervalued transfers of Parkland Airport lands in July 2014, allegedly orchestrated by Parkland Airport directors: one to Roseiko Enterprises Inc; and the second, to 1748632 Alberta Ltd (174). Wiebe is a director of 174 and a 40 % shareholder in that company.

8 In November 2016, Parkland Airport successfully applied for protection under the *CCAA*. Deloitte Restructuring Inc was appointed as Monitor.

9 The Initial Order granted November 29, 2016 by the first chambers judge contained a template provision prohibiting proceedings against Parkland Airport or the Monitor, which for ease of reference, will be called "the Initial Stay":

> 11 Until and including December 28, 2016, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.
>
> 12 During the Stay Period, all rights and remedies of any individual, firm, corporation . . . are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, . . .
>
> 13 Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

10 The Initial Order defines "Business" as carrying on business in a manner consistent with preserving its business and "Property" to mean current and future assets, undertakings, and properties of every nature and kind whatsoever (including proceeds).

11 It is not disputed that the Initial Stay suspended Weinrich's action against Parkland Airport although there is disagreement about whether it stayed Weinrich's action against Wiebe and Parkland Aerospace. The Initial Stay was extended by a series of orders to April 30, 2019.

12 The propriety of numerous transfers, encumbrances, and liens involving the assets of Parkland Airport, effected before the *CCAA* proceedings, became an issue. At some point, the Monitor recognized that there was no realistic hope that Parkland Airport could successfully restructure or that a claims process would be implemented. With the apparent approval of the creditors, the Monitor refrained from taking steps to sort out the legitimacy of various encumbrances affecting the assets of Parkland Airport, or the priority of various creditors, and instead moved to wrap up the *CCAA* proceedings.

13 On May 2, 2017, the supervising judge granted an order (the "tolling order"), suspending and tolling limitation periods to commence actions in relation to "Questioned Transactions", defined in the order's recitals as follows:

> . . . AND UPON noting that prior to the commencement of these proceedings, real property of the Debtor was transferred, charged or otherwise dealt with in circumstances which may give rise to transactions that could be challenged by the Monitor or creditors of the Debtor (the "Questioned Transactions"),which transactions and lands are more particularly set forth in the schedules attached hereto as Schedules "A" and "B"; AND UPON noting that the legitimacy of the Questioned Transactions has not yet been determined; AND UPON noting that at this stage in these proceedings it is not possible to determine whether it is economically beneficial to proceed to investigate and challenge any of the Questioned Transactions; AND UPON noting that the Monitor's authority to challenge any of the Questioned Transactions is pursuant to s 36.1 of the *Companies' Creditors Arrangement Act* ("CCAA") and the provisions of the *Bankruptcy and Insolvency Act* ("BIA") referred to therein and that creditors of the Debtor may have additional ability to challenge the Questioned Transactions under provincial or other legislation; AND UPON noting that limitation periods for commencing actions to challenge the Questioned Transactions continue to operate; AND UPON noting that it would be desirable to suspend the operation of all limitation periods until the economic benefit of challenging any of the Questioned Transactions can be determined; AND UPON hearing counsel for the Monitor, counsel for the Debtor, and counsel for certain creditors of the Debtor; AND UPON reading the Affidavit of Service of notice of this Application and the Monitor's Third and Fourth Reports; IT IS HEREBY ORDERED AND ADJUDGED THAT:
>
> > 2 All limitation periods applicable against the Monitor and the creditors of the Debtor to commence actions pursuant to the provisions of the CCAA, BIA or any provincial or other statutes to challenge any of the Questioned Transactions be and is hereby suspended and tolled until November 1, 2017, except as extended by further Order of this Honourable Court.
> >
> > 3 The suspension and tolling of limitation periods as provided for in this Order is without prejudice to the rights of any party claiming an interest in any of the lands which are subject to this Order [emphasis added].

14 The tolling order was extended by later orders to July 14, 2019.

15 Whether the tolling order preserves Weinrich's Amended Statement of Claim is in dispute. However, it is arguable that at least some of Weinrich's claims fall within the scope of "Questioned Transactions". Schedule "A" includes the transfer of Lot 33 to 1791961 Alberta Ltd and the transfer of Lot 69 to Roseiko Enterprises Inc. Schedule "B" includes an agreement charging lands filed by Weinrich affecting most or all of the lots within Plan 142 1472 and Plan 142 2007.

16 On February 26, 2018, the supervising judge issued an order lifting the Initial Stay against Parkland Airport to allow a foreclosure action to proceed. The Initial Stay was otherwise extended to October 19, 2018. A redemption order declared valid the first mortgage registered against Parkland Airport lands. This mortgage was later assumed by 2155734 Alberta Ltd (215), the entity that ultimately purchased the assets of Parkland Airport.

17 In February and March of 2019, Wiebe and Parkland Aerospace discontinued their action against all defendants (including Weinrich) in response to a threat of r 4.33 applications to strike the claim for long delay. Their statement of claim, the discontinuances of the action and the procedure card from the Weinrich action are the subject of an application to admit new evidence on appeal.

Application for Vesting and Sale Order

18 On April 17, 2019, the supervising judge heard an application for a vesting and sale order authorizing the sale of Parkland Airport's lands and assets to the first mortgagee 215, which involved assumption of the second mortgage in favour of Parkland Aerospace. Weinrich asked for an adjournment to allow it to put forth an alternate offer to purchase. Both the Initial Stay and the tolling order were extended to July 14, 2019.

19 The application was adjourned and heard by the supervising judge on May 8, 2019. In the interim, a second offer to purchase was made by Alsaloussi Holdings Ltd (a company apparently unrelated to Weinrich). There is limited information regarding Alsaloussi Holdings or the circumstances surrounding its offer, which involved assumption of the equitable mortgages granted in favor of Weinrich. Alsaloussi Holdings attended neither the April 17 th nor the May 8 th applications. Both offers had the effect of paying charges in priority to credit bid amounts and then barring all subordinate creditors from recovering against Parkland Airport. Weinrich opposed the sale to 215, arguing that the offer from Alsaloussi Holdings provided for a large cash payment that could be held to allow the various challenged transactions and creditor priorities to be determined. Acceptance of 215's offer would eliminate Weinrich's equitable mortgages and charges it had filed against Parkland Airport lands.

20 In response to Weinrich's objection, counsel for 215 suggested that keeping the *CCAA* proceedings going for the purpose of dealing with Weinrich's claims would not benefit anyone as "the cost detriment is not worth the end result". 215 also suggested that Weinrich would not be prejudiced, because its claims against various third parties would not be eliminated by any vesting order granted and Weinrich could continue its lawsuit outside the auspices of the *CCAA*.

21 The supervising judge found that 215's offer was in the best interest of the parties overall and consistent with the objective of winding up the *CCAA* process. In doing so, he noted that 215 had been paying operational shortfall costs and municipal taxes. The sale to 215 has since closed.

22 The vesting and sale order includes the following paragraphs preserving the claims of creditors against parties other than Parkland Airport:

> 16. Notwithstanding the terms of this Order respecting the free and clear transfer and vesting of interest in the Purchased Assets free and clear of Claims, all claims of creditors against [Parkland Airport] or claims against others are specifically preserved and nothing herein contained shall be considered prejudicial to the interests of those creditors or those claims or as affecting or prejudicing any claims affecting any creditors ability to claim priority to payment against any other creditor.
>
> 17. No legal claims that have been postponed or are reasonably affected by these CCAA proceedings shall be detrimentally affected by the failure to take timely steps in any proceedings unless a Court of competent jurisdiction determines that the alleged prejudice was both foreseeable and avoidable having regard to all of the circumstances [emphasis added].

23 Wiebe and Parkland Aerospace seek to have these paragraphs struck and were granted permission to appeal whether it was a reviewable error for the supervising judge to include these paragraphs in the order: *Wiebe v. Weinrich Contracting Ltd*, 2019 ABCA 323 (Alta. C.A.).

24 Wiebe and Parkland Aerospace argue that the supervising judge (1) exceeded his jurisdiction by retroactively expanding the scope of the Initial Stay and/or the tolling order and (2) decided the impugned parts of the order on his own motion, without reasonable notice to affected parties. They submit that Weinrich's action against them would have been vulnerable to dismissal for long delay under r 4.33 but that paragraphs 16 and 17 of the vesting and stay order now thwart any application under that rule.

25 In response, Weinrich suggests the supervising judge merely clarified the existing stay and tolling order, but in any event, had jurisdiction to make the order under the *CCAA*, the court's inherent jurisdiction or the *Rules of Court*.

Analysis

1. Authority to grant stays under the CCAA

26 The paramount purpose of the *CCAA* "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets": *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) at para 15 [*Century Services*]. Farley J in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) at para 5, expressed a similar view:

> It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

27 In furtherance of these remedial objectives, the *CCAA* provides "broad and flexible authority" permitting a court to make a wide range of orders necessary to support a company's reorganization. All insolvency proceedings in Canada are based on the single proceeding model, described by Professor Wood in *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2009):

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

28 To achieve this, the *CCAA* expressly provided, as at the relevant time, that a court may issue and extend a stay of proceedings against the debtor company while a compromise is sought:

> **11.02(1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

29 Stays of proceedings against the debtor company are common and are included in the initial commercial template order in *CCAA* proceedings in Alberta. [1]

1 Available here: https://albertacourts.ca/qb/areas-of-law/commercial/templates-and-forms. See appellants' factum at paras 62, 65.

30 The *CCAA* has been described as "skeletal in nature"; that is, legislation not "contain[ing] a comprehensive code that lays out all that is permitted or barred": *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para 44, *per* Blair JA). Thus, decisions of the court are frequently based on discretionary grants of jurisdiction grounded in the broad language of s 11 of the *CCAA*:

> 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 [emphasis added].

31 This broad and flexible authority means a high degree of deference is afforded to a supervising judge making a discretionary decision in the *CCAA* context. An appellate court may intervene if there was an error in principle or the discretion was exercised unreasonably: *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para 53 [*Callidus*]. It may also intervene if there was a breach of procedural fairness, if the breach had a negative impact on affected parties' rights: *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.) at paras 73-74 (*per* Deschamps J) and paras 275-276 (*per* LeBel J, dissenting, but not on whether the duty of procedural fairness applies to *CCAA* proceedings).

32 While the *CCAA* provides no express authority to grant a stay of proceedings against third parties other than the debtor company, such orders are quite common. Orders have also been granted *releasing* claims against third parties as part of approving a plan of arrangement. In short, "[c]ases support the view that third-party rights may be affected by a stay order": *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para 60. If it is just and convenient to do so, the court has jurisdiction to stay proceedings against non-corporate third parties: *Calpine Canada Energy Ltd., Re*, 2006 ABQB 153, 19 C.B.R. (5th) 187 (Alta. Q.B.).

33 It much less clear whether s 11 of the *CCAA*, or any other enactments, confer authority to grant stays that have retroactive effect — i.e., to grant orders which treat an action that was not stayed before the court's order as having been stayed at some time before the court's order.

2. Issues on appeal and problems with the record

34 Weinrich argues that the Initial Stay applied to stay its action against Wiebe and Parkland Aerospace, as well as Parkland Airport. In its view, the whole action was stayed.

35 It is not clear whether the Initial Stay is as broad as Weinrich suggests; indeed, we cannot discern from the limited record before us whether the Weinrich action was contemplated at the initial hearing in November 2016. While stays of proceedings against parties other than the debtor company are quite common, there are concerns about the possible unintended consequences if the template wording is interpreted so broadly as to automatically stay proceedings against the debtor company *and* third parties. Nor did the parties here conduct themselves with this understanding. The various actors in these proceedings differentiated between the Initial Stay for the benefit of Parkland Airport and the Monitor, and the May 2017 tolling order relating to questioned transactions. Each of these provisions was expressly extended multiple times in the course of the *CCAA* proceedings.

36 Similarly, it is unclear whether the May 2, 2017 tolling order is broad enough to capture Weinrich's actions against Wiebe and Parkland Aerospace. The breadth of the order, and the extent to which it captured Weinrich's action, is open to interpretation. The parties to this appeal could not confirm whether or not they attended court when the tolling order was granted. On its face, the order suggests they did not.

37 Whether the impugned provisions granted in April 2019 retroactively expanded the Initial Stay or the tolling order to preserve the entirety of Weinrich's action, or whether the supervising judge merely *clarified* the Initial Stay or the tolling order is the central issue; one that potentially affects the substantive rights of the appellants.

38 It is certainly arguable that the April 2019 order had the effect of retroactively expanding the scope of the Initial Stay or the tolling order resulting in the preservation of claims otherwise vulnerable to striking for long delay. But this question cannot be answered based on the limited record before us.

39 The Monitor declined to participate in this appeal; we have neither the benefit of his submissions nor the Monitor's report filed in conjunction with the May 2017 applications. At the application below, there was relatively little oral argument about the preservation of Weinrich's claims against Wiebe and Parkland Aerospace and no written argument. Wiebe and Parkland Aerospace argued that the Initial Stay and the tolling order only applied to actions against the debtor, Parkland Airport, and not to them, because those orders do not specifically say that they apply to actions against third parties. However, they made no arguments about the supervising judge's authority to grant a stay with retroactive effect, nor the considerations that should guide the exercise if that authority exists. The Monitor offered no insight on the proper interpretation or scope of the Initial Stay or the tolling order.

40 Further, the supervising judge made comments that appear to be incompatible as to whether his order was a clarification of the effect of the tolling order, or a new order with retroactive effect (compare transcript, p 31/lines 35-38 with transcript p 33/lines 1-31). That was quite understandable. The issue was sprung on him at the May 8, 2019 hearing without warning and

with no written material or citation of relevant law. The transcript of the proceedings indicates that the tolling order was not placed before him and there is no indication that he recalled the particulars of that order.

41 Given the record, it is impossible to discern whether the supervising judge intended to merely clarify the Initial Stay and/or the tolling order (believing they already encompassed Weinrich's entire action) or whether he intended to retroactively expand the terms of those orders to preserve the entirety of Weinrich's action.

42 Whether a supervising judge in *CCAA* proceedings has the jurisdiction to grant a retroactive stay of proceedings regarding third party claims is a novel issue yet to be considered by a Canadian commercial court. Given the broad wording of s 11 and applying a purposive and liberal interpretation to the legislative scheme, we do not foreclose the possibility that such an order might be granted in appropriate circumstances. The exercise of that discretion would be guided by the principles articulated in *Callidus*: that the jurisdiction granted by s 11 is constrained only by restrictions set out in the *CCAA* itself, the discretion must be exercised in furtherance of the remedial objectives of the *CCAA*, and the order made must be appropriate in the circumstances, the applicant has been acting in good faith and the applicant has been acting with due diligence: at paras 49, 67.

43 However, it is not necessary for us to determine this issue to resolve this appeal.

3. Procedural unfairness in the proceeding below

44 Despite the pressures of "real-time litigation" that mark insolvency proceedings, the principles of procedural fairness cannot be ignored. In *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed, Toronto: Carswell, 2013 [*Rescue!*], Professor Sarra quoted with approval an article by Madam Justice Romaine (at page 139):

> It is, however, important to remember that, while there may be greater flexibility in the Canadian system [of restructuring], there are rules and over-arching principles, binding and persuasive Canadian case law, good practices, and model orders that the Canadian court and stakeholders expect to be observed. While efficiency and speed are important considerations, so are due process, respect for the interests of stakeholders on either side of the border and the very important consideration that justice must be seen to be done through the observance of fair and familiar principles and processes.

45 A fundamental principle of an adversarial system is that a party is entitled to know the case that must be met. Absent an application and notice, the party is unable to make full argument. The only application before the supervising judge was 215's application to approve the sale of Parkland Airport's assets, and it only requested an extension of the Initial Stay against Parkland Airport pending closing. There was no application to expand the Initial Stay or the May 2, 2017 tolling order.

46 In oral argument, it was 215's counsel, not Weinrich, who introduced the idea of the supervising judge including a provision in the vesting and sale order to ensure Weinrich could pursue its claims relating to various transactions it challenged, including against Wiebe and Parkland Aerospace. This was done to assuage Weinrich's expressed concerns with the court accepting 215's offer:

> And if the Court is inclined I would say, we can specifically include a provision in the order which preserves rights against other parties, certainly not against the assets because 215 wants these assets free and clear except for the -- except for the claims that we have. But that issue can be addressed in another forum outside of this process and I want to be crystal clear on that because there's nothing in what we are asking the Court to do which precludes that from happening and if the Court needs to specifically ensure that that is the case, then a provision can be inserted in the order which says just that. If these parties wish to (INDISCERNIBLE) on and deal with these other claims and seek damages for what they perceive to be wrongs done, then have at it, but this process will not bring that to an end and we're not purporting to obtain or seek a release for that, 'cause there is no plan.
>
> (Transcript, p 16/lines 28-37)

47 What was to be an application to determine whether 215's offer to purchase would be approved, quickly evolved to include a discussion about preserving Weinrich's action against "other parties", including Wiebe and Parkland Aerospace. Unfortunately,

counsel for the appellants had a matter of minutes' notice before being called on to respond. Predictably, under that time pressure, counsel was unable to marshal arguments about whether the supervising judge had the authority to grant a stay with retroactive effect or whether it was appropriate in the circumstances. Indeed, that issue was not mentioned, much less argued. Counsel simply argued that the Initial Stay and the tolling order did not apply to the actions against his clients.

48 In the circumstances, Wiebe and Parkland were not afforded a reasonable opportunity to respond to the issue raised by 215, nor did the supervising judge have the benefit of bench briefs and full argument.

49 It is well known that the content of the duty of procedural fairness is sensitive to context: see *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paras 21-22, (1999), 174 D.L.R. (4th) 193 (S.C.C.) on this point in relation to administrative bodies. The context and purpose of *CCAA* proceedings can affect the specifics of the duty. Sometimes, emergent matters arise and quick decisions on complex matters are needed, and the content of the duty of procedural fairness necessarily reflects that. Indeed, s 11(1) of the *CCAA* recognizes that applications within *CCAA* proceedings may have to be made *ex parte* in appropriate circumstances, or on the supervising judge's own motion, without application or notice to some or all affected parties.

50 Those circumstances did not exist in the proceeding before the supervising judge. The purpose was to finalize the sale of Parkland Airport's land and assets, to liquidate the corporation and to bring the *CCAA* proceedings to an end. There was no particular time urgency to deciding whether Weinrich's actions against Wiebe and Parkland Aerospace and others were preserved by previous orders or should be preserved by a new one, nor was it inextricably linked to the sale of Parkland Airport's assets to 215.

51 To conclude: Wiebe and Parkland Aerospace did not receive sufficient notice that the supervising judge might grant an order preserving Weinrich's action against them and, as a result, were unable to effectively respond to that issue. The issue should have been adjudicated on notice to Wiebe, Parkland Aerospace and other affected parties, and with the benefit of full argument.

Result

52 The appeal is allowed. Paragraphs 16 and 17 of the order dated April 17, 2019 are struck. In the result, it is not necessary to decide the appellants' application to adduce fresh evidence on appeal. The matter is remitted back to the supervising judge for reconsideration of:

1. Whether the Initial Stay or the tolling order apply to Weinrich's action against Wiebe and Parkland Aerospace or other named defendants.

2. If not, whether Weinrich's action against Wiebe and Parkland or other named defendants should be stayed with retroactive effect to the date of Initial Stay, the original tolling order or some other date.

53 It may take some time to return this matter before the supervising judge, therefore, paragraphs 16 and 17 are preserved on an interim basis for a period of one month. If extenuating circumstances prevent the timely reconsideration by the supervising judge, the parties may schedule this matter before another commercial duty judge.

Appeal allowed.

End of Document

2019 ONSC 6966
Ontario Superior Court of Justice [Commercial List]

Clover Leaf Holdings Company, Re

2019 CarswellOnt 20001, 2019 ONSC 6966, 312 A.C.W.S. (3d) 691, 75 C.B.R. (6th) 124

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 CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED, CONNORS BROS. HOLDINGS COMPANY AND CONNORS BROS. SEAFOODS COMPANY

Hainey J.

Heard: November 25, 2019
Judgment: December 4, 2019
Docket: CV-19-631523-00CL

Counsel: Kevin Zych, Sean Zweig, Mike Shakra, for Applicants
Marc Wasserman, Martino Calvaruso, for Monitor
Natasha MacParland, for FCF Co. Ltd.
Peter Rubin, for Wells Forgo
Jeremy Opolsky, for Lion Capital
Robert Chadwick, Christopher Armstrong, for Terms Lenders

Subject: Civil Practice and Procedure; Insolvency

APPLICATION for amended and restated order to supplement limited relief obtained pursuant to initial order.

***Hainey J.*:**

Overview

1 On November 22, 2019, the applicants ("Clover Leaf"), obtained an initial order pursuant to the *Companies Creditors Arrangement Act* R.S.C. 1985, c. C-36 as amended ("*CCAA*") which appointed Alvarez & Marsal Canada Inc. as Monitor and stayed all proceedings against the applicants, their officers, directors and the Monitor until December 2, 2019.

2 On November 25, 2019 the applicants sought an amended and restated order to supplement the limited relief obtained pursuant to the initial order. I granted the order and indicated that I would provide a more detailed endorsement. This is my endorsement.

Facts

3 The applicants are the Canadian affiliates of Bumble Bee Foods, an international seafood supplier based in the United States ("Bumble Bee").

4 The applicants operate the Clover Leaf business in Ontario, New Brunswick and Nova Scotia. They have approximately 650 employees in Canada. The Clover Leaf business has long been associated with well-known brands of canned seafood products in Canada.

5 While the Clover Leaf business in Canada is cash flow positive and profitable, the balance sheet of the Bumble Bee group, including the applicants, has suffered extreme financial pressures primarily due to extensive litigation against Bumble Bee in the United States.

6 As a result, the Bumble Bee group has filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code ("Chapter 11 proceedings") and the U.S. Bankruptcy Court has granted certain First Day Orders in those proceedings.

7 The applicants are seeking similar relief in these proceedings to stabilize and protect their business in order to complete a comprehensive and coordinated restructuring of Clover Leaf in Canada and Bumble Bee in the United States. This will include an asset sale of each of their respective businesses ("Sale Transaction"). This outcome is the result of extensive consideration of various options and consultations with Bumble Bee's secured lenders in an attempt to restructure the business.

Applicants' Position

8 The applicants submit that this *CCAA* proceeding is in the best interests of their stakeholders and will result in their business being conveyed on a going concern basis with minimal disruption. The breathing room afforded by the *CCAA* and Chapter 11 proceedings, and the other relief sought, will allow the applicants to continue operations in the ordinary course, maintaining the stability of their business and operations, and preserving the value of their business while the Sale Transaction is implemented.

9 Although the applicants are party to a stalking horse asset purchase agreement, they are not seeking any relief in connection with it or the Sale Transaction at this stage. The applicants will return to court for that relief at a later date. They are, instead, only seeking the limited relief required at this time.

Issues

10 I must determine the following issues:

a) Is the relief sought on this application consistent with the amendments to the *CCAA* which came into effect on November 1, 2019?

b) Should I extend the stay of proceedings to December 31, 2019?

c) Should I approve the proposed DIP financing and grant the DIP charge?

d) Should I grant the administration charge and the directors' charge?

e) Should I approve the KEIP and the KEIP charge, and grant a sealing order?

f) Should I authorize the applicants to pay their ordinary course pre-filing debts? and

g) Should I grant the intercompany charge?

Analysis

The New CCAA Amendments

11 In determining this application I must consider the amendments made to the *CCAA* that came into force on November 1, 2019.

12 Section 11.001 of the *CCAA* provides as follows:

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.

13 The purpose of this new section of the *CCAA* is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process.

14 The applicants submit that the relief sought on this application is limited to what is reasonably necessary in the circumstances for the continued operation of their business. Further relief, including approval of the Sale Transactions and related bidding procedures, will not be sought until a later date on reasonable notice to a broader group of stakeholders.

15 I am satisfied that the relief sought on this motion is reasonably necessary for the continued operation of the applicants for the period covered by the order sought to allow them to take the next steps toward a smooth transition of their business to a new owner for the following reasons:

(a) Prior to initiating insolvency proceedings here and in the United States the applicants conducted a thorough assessment of their options and consulted with all their major creditors before arriving at the proposed Sale Transaction;

(b) The applicants' stakeholder such as employees, customers and suppliers who have not yet been consulted about these *CCAA* proceedings will not be prejudiced by the order sought. In fact, in my view, they will suffer prejudice if the order is not granted;

(c) The applicants have the support of their secured creditors who are expected to suffer a shortfall if the Sale Transaction closes;

(d) The applicants are not the cause of these insolvency proceedings; and

(e) The applicants are only seeking relief that is reasonably necessary to take the next steps toward a smooth transition to a new owner.

16 For these reasons, I have concluded that the relief sought is consistent with the new amendments to the *CCAA*.

17 I will now consider whether it is appropriate to grant certain of the specific terms of the amended and restated initial order.

Stay of Proceedings

18 The applicants seek to extend the stay of proceedings to December 31, 2019.

19 I am satisfied that the stay of proceedings should be extended as requested for the following reasons:

(a) The applicants have acted and are acting in good faith with due diligence;

(b) The stay of proceedings requested is appropriate to provide the applicants with breathing room while they seek to restore their solvency and emerge from these *CCAA* proceedings on a going-concern basis;

(c) Without continued protection under the *CCAA* and the support of their lenders the stability and value of the applicants' business will quickly deteriorate and will be unable to continue to operate as a going-concern;

(d) If existing or new proceedings are permitted to continue against the applicants, they will be destructive to the overall value of their business and jeopardize the proposed Sale Transaction; and

(e) The Monitor supports the requested extension of the stay of proceedings.

DIP Financing

20 The applicants submit that the proposed DIP financing should be approved for the following reasons:

(a) The proposed DIP financing is reasonably necessary for the continued operation of Clover Leaf in the ordinary course of business during the period covered by the order sought within the meaning of s. 11.2(5) of the *CCAA*. It is also consistent with the existing jurisprudence that DIP financing should be granted "to keep the lights on" and should be limited to terms that are reasonably necessary for the continued operation of the company; and

(b) The proposed DIP financing is reasonably necessary to allow the applicants to maintain liquidity and preserve the enterprise value of their business while the Sale Transaction is being pursued. The proposed DIP financing will be used to honour commitments to employees, customers and trade creditors.

21 I am satisfied for these reasons that the requirements of s. 11.2(5) of the *CCAA* are satisfied.

22 In this case, the applicants are not borrowers under the proposed DIP financing but they are proposed to be guarantors. The applicable jurisprudence has established the following factors which should be considered to determine the appropriateness of authorizing a Canadian debtor to guarantee a foreign affiliate's DIP financing:

(a) The need for additional financing by the Canadian debtor to support a going concern restructuring;

(b) The benefit of the breathing space afforded by *CCAA* protection;

(c) The lack of any financing alternatives to those proposed by the DIP lender;

(d) The practicality of establishing a stand-alone solution for the Canadian debtor;

(e) The contingent nature of the liability of the proposed guarantee and the likelihood that it will be called upon;

(f) Any potential prejudice to the creditors of the Canadian entity if the request is approved; and

(g) The benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied.

23 I have concluded that I should approve the proposed DIP financing and the proposed DIP charge for the following reasons:

(a) Because of its current financial circumstances, the Bumble Bee Group cannot obtain alternative financing outside of the Chapter 11 and *CCAA* proceedings;

(b) The applicants' liquidity is dependent on the secured lenders providing the proposed DIP financing;

(c) The proposed DIP financing is necessary to maintain the ongoing business and operations of the Bumble Bee Group, including the applicants;

(d) While the proposed DIP financing is being provided by the applicants' existing secured lenders rather than new third-party lenders, eleven third-party lenders were solicited with no viable proposal being received. In my view, this demonstrates that the proposed DIP financing represents the best available DIP financing option in the circumstances;

(e) The proposed DIP financing will preserve the value and going concern operations of the applicant's business, which is in the best interests of the applicants and their stakeholders;

(f) Because the DIP lenders are the existing secured lenders, they are familiar with the applicants' business and operations which will reduce administrative costs that would otherwise arise with a new-third party DIP lender;

(g) Protections have been included in the amended and restated initial order to minimize any prejudice to the applicants and their stakeholders;

(h) The amount of the proposed DIP Financing is appropriate having regard to the applicants' cash-flow statement; and

(i) The Monitor supports the proposed DIP financing and its report confirms that the applicants will have sufficient liquidity to operate their business in the ordinary course.

Payment of Pre-Filing Obligations

24 To preserve normal course business operations, the applicants seek authorization to continue to pay their suppliers of goods and services, honour rebate, discount and refund programs with their customers and pay employees in the ordinary course consistent with existing compensation arrangements.

25 The court has broad jurisdiction to permit the payment of pre-filing obligations in a *CCAA* proceeding. In granting authority to pay certain pre-filing obligations, courts have considered the following factors:

(a) Whether the goods and services are integral to the applicants' business;

(b) The applicants' need for the uninterrupted supply of the goods or services;

(c) The fact that no payments will be made without the consent of the Monitor;

(d) The Monitors' support and willingness to work with the applicants to ensure that payments in respect of pre-filing liabilities are appropriate;

(e) Whether the applicants have sufficient inventory of the goods on hand to meet their needs; and

(f) The effect on the debtors' ongoing operations and ability to restructure if they are unable to make pre-filing payments.

26 I am satisfied that it is critical to the operation of their business that the applicants preserve key relationships. Any disruption in the services proposed to be paid could jeopardize the value of their business and the viability of the Sale Transaction. The authority in the proposed amended and restated initial order to pay pre-filing obligations is appropriately tailored and responsive to the needs of the applicants and is specifically provided for in the applicants' cash flows and in the DIP budget. In particular, the payments are limited to those necessary to preserve critical relationships with employees, suppliers, and customers, to ensure the stability and continued operation of the applicants' business and will only be made with the consent of the Monitor. The relief sought is consistent with orders in other *CCAA* cases.

27 Further, in keeping with the requirements in s. 11.001 of the *CCAA* the contemplated payments are all reasonably necessary to the continued operation of the applicants' business so that there will be no disruption in services provided to the applicants and no deterioration in their relationships with their suppliers, customers and employees.

KEIP and KEIP Charge

28 I have also concluded that the KEIP and KEIP charge should be approved because of the following:

(a) The KEIP was developed in consultation with AlixPartners, Bennett Jones LLP and with the involvement of the Monitor. The Monitor is supportive of the KEIP. The secured creditors also support the KEIP charge;

(b) The KEIP is reasonably necessary to retain key employees who are necessary to guide the applicants through the *CCAA* proceedings and the Sale Transaction;

(c) The KEIP is incentive-based and will only be earned if certain conditions are met; and

(d) The amount of the KEIP, and corresponding KEIP charge, is reasonable in the circumstance.

29 In approving the KEIP and KEIP charge pursuant to s. 11 of the *CCAA* I have determined that the terms and scope of the KEIP have been limited to what is reasonably necessary at this time in accordance with s. 11.001 of the *CCAA*.

30 As the KEIP contains personal confidential information about the applicants' employees, including their salaries, I am granting a sealing order pursuant to s. 137(2) of the *Courts of Justice Act*, RSO 1990, c. C. 43. This will prevent the risk of disclosure of this personal and confidential information.

Intercompany Charge

31 I am also granting the requested Intercompany Charge to preserve the status quo between all entities within the Bumble Bee group to protect the interest of creditors against individual entities within the group. The Monitor supports the charge which ranks behind all the other court-ordered charges.

Administrative Charge

32 I am also granting an administration charge in the amount of $1.25 million to secure the professional fees and disbursements of the Monitor, its counsel and the applicants' counsel for the following reasons:

(a) The beneficiaries of the administration charge have, and will continue to, contribute to these *CCAA* proceedings and assist the applicants with their business;

(b) Each beneficiary of the administration charge is performing distinct functions and there is no duplication of roles;

(c) The quantum of the proposed charge is reasonable having regard to administration charges granted in other similar *CCAA* proceedings;

(d) The secured creditors support the administrative charge; and

(e) The Monitor supports the administrative charge.

Directors' Charge

33 Finally, I am granting a directors' charge in the amount of $2.3 million to secure the indemnity of the applicants' directors and officers for liabilities they may incur during these *CCAA* proceedings for the following reasons:

(a) The directors and officers may be subject to potential liabilities in connection with the *CCAA* proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

(b) The applicants' liability insurance policies provide insufficient coverage for their officers and directors;

(c) The directors' charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;

(d) The directors' charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the *CCAA* proceedings and does not cover willful misconduct or gross negligence;

(e) The applicants will require the active and committed involvement of its directors and officers, and their continued participation is necessary to complete the Sale Transaction;

(f) The amount of the directors' charge has been calculated based on the estimated potential exposure of the directors and officers and is appropriate given the size, nature and employment levels of the applicants; and

(g) The calculation of the directors' charge has been reviewed with the Monitor and the Monitor supports it.

Conclusion

34 For these reasons the amended and restated initial order is granted.

35 I thank counsel for their helpful submissions.

Application granted.

2020 BCSC 2037
British Columbia Supreme Court

Mountain Equipment Co-Operative (Re)

2020 CarswellBC 3324, 2020 BCSC 2037, 326 A.C.W.S. (3d) 368, 86 C.B.R. (6th) 140

In the Matter of the COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, as amended

In the Matter of 1077 HOLDINGS CO-OPERATIVE and 1314625 ONTARIO LIMITED (Petitioners)

Fitzpatrick J.

Heard: November 24, 27, 2020
Judgment: December 21, 2020
Docket: Vancouver S209201

Counsel: H. Gorman, Q.C., S. Boucher, for Petitioners, 1077 Holdings Co-Operative and 1314625 Ontario Limited
M.I.A. Buttery, Q.C., H.L. Williams, for Monitor, Alvarez & Marsal Canada Inc.
C. Gusikowski, for Lorne Hoover, himself and former MEC employees

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Moving party was former employee of bankrupt company — Company filed for bankruptcy, with sale of assets made to purchaser — Employee had been terminated just before sale of assets were made — Employee was one of group of former employees, who intended to advance claim against company — This claim would be under Companies' Creditors Arrangement Act (CCAA) — Employee claimed that law firm should be appointed as representative counsel for CCAA claim — Employee also sought court-ordered charge in amount of $85,000 against assets of company — Employee moved for above-noted relief — Motion dismissed — Request for representative counsel was premature, at best — Claims process was not underway — It was unknown how former employees would respond, so that any common issues would arise — Interests of former employees had to be balanced with those of stakeholders — Interests could be balanced by monitor, without need for representative counsel at this time — Charge against property was unnecessary, given that representative counsel was not required — Even had counsel been appointed, charge against property was unnecessary.

MOTION by former employee of bankrupt company, seeking to have representative counsel appointed and to place charge against property of company.

***Fitzpatrick J.*:**

INTRODUCTION

1 Lorne Hoover is a former employee of the petitioner, Mountain Equipment Co-operative ("MEC"). MEC has since changed its name to 1077 Holdings Co-operative.

2 Mr. Hoover seeks an order appointing Victory Square Law Office ("VSLO") as representative counsel for all of MEC's former employees in relation to claims that will be advanced by them in this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") proceeding.

3 In addition, Mr. Hoover seeks a court ordered charge in the amount of $85,000 against MEC's assets to secure that representation, with priority over all claims, save for certain court ordered charges that have already been court approved (such as the Administrative Charge, the D&O Charge and the KERP).

4 MEC opposes this relief as unnecessary and unwarranted. The Monitor has raised similar concerns, also stating that the relief may be redundant and unnecessary in the circumstances.

BACKGROUND FACTS

5 On October 2, 2020, I granted the Sale Approval and Vesting Order (SAVO) by which the Court approved a sale of substantially all of MEC's assets: *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 (B.C. S.C.).

6 On October 30, 2020, the sale transaction closed. Fortunately, the purchaser took over more retail locations than initially forecast, such that 21 of the 22 retail stores are to continue. In addition, the purchaser retained over 90% of MEC's active employees who worked in those locations across Canada.

7 MEC received net sale proceeds of approximately $22.9 million. Further amounts (approximately $7.5 million) remain held in escrow pending final accounting adjustments to be completed under the sale.

8 In November 2020, Mr. Hoover's application was filed. His application was heard with MEC's own applications toward addressing the next steps in this proceeding.

9 On November 27, 2020, I granted a Claims Process Order (the "CPO") and a further order to enhance the Monitor's powers in relation to these proceedings (the "Enhanced Powers Order"). The Enhanced Powers Order was necessary because of steps taken by MEC following the sale. MEC terminated all of its management personnel effective November 30, 2020. In addition, MEC's board of directors intended to resign and those resignations were to become effective immediately after the granting of this order.

10 The Enhanced Powers Order allows the Monitor to assume responsibility for the administration of the remainder of MEC's assets and importantly, the administration of a Claims Process.

THE CLAIMS PROCESS

11 Under the Enhanced Powers Order, the Monitor was authorized to initiate and administer the Claims Process. The Monitor anticipates that the Claims Process will involve a determination of a variety of claims, including the substantial claims of landlords whose leases were disclaimed and employees' claims arising from their termination.

12 The features of the Claims Process, as established by the CPO, are:

a) Claims affected by the CPO will be all Pre-filing Claims, Restructuring Period Claims, Employee Claims and D&O Claims. The Claims Process will not affect certain claims not relevant to this application;

b) By December 11, 2020, the Monitor will deliver Claims Packages and Employee Claims Packages to all known Claimants and Employee Claimants, respectively;

c) The Employee Claims Packages will include MEC's calculations of each Employee Claim and, if available in MEC's records, any relevant employment contract. A negative process will be in place such that an affected employee will only be required to file any materials if they dispute MEC's proposed assessment of their claim;

d) In the usual fashion, the Claims Process will be widely advertised in national papers and on the Monitor's Website;

e) Claimants with Pre-filing Claims and D&O Claims, and Employee Claimants who dispute their assessed Employee Claims, will have until February 10, 2021 (the "Claims Bar Date") to file Proofs of Claim or D&O Proofs of Claim with the Monitor;

f) Claimants with Restructuring Period Claims will have until the later of (i) 45 days after the date on which the Monitor sends a Claims Package with respect to a Restructuring Period Claim and (ii) the Claims Bar Date;

g) The Monitor shall review all Proofs of Claim and D&O Claims in consultation with MEC and the Directors and Officers named in respect of any D&O Claim, and shall accept, revise or reject each Claim;

h) If the Monitor intends to revise or reject a Claim, the Monitor shall send a Notice of Revision or Disallowance (NORD) to the Claimant or Employee Claimant by no later than March 22, 2021, unless otherwise ordered by this Court on application by the Monitor;

i) Any Claimant or Employee Claimant who intends to dispute a NORD shall deliver a Notice of Dispute of Revision or Disallowance to the Monitor within 30 days of receiving the NORD;

j) The Monitor may refer any Claims to Herman Van Ommen, Q.C., the Claims Officer, or the Court, for adjudication at its election by sending written notice to the Claimant or Employee Claimant; and

k) For any Claims adjudicated by a Claims Officer, the Claimant, Employee Claimant, Monitor or Petitioners may file a notice of appeal of the Claims Officer's determination within ten days of receiving notice of the same. Appeals will be conducted as true appeals and not as hearings *de novo*.

13 Approximately 210 of MEC's employees were terminated after the commencement of these *CCAA* proceedings. This group included 103 head office staff and 107 retail staff, all of whom received outstanding wages, vacation pay and benefits to the date of termination. Certain former MEC employees were terminated prior to the commencement of these *CCAA* proceedings but were on salary continuance. MEC and the Monitor expect that most of these employees will have claims for unpaid severance.

14 In its Fourth Report dated November 23, 2020 (the "Fourth Report"), the Monitor indicates that MEC's management has already undertaken significant efforts to prepare a preliminary calculation of the severance and termination amounts owing to former employees, with oversight and input from the Monitor. This would include an assessment of the applicable provincial statutory requirements (including those arising from any group terminations), which the Monitor states would apply to the majority of these employees. The Monitor considers that approximately 34 employees are entitled to contractual and/or common law notice.

15 MEC's assessments of all the former employee claims will be included in the Employee Claims Packages that each of them will receive and review. As above, if any employee disputes MEC's assessment of his/her claim amount, the claim will be reviewed by the Monitor and, if necessary, determined by the Claims Officer or the Court.

16 Although uncertain at this point, the initial indications are that the unsecured creditors could receive between 30%-50% of their claims.

REPRESENTATIVE COUNSEL

17 Mr. Hoover was employed by MEC for just over 21 years. He was terminated on October 14, 2020. He believes that one or more contracts governed his terms of employment. He states that he is uncertain as to his contractual status.

18 Mr. Hoover's status in relation to the remainder of MEC's other terminated employees arises from a Facebook group called "Former MEC Staffers". This Facebook group is comprised of approximately 85 members who purport to be former MEC employees.

19 Mr. Hoover states that he is unaware of any other organized group of former MEC employees with claims who are involved in the *CCAA* proceedings. Mr. Hoover has been told that the Administrator of the Facebook group has advised the members of his application before the Court. Mr. Hoover has been advised that no member of the Facebook group has expressed concern about the application.

20 Mr. Gusikoski, counsel for Mr. Hoover from VSLO, has been in contact with approximately 35 former employees who are members of the Facebook group, many of whom have no written contracts. In addition, Mr. Gusikoski has reviewed the contracts of many employees. Since the filing of Mr. Hoover's application, Mr. Gusikoski has received numerous emails from former MEC employees, expressing their wish that he represent them in these proceedings.

21 Mr. Gusikoski is of the view that there is a complex array of legal and factual issues likely to arise in relation to the employee claims to be addressed in the Claims Process. Those issues include:

a) *Employment Standards*: He agrees with MEC that the provincial employment standards legislation applies to employees who have been terminated, and that group termination provisions may be applicable;

b) *Common Law Severance*: He agrees with MEC that there are former employees who will be entitled to file claims for common law severance. There is no dispute that the issue will be a determination of what is "reasonable notice" in the circumstances, as that phrase is discussed in the case authorities. It is uncontroversial that the assessment of reasonable notice will be highly fact specific in relation to each former employee;

c) *Contractual Severance Provisions*: He asserts that there are a variety of contractual terms dealing with severance. Many contractual provisions are simply to the effect that the notice period is as set out in the legislation, however, he asserts that common law severance may still be available. Other contractual provisions refer not only to the legislated minimum notice periods, but also further entitlements (i.e. Separation Payments). He similarly takes the view that this language only sets a further minimum entitlement without waiving an employee's right to pursue damages at common law; and

d) *Application of Written Contracts*: He raises other issues that may also become relevant to an employee's claim. The first issue raised is whether any contract is even in force, arising from the contention that a number of employees were not offered fresh consideration when they signed a new contract in mid-employment. The second issue relates to long-term employees and whether the changed nature of their employment over time has negated the legal effect of termination provisions in an earlier employment contract, citing *Rasanen v. Lisle-Metrix Ltd.* (2002), 17 C.C.E.L. (3d) 134 (Ont. S.C.J.) at para. 41; aff'd (2004), 33 C.C.E.L. (3d) 47 (Ont. C.A.).

Legal Principles for Appointing Representative Counsel

22 Appointment of representative counsel in *CCAA* proceedings is not entirely unusual. There is no dispute here that the Court has jurisdiction to appoint representative counsel under its general power set out in s. 11 of the *CCAA*, if such relief is appropriate in the circumstances.

23 Many case authorities discuss the factors to be considered by the courts in determining whether the appointment of representative counsel is appropriate. Generally, these cases refer to the well known non-exhaustive factors set out in *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328 (Ont. S.C.J. [Commercial List]) at para. 21, as adopted by this Court in *League Assets Corp., Re*, 2013 BCSC 2043 (B.C. S.C.) at para. 72:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under *CCAA* protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;

- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.

24 For the purposes of this application, analysis of the *Canwest Publishing* factors can be addressed under three broad categories: (1) the former employee group, (2) the benefit of their representation in this proceeding, and (3) the balancing of stakeholder interests.

The Former Employee Group

25 Mr. Hoover submits that the former employees are a financially vulnerable group dispersed throughout Canada, but concentrated in western Canada. He confirms that the former employees have severance claims, only a portion of which are expected to be returned. He asserts that the former employees are disproportionately affected by MEC's *CCAA* proceedings, in that they have not only suffered immediate losses, but loss of income going forward. Mr. Hoover says that the former employees have little financial resources available to fund any "sophisticated" defence of their interests. He says that a "social benefit" will be derived from ensuring this vulnerable group of employees is represented by legal counsel.

26 MEC asserts that there is insufficient evidence to support that these former employees could not retain a law firm, either individually or as a group. However, later emails sent by many former MEC employees to VSLO mention that the termination of their employment has caused financial stress in their lives. This is not entirely surprising, whether this is a short-term or longer-term situation.

27 Certainly, the negative economic consequences of the COVID-19 pandemic have caused significant hardship to many Canadians, despite the government support available to them. For the purpose of this application, I accept that Mr. Hoover has established some evidence to the effect that, generally speaking, the former employees have been left in a vulnerable position arising from the loss of their jobs.

28 Courts have appointed representative counsel in numerous *CCAA* proceedings for current and/or former employees and retirees: see *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196 (Ont. S.C.J. [Commercial List]) at paras. 10-16; *Fraser Papers Inc., Re* [2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List])], 2009 CanLII 55115 and 2009 CanLII 63589 [2009 CarswellOnt 7125 (Ont. S.C.J. [Commercial List])]; *Target Canada Co., Re*, 2015 ONSC 303 (Ont. S.C.J.) at para. 61. However, the circumstances in those cases were significantly different than those here. An important factor in those restructurings was that literally thousands of former and current employees or retirees sought representation in the early days of those complex *CCAA* proceedings.

29 In *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359 (B.C. S.C.) at paras. 122-129, this Court appointed the union to represent hundreds of laid-off employees in the early days of the Northern Pulp restructuring.

30 In *Canwest Publishing*, a smaller number (75) of former employees and retirees sought representation. Justice Pepall (as she then was) agreed that a representation order was appropriate because, among other factors, the vulnerable employee group was facing what was to be a complex *CCAA* restructuring, particularly given the sales process that was underway.

31 The circumstances relating to MEC and this Claims Process represent a far different scenario than was addressed in the above cases. At present, what remains to be advanced is the distribution of the monies in the Monitor's hands in accordance with the Claims Process. Of particular note are the following factors in relation to the Employee Claimants:

a) There is no reason to question the good faith efforts of MEC's management to gather the applicable facts and documents and assess what MEC considers to be the termination entitlement of each employee. This effort is subject to the involvement and oversight of the Monitor;

b) The majority of the 210 employees will be subject to the applicable provincial legislation, where the calculation of severance entitlement, including in the event of a group termination, is fairly straightforward;

c) With respect to the former employees who have contracts or are entitled to common law notice, their entitlement will be based on the specific facts and circumstances unique to them, indicative of a unique analysis, as opposed to common issues to be advanced on behalf of all or most of them;

d) It remains to be seen whether common issues arise with respect to the former employees that would justify joint representation on the contract or common law issues;

e) Mr. Hoover argues that "information asymmetries" between employees would lead to obvious and manifest unfairness. However, there is no evidence that the employees who are clearly not subject to the legislation could not band together to fund joint representation to present common or individual issues, whether through VSLO or another law firm: *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426 (Ont. S.C.J. [Commercial List]) at para. 16;

f) It may be that VSLO's representation of all the employees would present a conflict, since advocating for one employee may increase his or her claim to the detriment of others who will share in the same pot of monies: *Urbancorp* at para. 20;

g) Mr. Hoover argues that many employees are or may be unaware of significant legal interests they have without representation. However, Mr. Gusikoski has already been in contact with 35 employees. In addition, copies of Mr. Hoover's application materials, which identify various legal issues, can be posted on the Facebook group or other social media; and

h) Mr. Hoover also argues that some employees may not be aware of common law severance rights, which could increase their claim significantly. Again, VSLO and/or Mr. Hoover can identify the issues for the Facebook group and identify sources of legal resources for use by them, just as many self-represented parties use in other litigation before the Court.

Benefit of Representation in this Proceeding

32 Many of the above factors are brought into sharper focus in relation to whether there is some benefit in appointing representative counsel to promote the efficient administration of these proceedings for the benefit of all stakeholders.

33 This proceeding is not in its early days; rather, it is in its final days as the Claims Process begins toward determining the proportionate sharing of the remaining monies as between the creditors. The Claims Process is a comprehensive one that will lead unsecured creditors toward that final outcome. Each former employee will have a full opportunity to either accept MEC's proposed assessment of his/her claim or contest that assessment within the specific procedures set out in the CPO.

34 In that event, I agree with MEC's counsel that there seems to be little utility in appointing representative counsel even before that process is underway.

35 Mr. Hoover submits that VSLO possesses specialized expertise in labour and employment law matters and, of that, I have no doubt. Mr. Hoover also submits that VSLO can work with MEC's counsel or the Monitor to sharply consolidate issues and streamline dispute resolution processes before the Claims Officer. However, it is far from clear what issues may need to be "consolidated" and it is far from clear whether there will be need for counsel to act for employees to streamline the process to determine their claims if they dispute MEC's assessment.

36 Mr. Hoover argues that the former employees have not been involved with legal counsel in these proceedings. Furthermore, Mr. Hoover says that they have not been provided with timely advice about the *CCAA* proceedings which relate directly to their interests. That may be the case, but former employees have full access to the materials filed in these proceedings which have

been posted online from the outset. I expect that, in large part, many of the stakeholders, including the former employees, have been awaiting the outcome of the sale process to see what amounts might be available to them as unsecured creditors.

37 Mr. Hoover cites *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65 (N.S. S.C.) at paras. 9 and 16 as confirming that representative counsel can provide effective communication to stakeholders regarding the *CCAA* proceedings and ensure that their interests are brought to the attention of the Court.

38 As I see it, MEC and the Monitor are very much alive to the interests of the Employee Claimants and the Claims Process has been designed to specifically address their unique interests. Further, leaving aside Mr. Hoover's Facebook group, the Employee Claims Package that each of them will receive will describe in detail the stage of these proceedings and how their claims are to be addressed.

39 Mr. Gusikoski asserts that many former employees are entitled to both statutory and contractual/common law notice periods. He asserts that many of the written contracts have similar legal issues which could apply to many participants, which could be more efficiently grouped and adjudicated within the Claims Process in a manner most efficient to the resolution of all issues. As such, Mr. Hoover argues that granting a representative counsel is the *only way* in which to ensure the former employees' claims are determined in the fairest, consistent and efficient manner possible.

40 At paras. 62-63 in *Nortel Networks*, in assessing appointment of representative counsel, the court considered the "commonality of interest" test that is commonly referred to in respect of classification of creditors. Justice Morawetz (as he then was) found that the former employees had a "commonality of interest" that could benefit the proceeding by the appointment of one representative counsel.

41 Mr. Hoover refers to authorities where representative counsel were appointed in relation to claims processes. In *Target Canada Co., Re*, 2015 ONSC 1028 (Ont. S.C.J.) at paras. 32-40, the court appointed, with limited funding, counsel for certain franchisees who were facing "similar circumstances". The role of counsel in that event was with respect to several matters, one of which related to participating in the claims process. In *TBS Acquireco Inc., Re*, 2013 ONSC 4663 (Ont. S.C.J. [Commercial List]) at paras. 33-37, the court declined any appointment and funding to allow terminated employees to advance *Wage Earner Protection Program* claims.

42 I accept that there may be circumstances to justify appointing representative counsel for the purpose of pursuing claims in a claims process. Mr. Hoover's arguments may be valid at some point in the Claims Process. However, until the Claims Process is underway and the former employees respond, it is completely unknown as to which of them might dispute MEC's assessment and, if so, on what basis. In that event, it is largely premature as to whether any common issues will emerge that may support a representative counsel appointment.

43 I have no doubt that the Monitor will be attuned to any common issues as may emerge in the Claims Process and will consider the most efficient manner of adjudicating those issues. At that time, it may be the case that representative counsel makes sense to coordinate the former employees' arguments so as to avoid a multiplicity of retainers within the Claims Process.

Balancing of Stakeholder Interests

44 MEC filed a Response opposing the appointment of representative counsel and the granting of a charge in favour of representative counsel. In addition, the Monitor filed a Response indicating that it was not supportive of this relief. No other stakeholder took a position on this application.

45 The Monitor's position was addressed in more detail in the Fourth Report. At para. 11.5, the Monitor states that it views the relief sought as possibly redundant and not necessary in the circumstances. The Monitor states, in part:

> d) the Monitor, as an independent officer of the Court, will be adjudicating claims and any disputed claims that are unable to be settled will be referred to the independent Claims Officer and/or the Court for resolution. Any third-party legal counsel engaged to prepare and calculate the Former Employees' claims when a negative claims process

> is being administered by the Court's officer is duplicative and impacts potential recoveries to the estate and affected creditors including non-former employee claimants; and
>
> e) the Employee Claims are unsecured claims that should be treated equitably with other unsecured claims in the Claims Process, of which such claimants (primarily landlord claims in respect of disclaimed leases) have not been granted a charge for their respective legal counsel.

46 Mr. Hoover takes great umbrage at the Monitor's stated position, either in the Response or the Fourth Report, asserting that the Monitor has "entered the fray" by failing to act impartially in relation to the former employees. In addition, Mr. Hoover asserts that, in doing so, the Monitor has acted outside the scope of its duties as prescribed by this Court.

47 The comments found in *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 (Ont. C.A.) are well accepted in describing the role of a monitor in *CCAA* proceedings, in that:

> [109] ... the monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose.

48 Having reviewed the Monitor's statements in context, I consider that Mr. Hoover's submissions on this point are misplaced. The Monitor has considered the particular circumstances of the former employees, but importantly, the Monitor has also considered the relief sought by them more generally in the present circumstances of this *CCAA* restructuring proceeding. To do so is entirely appropriate, since the interests of the former employees cannot be considered in isolation in terms of the balancing of interests of all stakeholders.

49 As with many issues, the Monitor is uniquely situated to comment on the overall circumstances so as to assist the Court in the balancing exercise. Indeed, the very authorities that are cited by all parties here, including the former employees, as to the applicable test in appointing representative counsel (*Canwest Publishing*), specifically sets out that one factor to be considered is the position of the Monitor.

50 The Monitor's comments and its position emphasize that the Claims Process has been put in place and is a comprehensive process for the determination of the claims to be advanced against MEC. As with other claims processes granted in *CCAA* proceedings, it is intended to afford an efficient and expeditious means of resolving claims, including those of the former employees, to allow distribution to the creditors as soon as possible.

51 With the Enhanced Powers Order, the Monitor has assumed conduct of the Claims Process and has full access to MEC's books and records as may be relevant to that task. Further, the Monitor, as a court appointed officer, can be expected to address claims in a fair manner, including those relating to former employees.

52 The Claims Process is intended to benefit all stakeholders, not just the former employees. Many other creditors will participate in the Claims Process without legal representation as they wish. The Claims Process is expected to be easily understood in terms of how the process works, and how disputes are to be raised and addressed. As noted by the court in *Urbancorp* at para. 18, it is a "normal process" for a Monitor to deal with claimants.

53 In all of the circumstances, I am not convinced that a representative counsel appointment is appropriate at this time. If certain issues emerge in the Claims Process that might support a more coordinated resolution of common issues, either the Monitor or any of the former employees have leave to reapply for such relief.

REPRESENTATIVE COUNSEL CHARGE

54 I will also address Mr. Hoover's request for a court ordered charge for representative counsel if I had acceded to his request for representative counsel and to address any future application that might arise.

55 Mr. Hoover seeks a charge of $85,000 against MEC's property to secure what he expects will be VSLO's anticipated fees so as to allow for the former employees' "effective participation" in the Claims Process.

56 Section 11.52(1)(c) of the *CCAA* allows the court to grant a charge on a petitioner's assets to secure payment of the legal fees and disbursements for representative counsel who may be appointed:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> . . .
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> . . .
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

57 The Court must be satisfied that the charge is necessary for the effective participation of representative counsel in the proceedings: *Urbancorp* at para. 14.

58 Factors to consider in approving an administrative charge include those set out in *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 54, as adopted by this Court in *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.) at para. 42:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwanted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and,
>
> (f) the position of the Monitor.

59 MEC's business was large and complex, but that was in the past. Having now sold the business, MEC's interests are simply to administer a sum of money for distribution to its creditors under the Claims Process, now a role assumed by the Monitor.

60 The Claims Process has been designed to provide as streamlined a process as possible for the former employees. The process is not complex or difficult.

61 Mr. Hoover argues that, while the Monitor is a representative of the Court and has an obligation to all stakeholders, it does not have the time or resources to properly advise the former employees. I disagree and would respond that this is not a correct characterization of the Monitor's role in the Claims Process.

62 The Monitor will have an impartial and important role in that process, and it is to be expected that the Monitor will provide assistance to all claimants, as necessary and appropriate. In that sense, I am of the view that the Monitor's comments about this relief being redundant and unnecessary have some merit given present circumstances: *Homburg Invest Inc., Re*, 2014 QCCS 980 (Que. Bktcy.) at para. 100 (see factors a and b).

63 In addition, MEC argues that the proposed charge for the former employees is unnecessary and would adversely affect MEC's other stakeholders, including its landlords, suppliers and vendors, and other unsecured creditors. Just as the Monitor has

in this case, the monitor in *Urbancorp* argued that the court would be wrong to allow funding that was solely in the interest of one group of stakeholders (para. 18). This argument was accepted by Justice Newbould, who noted:

> [24] Estate funds should be spent for the benefit of the estate as a whole, not for the benefit of one group whose interests are contrary to the interests of the estate as a whole....

64 No other unsecured creditor or creditor group has sought funding from MEC's estate for their participation in the Claims Process. While certainly some of them will have more substantial resources than the former employees individually, certainly some of them will not.

65 Further, it is difficult to assess the reasonableness of the quantum of the proposed charge. This is because it is difficult to say which of MEC's assessments might be contested and, if so, on what basis. For example, if only a few employees advance a dispute within the Claims Process, it will be apparent that estate resources are being spent on only a relatively small subset of stakeholders. This is arguably unreasonable, particularly since those funds would be spent to increase those few employees' slice of the pie to the detriment of others who do have the benefit of estate funded representation.

66 In my view, weighing all the above factors leads me to conclude that, even if I had appointed representative counsel, the proposed charge to secure that representation is not appropriate in the present circumstances.

CONCLUSION

67 Mr. Hoover's application is dismissed. Mr. Hoover and the Monitor have leave to bring this issue forward in the future, if further steps taken within the Claims Process dictate a further consideration of the issues.

Motion dismissed.

2012 ONSC 506
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 1263, 2012 ONSC 506, [2012] O.J. No. 472, 217 A.C.W.S. (3d) 12, 85 C.B.R. (5th) 169, 95 C.C.P.B. 48

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 Timminco Limited and Bécancour Silicon Inc. (Applicants)

Morawetz J.

Heard: January 12, 2012
Judgment: February 2, 2012
Docket: CV-12-9539-00CL

Counsel: A.J. Taylor, M. Konyukhova, K. Esaw, for Applicants
D.W. Ellickson, for Communications, Energy and Paperworkers' Union of Canada
C. Sinclair, for United Steelworkers' Union
K. Peters, for AMG Advance Metallurgical Group NV
M. Bailey, for Superintendent of Financial Services (Ontario)
S. Weisz, for FTI Consulting Canada Inc.
A. Kauffman, for Investissement Quebec

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure; Labour; Employment; Public

Headnote

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Costs and expenses of administrators — Priority over other claims

Super priority of administration charge — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — Absence of court-ordered super priority charge would frustrate objectives of CCAA — Without assistance of advisors, and in void caused by lack of governance structure, companies would be unable to proceed with restructuring and likely result would be bankruptcy — It was unlikely that advisors would participate in proceedings, and it was neither reasonable nor realistic to expect advisors to participate, unless administration charge was granted to secure their fees and disbursements — Role of advisors was critical to efforts to restructure insolvent companies — Employees were not prejudiced by requested relief since alternative was bankruptcy, which would not be better result for stakeholders.

Bankruptcy and insolvency --- Priorities of claims — Restricted and postponed claims — Officers, directors, and stockholders

Super priority of directors' and officers' charge — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — Absence of court-ordered super priority charge would frustrate objectives of CCAA — Without assistance of advisors, and in void caused by lack of governance structure, companies would be unable to proceed with restructuring and

likely result would be bankruptcy — Directors and officers would be unlikely to continue their service without D&O charge — It was neither reasonable nor realistic to expect directors and officers to continue without requested protection — Employees were not prejudiced by requested relief since alternative was bankruptcy, which would not be better result for stakeholders.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans

Suspension of special payments — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Companies had insufficient liquidity to make special payments to plans at this time — Employees were not prejudiced by requested relief since likely outcome should proceedings fail was bankruptcy — There was no priority for special payments in bankruptcy — Application of provincial pensions legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Requiring companies to make special payments would deprive them of sufficient funds to continue operating, which was what CCAA was intended to avoid.

Pensions --- Administration of pension plans — Valuation and funding of plans — Funding arrangements

Suspension of special payments — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Companies had insufficient liquidity to make special payments to plans at this time — Employees were not prejudiced by requested relief since likely outcome should proceedings fail was bankruptcy — There was no priority for special payments in bankruptcy — Application of provincial pensions legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Requiring companies to make special payments would deprive them of sufficient funds to continue operating, which was what CCAA was intended to avoid.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous

Relationship between Act and provincial pensions acts — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Application of provincial pension legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Order requiring company to make special payments in accordance with provincial legislation would frustrate rehabilitative purpose of CCAA if such order would have effect of forcing company into bankruptcy — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial pension legislation.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending

obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Application of provincial pension legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy, contrary to purpose of CCAA — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial pension legislation — Doctrine of paramountcy was properly invoked.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Wages and salaries of employees — Entitlement to preferred status

Key Employee Retention Plans — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA) — Insolvent companies' board of directors approved key employee retention plans (KERPs) in order to keep employees who were considered critical to successful proceedings under CCAA because they were experienced employees who played central roles in restructuring initiatives — Insolvent companies brought motion for order approving KERPs, and sealing confidential supplement to monitor's report — Motion granted — KERPs were approved — It was necessary that KERPs' participants be incentivized to remain in current positions during restructuring process — Continued participation of these employees would assist company in its objectives — Replacement of these employees if they left would not provide any substantial economic benefits to company — Confidential supplement to monitor's report, which contained copies of unredacted KERPs, was sealed pursuant to R. 151 of Federal Courts Rules.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Confidentiality or sealing orders

Companies' Creditors Arrangement Act (CCAA) — Supplement to monitor's report — Insolvent companies obtained relief under CCAA — Insolvent companies' board of directors approved key employee retention plans (KERPs) in order to keep certain employees who were considered critical to successful proceedings under CCAA — Supplement to monitor's report contained copies of unredacted KERPs, which had sensitive personal compensation information — Insolvent companies brought motion for order approving KERPs, and sealing confidential supplement to monitor's report — Motion granted — KERPs were approved — Confidential supplement to monitor's report was sealed pursuant to R. 151 of Federal Courts Rules for period of 45 days — Disclosure of personal information in supplement could compromise commercial interests of companies and cause harm to KERPs' participants — Confidentiality order was necessary to prevent serious risk to companies' and KERPs participants' interests.

Labour and employment law --- Labour law — Collective agreement — Employee benefits — Pensions

Insolvent employer.

MOTION by insolvent companies for order suspending obligations to make special payments to pension plans, granting super priority to two charges, approving key employee retention plans, and sealing confidential supplement to monitor's report.

***Morawetz J.*:**

1 This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

> Motion granted. Reasons will follow. Order to go subject to proviso that the Sealing Order is subject to modification, if necessary, after reasons provided.

2 These are those reasons.

Background

3 On January 3, 2012, Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") applied for and obtained relief under the *Companies' Creditors Arrangement Act* (the "CCAA").

4 In my endorsement of January 3, 2012, (*Timminco Ltd., Re*, 2012 ONSC 106 (Ont. S.C.J. [Commercial List])), I stated at [11]: "I am satisfied that the record establishes that the Timminco Entities are insolvent and are 'debtor companies' to which the CCAA applies".

5 On the initial motion, the Applicants also requested an "Administration Charge" and a "Directors. and Officers. Charge" ("D&O Charge"), both of which were granted.

6 The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefit Act* (the "PBA") or the *Quebec Supplemental Pensions Plans Act* (the "QSPPA") (collectively, the "Encumbrances") in favour of any persons that have not been served with this application.

7 IQ had been served and did not object to the Administration Charge and the D&O Charge.

8 At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

9 The Timminco Entities now bring this motion for an order:

(a) suspending the Timminco Entities. obligations to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administration Charge and the D&O Charge;

(c) approving key employee retention plans (the "KERPs") offered by the Timminco Entities to certain employees deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the Timminco Entities to secure the Timminco Entities. obligations under the KERPs (the "KERP Charge"); and

(d) sealing the confidential supplement (the "Confidential Supplement") to the First Report of FTI Consulting Canada Inc. (the "Monitor").

10 If granted, the effect of the proposed Court-ordered charges in relation to each other would be:

- first, the Administration Charge to the maximum amount of $1 million;
- second, the KERP Charge (in the maximum amount of $269,000); and
- third, the D&O Charge (in the maximum amount of $400,000).

11 The requested relief was recommended and supported by the Monitor. IQ also supported the requested relief. It was, however, opposed by the Communications, Energy and Paperworkers. Union of Canada ("CEP"). The position put forth by counsel to CEP was supported by counsel for the United Steelworkers. Union ("USW").

12 The motion materials were served on all personal property security registrants in Ontario and in Quebec: the members of the Pension Plan Committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan; the Financial Services Commission of Ontario; the Regie de Rentes du Quebec; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union; and La Section Locale 184 de Syndicat Canadien des Communications, De L.Energie et du Papier; and various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

13 Counsel to the Applicants identified the issues on the motion as follows:

(a) Should this court grant increased priority to the Administration Charge and the D&O Charge?

(b) Should this court grant an order suspending the Timminco Entities. obligations to make the pension contributions with respect to the pension plans?

(c) Should this court approve the KERPs and grant the KERPs Charge?

(d) Should this court seal the Confidential Supplement?

14 It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

15 The affidavit of Peter A.M. Kalins, sworn January 5, 2012, provides information relating to the request to suspend the payment of certain pension contributions. Paragraphs 14-28 read as follows:

14. The Timminco Entities sponsor the following three pension plans (collectively, the "**Pension Plans**"):

(a) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648) (the "**Haley Pension Plan**");

(b) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042) (the "**Bécancour Non-Union Pension Plan**"); and

(c) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the "**Bécancour Union Pension Plan**").

Haley Pension Plan

15. The Haley Pension plan, sponsored and administered by Timminco, applies to former hourly employees at Timminco's magnesium facility in Haley, Ontario.

16. The Haley Pension Plan was terminated effective as of August 1, 2008 and accordingly, no normal cost contributions are payable in connection with the Haley Pension Plan. As required by the Ontario *Pension Benefits Act* (the "**PBA**"), a wind-up valuation in respect of the Haley Pension Plan was filed with the Financial Services Commission of Ontario ("**FSCO**") detailing the plan's funded status as of the wind-up date, and each year thereafter. As of August 1, 2008, the Haley Pension Plan was in a deficit position on a wind-up basis of $5,606,700. The PBA requires that the wind-up deficit be paid down in equal annual installments payable annually in advance over a period of no more than five years.

17. As of August 1, 2010, the date of the most recently filed valuation report, the Haley Pension Plan had a wind-up deficit of $3,922,700. Contributions to the Haley Pension Plan are payable annually in advance every August 1. Contributions in respect of the period from August 1, 2008 to July 31, 2011 totalling $4,712,400 were remitted to the plan. Contributions in respect of the period from August 1, 2011 to July 31, 2012 were estimated to be $1,598,500 and have not been remitted to the plan.

18. According to preliminary estimates calculated by the Haley Pension Plan's actuaries, despite Timminco having made contributions of approximately $4,712,400 during the period from August 1, 2008 to July 31, 2011, as of August 1, 2011, the deficit remaining in the Haley Pension Plan is $3,102,900.

Bécancour Non-Union Pension Plan

19. The Bécancour Non-Union Pension Plan, sponsored by BSI, is an on-going pension plan with both defined benefit ("**DB**") and defined contribution provisions. The plan has four active members and 32 retired and deferred vested members (including surviving spouses).

20. The most recently filed actuarial valuation of the Bécancour Non-Union Pension Plan performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Non-Union Pension Plan was $3,239,600.

21. In 2011, normal cost contributions payable to this plan totaled approximately $9,525 per month (or 16.8% of payroll). Amortization payments owing to this plan totaled approximately $41,710 per month. All contributions in respect of the plan were paid when due in accordance with the Québec *Supplemental Pension Plans Act* (the "**QSPPA**") and regulations.

Bécancour Union Pension Plan

22. The BSI-sponsored Bécancour Union Pension Plan is an on-going DB pension plan with two active members and 98 retired and deferred vested members (including surviving spouses).

23. The most recently filed actuarial valuation performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Union Pension Plan was $7,939,500.

24. In 2011, normal cost contributions payable to the plan totaled approximately $7,083 per month (or 14.7% of payroll). Amortization payments owing to this plan totaled approximately $95,300 per month. All contributions in respect of the plan were paid when due in accordance with the QSPPA and regulations.

25. BSI unionized employees have the option to transfer their employment to QSLP, under the form of the existing collective bargaining agreement. In the event of such transfer, their pension membership in the Bécancour Union Pension Plan will be transferred to the Quebec Silicon Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). Also, in the event that any BSI non-union employees transfer employment to QSLP, their pension membership in the Bécancour Non-Union Pension Plan would be transferred to the Quebec Silicon Non-Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). I am advised by Andrea Boctor of Stikeman Elliott LLP, counsel to the Timminco Entities, and do verily believe that if all of the active members of the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan transfer their employment to QSLP, the Régie des rentes du Québec would have the authority to order that the plans be wound up.

Pension Plan Deficiencies and the Timminco Entities' CCAA Proceedings

26. The assets of the Pension Plans have been severely impacted by market volatility and decreasing long-term interest rates in recent years, resulting in increased deficiencies in the Pension Plans. As a result, the special payments payable with respect to the Haley Plan also increased. As at 2010, total annual special payments for the final three years of the wind-up of the Haley Pension Plan were $1,598,500 for 2010, $1,397,000 for 2011 and $1,162,000 for 2012, payable in advance annually every August 1. By contrast, in 2011 total annual special payments to the Haley Pension Plan for the remaining two years of the wind-up increased to $1,728,700 for each of 2011 and 2012.

Suspension of Certain Pension Contributions

27. As is evident from the Cashflow Forecast, the Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the "**Normal Cost Contributions**"). Timminco currently owes approximately $1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately $140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the "**Pension Contributions**"), they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

28. The Timminco Entities intend to make all normal cost contributions when due. However, management of the Timminco Entities does not anticipate an improvement in their cashflows that would permit the making of Pension Contributions with respect to the Pension Plans during these CCAA proceedings.

The Position of CEP and USW

16 Counsel to CEP submits that the super priority charge sought by the Timminco Entities would have the effect of subordinating the rights of, *inter alia*, the pension plans, including the statutory trusts that are created pursuant to the QSPPA. In considering this matter, I have proceeded on the basis that this submission extends to the PBA as well.

17 In order to grant a super priority charge, counsel to CEP, supported by USW, submits that the Timminco Entities must show that the application of provincial legislation "would frustrate the company's ability to restructure and avoid bankruptcy". (See *Indalex Ltd., Re*, 2011 ONCA 265 (Ont. C.A.) at para. 181.)

18 Counsel to CEP takes the position that the evidence provided by the Timminco Entities falls short of showing the necessity of the super priority charge. Presently, counsel contends that the Applicants have not provided any plan for the purpose of restructuring the Timminco Entities and, absent a restructuring proposal, the affected creditors, including the pension plans, have no reason to believe that their interests will be protected through the issuance of the orders being sought.

19 Counsel to CEP takes the position that the Timminco Entities are requesting extraordinary relief without providing the necessary facts to justify same. Counsel further contends that the Timminco Entities must "wear two hats" and act both in their corporate interest and in the best interest of the pension plan and cannot simply ignore their obligations to the pension plans in favour of the corporation. (See *Indalex Ltd., Re*, *supra*, at para. 129.)

20 Counsel to CEP goes on to submit that, where the "two hats" gives rise to a conflict of interest, if a corporation favours its corporate interest rather than its obligations to its fiduciaries, there will be consequences. In *Indalex Ltd., Re*, *supra*, the court found that the corporation seeking CCAA protection had acted in a manner that revealed a conflict with the duties it owed the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the plans (See *Indalex Ltd., Re*, *supra*, at paras. 140 and 207.)

21 In this case, counsel to CEP submits that, given the lack of evidentiary support for the super priority charge, the risk of conflicting interests and the importance of the Timminco Entities. fiduciary duties to the pension plans, the super priority charge ought not to be granted.

22 Although counsel to CEP acknowledges that the court has the discretion in the context of the CCAA to make orders that override provincial legislation, such discretion must be exercised through a careful weighing of the facts before the court. Only where the applicant proves it is necessary in the context and consistent with the objects of the CCAA may a judge make an order overriding provincial legislation. (See *Indalex Ltd., Re*, *supra*, at paras. 179 and 189.)

23 In the circumstances of this case, counsel to CEP argues that the position of any super priority charge ordered by the court should rank after the pension plans.

24 CEP also takes the position that the Timminco Entities. obligations to the pension plans should not be suspended. Counsel notes that the Timminco Entities have contractual obligations through the collective agreement and pension plan documents to make contributions to the pension plans and, as well, the Timminco Entities owe statutory duties to the beneficiaries of the pension funds pursuant to the QSPPA. Counsel further points out that s. 49 of the QSPPA provides that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust for the employer.

25 In addition, counsel takes the position that the Court of Appeal for Ontario in *Indalex Ltd., Re*, *supra*, confirmed that, in the context of Ontario legislation, all of the contributions an employee owes a pension fund, including the special payments, are subject to the deemed trust provision of the PBA.

26 In this case, counsel to CEP points out that the special payments the Timminco Entities seek to suspend in the amount of $95,300 per month to the Bécancour Union Pension Plan, and of $47,743 to the Silicium Union Pension Plan, are payments that are to be held in trust for the beneficiaries of the pension plans. Thus, they argue that the Timminco Entities have a fiduciary obligation to the beneficiaries of the pension plans to hold the funds in trust. Further, the Timminco Entities. request to suspend

the special payments to the Bécancour Union Pension Plan and the Quebec Silicon Union Pension Plan reveals that its interests are in conflict.

27 Counsel also submits that the Timminco Entities have not pointed to a particular reason, other than generalized liquidity problems, as to why they are unable to make special payments to their pension plans.

28 With respect to the KERPs, counsel to CEP acknowledges that the court has the power to approve a KERP, but the court must only do so when it is convinced that it is necessary to make such an order. In this case, counsel contends that the Timminco Entities have not presented any meaningful evidence on the propriety of the proposed KERPs. Counsel notes that the Timminco Entities have not named the KERPs recipients, provided any specific information regarding their involvement with the CCAA proceeding, addressed their replaceability, or set out their individual bonuses. In the circumstances, counsel submits that it would be unfair and inequitable for the court to approve the KERPs requested by the Timminco Entities.

29 Counsel to CEP's final submission is that, in the event the KERPs are approved, they should not be sealed, but rather should be treated in the same manner as other CCAA documents through the Monitor. Alternatively, counsel to CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

The Position of the Timminco Entities

30 At the time of the initial hearing, the Timminco Entities filed evidence establishing that they were facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume, long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with the development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities also face significant pension and environmental remediation legacy costs, and financial costs related to large outstanding debts.

31 I accepted submissions to the effect that without the protection of the CCAA, a shutdown of operations was inevitable, which the Timminco Entities submitted would be extremely detrimental to the Timminco Entities. employees, pensioners, suppliers and customers.

32 As at December 31, 2011, the Timminco Entities. cash balance was approximately $2.4 million. The 30-day consolidated cash flow forecast filed at the time of the CCAA application projected that the Timminco Entities would have total receipts of approximately $5.5 million and total operating disbursements of approximately $7.7 million for net cash outflow of approximately $2.2 million, leaving an ending cash position as at February 3, 2012 of an estimated $157,000.

33 The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession ("DIP") facility. The Timminco Entities existing stakeholders, Bank of America NA, IQ, and AMG Advance Metallurgical Group NV, have declined to advance any funds to the Timminco Entities at this time. In addition, two thirdparty lenders have apparently refused to enter into negotiations regarding the provision of a DIP Facility. [1]

1 In a subsequent motion relating to approval of a DIP Facility, the Timminco Entities acknowledged they had reached an agreement with a third-party lender with respect to providing DIP financing, subject to court approval. Further argument on this motion will be heard on February 6, 2012.

34 The Monitor, in its Second Report, dated January 11, 2012, extended the cash forecast through to February 17, 2012. The Second Report provides explanations for the key variances in actual receipts and disbursements as compared to the January 2, 2012 forecast.

35 There are some timing differences but the Monitor concludes that there are no significant changes in the underlying assumptions in the January 10, 2012 forecast as compared to the January 2, 2012 forecast.

36 The January 10 forecast projects that the ending cash position goes from positive to negative in mid-February.

37 Counsel to the Applicants submits that, based on the latest cash flow forecast, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

38 The Timminco Entities submit that this is an appropriate case in which to grant super priority to the Administration Charge. Counsel submits that each of the proposed beneficiaries will play a critical role in the Timminco Entities. restructuring and it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

39 Statutory Authority to grant such a charge derives from s. 11.52(1) of the CCAA. Subsection 11.52(2) contains the authority to grant super-priority to such a charge:

> 11.52(1) Court may order security or charge to cover certain costs — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

40 Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities. liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

41 Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

> 11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> (2) Priority — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Analysis

(i) Administration Charge and D&O Charge

42 It seems apparent that the position of the unions. is in direct conflict with the Applicants. positions.

43 The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

44 Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

45 Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

46 It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timmico Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

47 The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

48 Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corp., Re*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corp., Re* (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

49 It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

50 Further, as I indicated in *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

51 The Court of Appeal in *Indalex Ltd., Re* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

> The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...
>
> . . .
>
> What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

52 The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

53 Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

54 Further, the Timminco Entities submit that the doctrine of paramountcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities. CCAA proceedings.

55 The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

56 The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater inc., Re* (2009), 57 C.B.R. (5th) 285 (C.S. Que.); *Collins & Aikman Automotive Canada Inc., Re* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc., Re* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Commercial List]).

57 I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

58 The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

> Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

59 Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex Ltd., Re*, *supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

60 Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

61 The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

62 On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

63 In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial* and *Nortel Networks Corp., Re*).

64 In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

65 There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

66 In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

67 If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

68 For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

69 I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities. obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

70 I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities. failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

71 Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

72 In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities. CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is $269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corp., Re*, [2009] O.J. No. 1044 (Ont. S.C.J. [Commercial List]), *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]), and *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]).

73 In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

74 The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

75 I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

76 The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable 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 the 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.

77 CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

78 In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

Disposition

79 In the result, the motion is granted. An order shall issue:

(a) suspending the Timminco Entities. obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administrative Charge and the D&O Charge;

(c) approving the KERPs and the grant of the KERP Charge;

(d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.

Motion granted.

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

Headnote

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

Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act.*

***Pepall J.*:**

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.* [1] The applicants also seek to have the stay of proceedings and other provisions extend

to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

1 R.S.C. 1985, c. C. 36, as amended

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Backround Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*[2] . It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

2 R.S.C. 1985, c.C.44.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do

the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

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

4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*[5]; *Smurfit-Stone Container Canada Inc., Re*[6]; and *Calpine Canada Energy Ltd., Re*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*[8] and *Global Light Telecommunications Inc., Re*[9]

8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of

this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

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

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The

section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors

and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re* [10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re* [11] have all been met and I am persuaded that the relief in this regard should be granted.

11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)* [12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

12 [2002] 2 S.C.R. 522 (S.C.C.).

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount

of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

2014 ONSC 494
Ontario Superior Court of Justice [Commercial List]

Jaguar Mining Inc., Re

2013 CarswellOnt 18630, 2014 ONSC 494, 12 C.B.R. (6th) 290, 236 A.C.W.S. (3d) 820

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 Jaguar Mining Inc., Applicant

Morawetz R.S.J.

Heard: December 23, 2013
Judgment: December 23, 2013
Written reasons: January 16, 2014
Docket: CV-13-10383-00CL

Counsel: Tony Reyes, Evan Cobb for Applicant, Jaguar Mining Inc.
Robert J. Chadwick, Caroline Descours for Ad Hoc Committee of Noteholders
Joseph Bellissimo for Secured Lender, Global Resource Fund
Jeremy Dacks for Proposed Monitor, FTI Consulting Canada Inc.
Robin B. Schwill for Special Committee of the Board of Directors

Subject: Insolvency; Civil Practice and Procedure

APPLICATION by debtor for prection under *Companies' Creditors Arrangement Act*.

Morawetz J. **(orally):**

1 On December 23, 2013, I heard the CCAA application of Jaguar Mining Inc. ("Jaguar") and made the following three endorsements:

> 1. CCAA protection granted. Initial Order signed. Reasons will follow. It is expected that parties will utilize the e-Service Protocol which can be confirmed on comeback motion. Sealing Order of confidential exhibits granted.
>
> 2. Meeting Order granted in form submitted.
>
> 3. Claims Procedure Order granted in form submitted.

2 These are my reasons.

3 Jaguar sought protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") and requested authorization to commence a process for the approval and implementation of a plan of compromise and arrangement affecting its unsecured creditors.

4 Jaguar also requested certain protections in favour of its wholly-owned subsidiaries that are not applicants (the "Subsidiaries" and, together with the Applicant, the "Jaguar Group").

5 Counsel to Jaguar submits that the principal objective of these proceedings is to effect a recapitalization and financing transaction (the "Recapitalization") on an expedited basis through a plan of compromise and arrangement (the "Plan") to provide a financial foundation for the Jaguar Group going forward and additional liquidity to allow the Jaguar Group to continue to

work towards its operational and financial goals. The Recapitalization, if implemented, is expected to result in a reduction of over $268 million of debt and new liquidity upon exit of approximately $50 million.

6 Jaguar's senior unsecured convertible notes (the "Notes") are the primary liabilities affected by the Recapitalization. Any other affected liabilities of Jaguar, which is a holding company with no active business operations, are limited and identifiable.

7 The Recapitalization is supported by an Ad Hoc Committee of Noteholders of the Notes (the "Ad Hoc Committee of Noteholders") and other Consenting Noteholders, who collectively represent approximately 93% of the Notes.

8 The background facts are set out in the affidavit of David M. Petrov sworn December 23, 2013 (the "Petrov Affidavit"), the important points of which are summarized below.

9 Jaguar is a corporation existing under the *Business Corporations Act*, R.S.O. 1990 c. B.16, with a registered office in Toronto, Ontario. Jaguar has assets in Canada.

10 Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration in Brazil, employing in excess of 1,000 people. Jaguar itself does not carry on active gold mining operations.

11 Jaguar has three wholly-owned Brazilian operating subsidiaries: MCT Mineração Ltda. ("MCT"), Mineração Serras do Oeste Ltda. ("MSOL") and Mineração Turmalina Ltda. ("MTL") (and, together with MCT and MSOL, the "Subsidiaries"), all incorporated in Brazil.

12 The Subsidiaries' assets include properties in the development stage and in the production stage.

13 Jaguar has been the main corporate vehicle through which financing has been raised for the operations of the Jaguar Group. The Subsidiaries have guaranteed repayment of certain funds borrowed by Jaguar.

14 Jaguar has raised debt financing by (a) issuing notes, and (b) borrowing from Renvest Mercantile Bank Corp. Inc., through its global resource fund ("Renvest").

15 In aggregate, Jaguar has issued a principal amount of $268.5 million of Notes through two transactions, known as the "2014 Notes" and the "2016 Notes".

16 Interest is paid semi-annually on the 2014 Notes and the 2016 Notes. Jaguar has not paid the last interest payment due on November 1, 2013. Under the 2014 Notes, the grace period has lapsed and an event of default has occurred.

17 Jaguar is also the borrower under a fully drawn $30 million secured facility (the "Renvest Facility") with Renvest. The obligations under the Renvest Facility are secured by a general security agreement from Jaguar as well as guarantees and collateral security granted by each of the Subsidiaries.

18 Jaguar has identified another potential liability. Mr. Daniel Titcomb, former chief executive officer of Jaguar, and certain other associated parties, have instituted a legal proceeding against Jaguar and certain of its current and former directors that is currently proceeding in the United States Federal Court. Counsel to Jaguar submits that this lawsuit alleges certain employment-related claims and other claims in respect of equity interests in Jaguar that are held by Mr. Titcomb and others. Counsel to Jaguar advises that Jaguar and its board of directors believe this lawsuit to be without merit.

19 Counsel also advises that, aside from the lawsuit and professional service fees incurred by Jaguar, the unsecured liabilities of Jaguar are not material.

20 The Jaguar Group's mines are not low-cost gold producers and the recent decline in the price of gold has negatively impacted the Jaguar Group.

21 Based on current world prices and Jaguar Group's current level of expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations early in the first quarter of 2014.

22 Counsel also submits that, as a result of Jaguar's event of default under the 2014 Notes, certain remedies have become available, including the possible acceleration of the principal amount and accrued and unpaid interest on the 2014 Notes. As of November 13, 2013, that principal and accrued interest totalled approximately $169.3 million.

23 Jaguar's unaudited consolidated financial statements for the nine months ending September 30, 2013 show that Jaguar had an accumulated deficit of over $317 million and a net loss of over $82 million for the nine months ending September 30, 2013. Jaguar's current liabilities (at book value) exceed Jaguar's current assets (at book value) by approximately $40 million.

24 I accept that Jaguar faces a liquidity crisis and is insolvent.

25 Jaguar has been involved in a strategic review over the past two years. Counsel submits that the efforts of Jaguar and its advisors have shown that a comprehensive restructuring plan involving a debt-to-equity exchange and an investment of new money is the best available alternative to address Jaguar's financial issues.

26 Counsel to Jaguar advises that the board of directors of Jaguar has determined that the Recapitalization is the best available option to Jaguar and, further, that the plan cannot be implemented outside of a CCAA proceeding. Counsel emphasizes that without the protection of the CCAA, Jaguar is exposed to the immediate risk that enforcement steps may be taken under a variety of debt instruments. Further, Jaguar is not in a position to satisfy obligations that may result from such enforcement steps.

27 Jaguar requests a stay of proceedings in favour of non-applicant Subsidiaries contending that, because of Jaguar's dependence upon its Subsidiaries for their value generating capacity, the commencement of any proceedings or the exercise of rights or remedies against these Subsidiaries would be detrimental to Jaguar's restructuring efforts and would undermine a process that would otherwise benefit Jaguar Group's stakeholders as a whole.

28 Jaguar also seeks a charge on its current and future assets (the "Property") in the maximum amount of $5 million (a $500,000 first-ranking charge (the "Primary Administration Charge") and a $4.5 million fourth-ranking charge (the "Subordinated Administration Charge") (together, the "Administration Charge")). The purpose of the charge is to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by various professionals, as well as Canaccord Genuity and Houlihan Lokey, as financial advisors to the Ad Hoc Committee (collectively, the "Financial Advisors").

29 Counsel advises that the Financial Advisors' monthly work fees (but not their success fees) will be secured by the Primary Administration Charge, while the Financial Advisors' success fees will be secured solely by the Subordinated Administration Charge.

30 Counsel further advises that the Proposed Initial Order contemplates the establishment of a charge on Jaguar's Property in the amount of $150,000 (the "Director's Charge") to protect the directors and officers. Counsel further advises that the benefit of the Director's Charge will only be available to the extent that a liability is not covered by existing directors and officers insurance. The directors and officers have indicated that, due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Director's Charge.

31 Counsel to Jaguar further advises that the proposed monitor is of the view that the Director's Charge and the Administration Charge are reasonable in these circumstances.

32 Jaguar is unaware of any secured creditors, other than those who have received notice of the application, who are likely to be affected by the court-ordered charges.

33 In addition to the Initial Order, Jaguar also seeks a Claims Procedure Order and a Meeting Order, submitting that it must complete the Recapitalization on an expedited timeline.

34 Each of the Claims Procedure Order and Meeting Order include a comeback provision.

35 Having reviewed the record and upon hearing submissions, I am satisfied the Applicant is a company to which the CCAA applies. It is insolvent and faces a looming liquidity crisis. The Applicant is subject to claims in excess of $5 million and has assets in Canada. I am also satisfied that the application is properly before me as the Applicant's registered office and certain of its assets are situated in Toronto, Ontario.

36 I am also satisfied that the Applicant has complied with the obligations of s. 10(2) of the CCAA.

37 I am also satisfied that an extension of the stay of proceedings to the Subsidiaries of Jaguar is appropriate in the circumstances. Further, I am also satisfied that it is reasonable and appropriate to grant the Administration Charge and the Director's Charge over the Property of the Applicant. In these circumstances, I am also prepared to approve the Engagement Letters and to seal the terms of the Engagement Letters. In deciding on the sealing provision, I have taken into account that the Engagement Letters contain sensitive commercial information, the disclosure of which could be harmful to the parties at issue. However, as I indicated at the hearing, this issue should be revisited at the comeback hearing.

38 I am also satisfied that Jaguar should be authorized to comply with the pre-filing obligations to the extent provided in the Initial Order.

39 In arriving at the foregoing conclusions, I reviewed the argument submitted by counsel to Jaguar that the stay of proceedings against non-applicants is appropriate. The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.

40 The court has jurisdiction to extend the stay in favour of Jaguar's Subsidiaries. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Calpine Canada Energy Ltd., Re*, 2006 ABQB 153, 19 C.B.R. (5th) 187 (Alta. Q.B.); *SkyLink Aviation Inc., Re*, 2013 ONSC 1500, 3 C.B.R. (6th) 150 (Ont. S.C.J. [Commercial List]).

41 The authority to grant the court-ordered Administration Charge and Director's Charge is contained in ss. 11.51 and 11.52 of the CCAA.

42 In granting the Administration Charge, I am satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate; and

(iii) the charges should extend to all of the proposed beneficiaries.

43 In considering both the amount of the Administration Charge and who should be entitled to its benefit, the following factors can also be considered:

(a) the size and complexity of the business being restructured; and

(b) whether there is an unwarranted duplication of roles.

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

44 In this case, the proposed restructuring involves the proposed beneficiaries of the charge. I accept that many have played a significant role in the negotiation of the Recapitalization to date and will continue to play a role in the implementation of the Recapitalization. I am satisfied that there is no unwarranted duplication of roles among those who benefit from the proposed Administration Charge.

45 With respect to the Director's Charge, the court must be satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate;

(iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

(iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

46 A review of the evidence satisfies me that it is appropriate to grant the Director's Charge as requested.

47 Jaguar requested that the Initial Order authorize it to perform certain pre-filing obligations in respect of professional service providers and third parties who provide services in respect of Jaguar's public listing agreement. In the circumstances, I find it to be reasonable that Jaguar be authorized to perform these pre-filing obligations.

48 In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.

49 Counsel to Jaguar submits that Jaguar's approach to classification of the affected unsecured creditors is appropriate in these circumstances, citing a commonality of interest. Counsel also references s. 22(2) of the CCAA. For the purposes of today's motion, I am prepared to accept this argument. However, this is an issue that can, if raised, be reviewed at the comeback hearing.

50 In the result, an Initial Order is granted together with a Meeting Order and Claims Procedure Order. All orders have been signed in the form presented.

Application granted.

End of Document

2013 ONSC 6167
Ontario Superior Court of Justice [Commercial List]

8440522 Canada Inc., Re

2013 CarswellOnt 13921, 2013 ONSC 6167, 233 A.C.W.S. (3d) 286, 8 C.B.R. (6th) 86

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

In the Matter of a Plan of Compromise or Arrangement of 8440522 Canada Inc., Data & Audio-Visual Enterprises Wireless Inc., and Data & Audio-Visual Enterprises Holdings Incorporation

Newbould J.

Heard: September 30, 2013
Judgment: October 4, 2013
Docket: 13-CV-16274-OOCL

Counsel: Robert Frank, Virginie Gauthier, Evan Cobb for Applicants
David C. Moore for Catalyst Capital Group Inc.
John Porter, Leanne M. Williams for Ernst & Young Inc, the proposed Monitor
Robert J. Chadwick for proposed DIP lender and the ad hoc Committee of Noteholders
Kevin P. McElcheran, James D. Gage for Quadrangle, a shareholder and, for subordinated note holders

Subject: Insolvency

APPLICATION for protection under *Companies' Creditors Arrangements Act*.

***Newbould J.*:**

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

Background facts

2 The Mobilicity Group consists of Data & Audio-Visual Enterprises Wireless Inc., the operating company ("Wireless" or "Mobilicity"), its holding company Data & Audio-Visual Enterprises Holdings Inc. ("Holdings") and 8440522 Canada Inc., wholly owned by Wireless and which has no material assets or liabilities.

3 Mobilicity carries on business as a Canadian wireless telecommunications carrier. It provides cellular service to Canadians in five urban markets: Ottawa, Toronto, Calgary, Edmonton and Vancouver and has roaming agreements with third party service providers to provide continuity of service outside of these markets. Mobilicity also offers hardware (handsets and accessories) to its customers.

4 Mobilicity was founded on the concept of offering low cost cellular services to value-conscious consumers seeking less expensive cellular services than those offered by the established players in the market, being Bell Canada Inc., TELUS Corporation and Rogers Communications Inc.

5 In addition to four corporately-owned stores, the Mobilicity dealer network consists of approximately 314 points of distribution which include approximately 94 "platinum-level" stores that exclusively sell Mobilicity-branded services and only offer wireless-related products at their stores, and approximately 150 "gold" and "silver" level stores that sell Mobilicity-branded

services, but also sell non-wireless related products. With the exception of the four corporately owned stores, these points of distribution are operated independently from the Mobilicity Group and are compensated for sales on a commission basis 45 days after the end of the month in which a subscriber is signed on, subject to certain customer retention requirements. These dealers often operate with very low liquidity and any disruption to the stream of revenue derived from commissions would cause many of them to cease operations due to a lack of funding

6 Mobilicity operates on a "pay in advance" billing system which provides set monthly plans for its subscribers. Mobilicity has approximately 194,000 subscribers who together generate gross revenues of approximately $6.3 million per month.

7 Mobilicity's business model provides for outsourcing of certain business functions: network building and maintenance, real-time billing and rating, provisioning systems, handset logistics and distribution and call centre operations. Suppliers of such business functions include: Ericsson Canada Inc., Amdocs Canadian Managed Services Inc. and Ingram Micro Inc.

8 The single most significant capital expenditure made by Mobilicity was the acquisition of its 10 spectrum licenses from the Government of Canada effective in 2009. Mobilicity acquired the spectrum licenses for $243 million using funds contributed by Holdings.

9 After purchasing the spectrum licences, Mobilicity incurred significant costs by establishing an office, hiring a management team to develop the wireless carrier business, and contracting with Ericsson Canada Inc. to build a network system.

Outstanding indebtedness

10 In aggregate, the Mobilicity Group has raised in excess of $400 million in debt financing to fund capital expenditures and operations since 2008. A description of that indebtedness is below:

> a. Wireless is the borrower under certain first lien notes issued in a principal amount of $195,000,000 due April 29, 2018. Holdings is a guarantor of the first lien notes and each of Wireless and Holdings has entered into a general security agreement in connection with the first lien notes. The Catalyst Capital Group Inc. ("Catalyst") holds approximately 32% of the first lien notes.
>
> b. Wireless is the borrower of $43.25 million in second lien notes (the "Bridge Notes") due September 30, 2013. These Bridge Notes are also guaranteed by Holdings and the obligations thereunder are secured by the assets of Wireless and Holdings. The Bridge Notes rank behind the first lien notes in right of payment and the security on the Bridge Notes is subordinate to the first lien notes security.
>
> c. Holdings has issued 15% Senior Unsecured Debentures in the total principal amount of $95 million due September 25, 2018. As of July 31, 2013, the amount outstanding on the Unsecured Senior Notes (including payment in kind interest) was approximately $154.4 million.
>
> d. Holdings has also issued 12% Convertible Unsecured Notes due September 25, 2018. Initially, convertible notes in the principal amount of $59,741,000 were issued (the "Unsecured Pari Passu Notes"). Subsequently, additional convertible notes in the principal amount of $35,000,000 were issued (the "Unsecured Subordinated Notes"). The Unsecured Subordinated Notes rank subordinate in right of payment to the Unsecured Pari Passu Notes and the Unsecured Senior Notes and the Unsecured Pari Passu Notes rank pari passu in right of payment with the Unsecured Senior Notes. As of July 31, 2013, the amount outstanding on the Unsecured Pari Passu Notes and the Unsecured Subordinated Notes (including payment in kind interest) respectively, was approximately $88.4 million and approximately $38.6 million.

11 The cash interest payment under the above described indebtedness is a payment of over $9 million on the first lien notes which became due on September 30, 2013, the date of the Initial Order.

Mobilicity Group's financial difficulties

12 Wireless telecom start-ups are highly capital-intensive. As indicated by the substantial indebtedness incurred by the Mobilicity Group to date, significant fixed costs must be incurred before revenue can be generated. During the period where a wireless carrier is building its customer base, revenue is typically insufficient to cover previously incurred investments and ongoing operating costs. It can take several years for a customer base to be adequately built to provide profitability. The applicants submit that Mobilicity ran out of "financial runway" before profitability was achieved and it now faces an imminent liquidity crisis.

13 For the seven months ended July 31, 2013, the Mobilicity Group recognized revenue of $46,864,490. During that period, the Mobilicity Group recorded a net loss of $71,958,543. As of July 31, 2013, the Mobilicity Group had on a consolidated basis accumulated a net deficit of $431,807,958.

14 In July 2012, the Mobilicity Group engaged National Bank and Canaccord Genuity (together, the "financial advisors") as their financial advisors in an effort to raise additional financing.

15 With the assistance of the financial advisors, the Mobilicity Group solicited more than 30 potential investors in an attempt to raise financing. In this regard, an investor roadshow was completed in August and September of 2012 without success.

16 The Bridge Notes facility was entered into on February 6, 2013 to allow Mobilicity to continue operations while it pursued strategic alternatives. The Bridge note lenders are the first lien note holders other than Catalyst, and certain existing holders of Unsecured Senior Notes. Catalyst has started oppression proceedings attacking the Bridge Notes facility.

17 Mr. William Aziz was retained in late April of 2013 through BlueTree Advisors II Inc. as Chief Restructuring Officer to provide assistance in dealing with restructuring matters. Mr. Aziz has extensive experience in the area of corporate restructuring.

18 The Mobilicity Group proposed alternative plans of arrangement earlier this year. During the course of those proceedings, a transaction was agreed to sell the Mobilicity Group to TELUS Corporation for $380 million pursuant to a plan of arrangement under the *Canada Business Corporations Act*. The plan of arrangement was approved on May 28, 2013. However, On June 4, 2013, the Minister of Industry announced that TELUS Corporation's application to transfer the spectrum licenses would not be approved at that time. Accordingly, the TELUS transaction was not completed.

19 The Mobilicity Group has continued to engage with potential acquirers. As part of those efforts, the Mobilicity Group solicited and received an expression of interest and engaged in detailed discussions with a significant U.S.-based wireless service provider. However, after significant due diligence these discussions did not ultimately result in a binding offer due to uncertainty surrounding the Government's upcoming spectrum auction.

20 In the two weeks preceding this application the Mobilicity Group developed a transaction structure for a proposed transaction with a prospective purchaser, which is currently being considered by Industry Canada. The government's assent to the proposed transaction was not obtained prior to this application being made.

Analysis

21 It is clear from the affidavit of Mr. Aziz that the Mobilicity Group is insolvent and that without the protection of the CCAA, a shutdown of operations would be inevitable as the Mobilicity Group will cease to be able to pay its trade creditors in the ordinary course and will cease to be able to make interest payments on its outstanding debt securities. Thus the applicants are entitled to relief under the CCAA.

22 The Initial Order contained provisions permitting a charge for directors and an administration charge. These were not opposed except as to part of the administrative charge discussed below. The applicants also sought authorization to continue the engagement of the financial advisors who had initially been retained in 2012, which was not opposed, and approval of KERP agreements for a small number of employees, also not opposed. The Monitor supported these provisions and they appeared to be reasonable, and were approved.

23 I will deal with issues that were raised by Catalyst, not in opposition to the Initial Order, but in opposition to certain parts of it.

DIP financing

24 The Mobilicity Group has obtained a $30 million DIP facility available in five tranches, to be used only in accordance with the cash flow forecasts of the applicants. They seek approval of this facility and a charge to secure the facility. The facility was obtained after a solicitation process undertaken by the Mobilicity Group and its financial advisors, described in some particularity in Mr. Aziz's affidavit. The lenders are the holders of the second lien notes under the Bridge Loan and other unsecured lenders of the Mobilicity Group.

25 The DIP financing ranks pari passu with the Bridge Notes, and subordinate to the first lien notes, with the exception of cash interest payments under the DIP Financing. Since the DIP financing ranks subordinate to the first lien notes, the holders of the first lien notes, including Catalyst, will not be adversely affected by the DIP Financing.

26 In the solicitation process, the Mobilicity Group received DIP financing proposals from not less than four parties, including existing creditors as well as third parties with no prior financial involvement with the Mobilicity Group. One such proposal was provided by the holders of the Bridge Notes and another was provided by Catalyst. The Mobilicity Group engaged its financial advisors and legal counsel to assist in the evaluation of the DIP Financing options that were presented.

27 Upon review, the Mobilicity Group determined, with advice from its advisors, that the proposals provided by the non-creditor third parties likely could not be implemented. Therefore, the financial advisors held discussions with the holders of the Bridge Notes and Catalyst to obtain what the Mobilicity Group believed to be the best available offer from each party either in the form of a final definitive term sheet or definitive agreements. These discussions occurred over the course of several weeks.

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

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

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

31 As to that question, I accept the position of Mobilicity that it is important that now that the CCAA proceedings have commenced, approving a DIP facility will provide some assurance of stability to the market place, including the customers of Mobilicity and its suppliers and dealers. If no DIP financing were approved, there is a serious risk that customers of Mobilicity, who do not have long term contracts, will go elsewhere. That would negatively affect the cash flow of Mobilicity and the assumption that advances under the DIP loan would not be required until November.

32 Should this DIP facility be approved with its proposed security? In my view it should. On the record before me, the facility was approved by the board of directors of the Mobilicity Group with the benefit of expert advice after a process undertaken to obtain bids for the loan. I recognize that board approval is a factor that may be taken into account but it is not determinative. See *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para. 85.

33 The factors in s.11.2 (4) of the CCAA must be considered. I will deal with each of them.

(a) The period during which the company is expected to be subject to the CCAA proceedings.

34 Mobilicity hopes to be able to enter into a transaction with a proposed purchaser within a relatively short period of time. The applicants submit that it is reasonable to estimate that the proceedings could last to February, 2014 and that subject to its conditions, the DIP facility can provide funding until that time.

(b) How the company's business and financial affairs are to be managed during the proceedings.

35 The Mobilicity Group retained Mr. Aziz in April, 2013 as its CRO, and he will continue in that capacity. He is a person of known ability. The business will continue to be run on a day to day basis by management who are looking for stability to enable it to keep its customer base.

(c) Whether the company's management has the confidence of its major creditors.

36 Catalyst, as the holder of approximately 34% of the first lien notes, says it has no confidence in Mr. Aziz or the way that it alleges the Mobilicity Group has ignored the different interests of Mobilicity and its holding company. That is the subject of its claim for oppression. However, the balance of first lien note holders, all of the Bridge Note holders, approximately 92% of the unsecured debenture holders and all of the holders of the pari passu notes support the company's management and the approval of the DIP facility. That is, holders of $444 million of the Mobilicity Group's debt, or 88% of that debt, support management and the DIP facility.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement.

37 The Mobilicity Group's preferred course is to achieve a going concern transaction that will be of benefit to all stakeholders, including the first lien note holders. The DIP facility permits some stability and breathing room to enable this to happen.

(e) The nature and value of the company's property.

38 The earlier TELUS deal was for $380 plus assumption of obligations of the company. If the value of the Mobilicity Group is anywhere near that size, the $30 million DIP facility appears reasonable, particularly as it is to be drawn down in tranches when needed.

(f) Whether any creditor would be materially prejudiced as a result of the security.

39 No creditors will be materially prejudiced as a result of the DIP facility charge. The secured creditors likely to be affected by the charge have consented to it. The charge is junior to the security granted to the holders of first lien notes and is subordinate to any encumbrances that may have priority over the first lien notes either by contract or by operation of law.

(g) The position of the Monitor as set out in its report.

40 In its pre-filing report, E & Y, the proposed Monitor, has reviewed the process leading to the DIP facility and its terms. It states that it is of the view that the DIP facility charge is required and is reasonable in the circumstances in view of the applicants' liquidity needs.

41 In all of the circumstances, I approved the DIP facility and its charge. There is a come-back clause in the Initial Order, which Catalyst may or may not wish to utilize. I would observe that if Catalyst seeks to have a DIP facility proposed by it to replace the approved DIP facility, some consideration of the *Soundair* and *Crown Trust Co. v. Rosenberg* principles may be appropriate.

Stay of oppression action

42 The Initial Order sought by the applicants contained a usual stay order preventing the commencement or continuance of proceedings against or in respect of the applicants and the Monitor. Included in the protection were the DIP lenders, the holders of Bridge Notes and the Collateral Agent under the Bridge notes. The applicants submitted, and I agree with them, that this expanded group was appropriate in the circumstances as the holders of Bridge Notes and the Trustee have each been named in the oppression application brought by Catalyst. The holders of the Bridge Notes and the Trustee are parties to the oppression application by Catalyst solely due to their lending arrangements with the applicants and, as a result, the applicants are central parties to that litigation and would need to participate actively in any steps taken in that litigation. Further, any continuation of the oppression application against the holders of the Bridge Notes and the Trustee would distract from the goals of these proceedings and also result in unwarranted expenditure of resources by the holders of the Bridge Notes and the Trustee, each of which are indemnified in a customary manner by the applicants for these types of expenditures. As the DIP lenders are also Bridge Note holders and as such parties are stepping into a similar financial position as the Bridge Note holders, the extension of the stay to those parties is appropriate and reasonable. See *Sino-Forest Corp., Re* (May 8, 2012), Doc. CV-12-9667-00CL (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]) at paras. 23 and 24.

43 Catalyst contended, however, that the stay provisions should exclude its oppression application. Why this is so is not clear. Mr. Moore said there had been no steps taken in the application since the August cross-examination of Mr. Aziz, and that Catalyst would undertake not to take further steps until the come-back date. I see no reason why the oppression application should be excluded from the stay contained in the Initial Order. It may be that Catalyst will be paid out in the near future if the transaction now on the table can be concluded. In any event, it is open to any party to apply to lift a stay on proper grounds. Catalyst is no different.

Ad hoc committee charge

44 The Initial Order contains an administration charge to cover fees and disbursements to be paid out to the Monitor and its counsel, counsel to the applicants, counsel to the DIP lenders and counsel to the ad hoc committee of Noteholders. Catalyst contends that there is no basis for counsel for the ad hoc committee of Noteholders to be included in this charge or to be paid by the applicant.

45 In this case, counsel to the DIP lenders is also counsel to the ad hoc committee of noteholders. That committee includes the balance of the first lien noteholders other than Catalyst who are the Bridge Note holders. It was the Bridge Notes that permitted the Mobilicity Group to continue since February of this year. Those noteholders making up the ad hoc committee have been working in a supportive capacity in an attempt to have the Mobilicity Group re-organized in a constructive way. I am satisfied that the ad hoc committee has been of assistance to the process and that the charge is appropriate and necessary. I would also note that the administrative charge is junior to the first lien notes and thus the security position of Catalyst is not affected by the charge. As well the administrative charge is supported by the proposed Monitor.

Appointment of chief restructuring officer

46 The Initial Order authorizes the applicants to continue the engagement of William Aziz as the chief restructuring officer of the Mobilicity Group on the terms set out in the CRO engagement letter. This letter has been sealed as confidential. Catalyst said it should see the letter and until then no order should be made. On the day before this application was heard, counsel for the Mobilicity Group offered to send the complete record to counsel for Catalyst if an undertaking was given that the material would be kept confidential prior to the hearing. Mr. Moore objected to such a pre-condition and was served shortly before the hearing with the application record without the confidential documents.

47 Catalyst contends that no order should be made until it has had a chance to see the terms of the engagement letter. I do not think this wise. To proceed with the CCAA process without the continuation of Mr. Aziz as the chief restructuring officer would send the entirely wrong signal to all stakeholders, let alone the Government of Canada with whom Mr. Aziz has been dealing regarding a proposed transaction.

48 Mr. Aziz has a thorough knowledge of the affairs of the Mobilicity Group, having been its chief restructuring officer since April of this year. He has been central to the efforts of the applicants to restructure. He is very knowledgeable and experienced. In is appropriate that his engagement now be continued. The proposed Monitor has reviewed the engagement letter and is of the view that the fee arrangement is reasonable and consistent with the fee arrangements in other engagements of similar size, scope and complexity.

49 Counsel for the applicants and Catalyst were agreeable to working out an appropriate confidentiality arrangement. Once Catalyst has seen the engagement letter for Mr. Aziz, it will be entitled if so advised to bring whatever come-back motion it thinks appropriate.

50 The Initial Order as signed contains provisions as discussed in this endorsement.

Application granted.

2015 BCSC 1376
British Columbia Supreme Court

North American Tungsten Corp., Re

2015 CarswellBC 2232, 2015 BCSC 1376, [2015] B.C.W.L.D. 6686, [2015] B.C.W.L.D. 6687, 256 A.C.W.S. (3d) 767

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of North American Tungsten Corporation Ltd. Petitioner

Butler J., In Chambers

Heard: July 8, 2015
Judgment: July 9, 2015
Docket: Vancouver S154746

Counsel: John R. Sandrelli, Jordan D. Schultz, for Petitioner
Kibben M. Jackson, for Monitor, Alvarex & Marsal Canada Inc.
William E.J. Skelly, for Callidus Capital Corporation
Mary Buttery, H. Lance Williams, for Government of Northwest Territories
Jonathan McLean, Angela L. Crimeni, for Wolfram Bergbau and Hütten AG, Global Tungsten & Powders Corp.

Subject: Civil Practice and Procedure; Insolvency

APPLICATIONS by debtor company for extension of stay of proceedings, and for approval of interim financing.

***Butler J., In Chambers*:**

1

> THE COURT: This is my ruling on the applications I heard yesterday. The petitioner, North American Tungsten Corporation Ltd. (the "Company"), applies for an extension of the stay of proceedings which was granted in the initial order in this matter on June 9, 2015 (the "Initial Order"), and seeks approval for interim financing pursuant to s. 11.2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

2 I will set out the background to this matter and the parties' positions. For the reasons that follow, I am approving the Company's application to extend the stay and approving the interim financing facility on the terms proposed as those were modified during the course of argument yesterday. As always, if a transcript of this ruling is ordered, I reserve the right to amend it, but only as to form, not substance.

Background

3 The Company is involved in the exploration, development, mining and processing of tungsten and other minerals. The main capital assets of the Company are the Cantung Mine located in the Northwest Territories and the Mactung property, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories. The Mactung property is one of the largest deposits of tungsten in the world. It has received approvals from the federal and Yukon governments to proceed to the next stage of development, but a very large capital investment will be required to construct a mine.

The Monitor

22 The Monitor provided detailed comments supporting the Company's application for interim financing as well as the stay. In doing so it made the following observations:

- Without the interim financing, the Company would have no choice but to immediately cease operations. This would negatively impact the progress of reclamation of the mine and tailings ponds and may have a negative impact on the near term market value of the Mactung property.

- The key senior management of the Company remain in place and are committed to pursuing restructuring solutions or transactions that will see an orderly transition of ownership and stewardship of the assets.

- The Interim Facility is supported by Queenwood II and the debenture holders, the creditors who potentially have the most to lose.

- Based on the confidential appraisal, it appears that the equipment values in aggregate exceed the amounts due to Callidus, which may eliminate or at least mitigate the potential prejudice to creditors having security over Mactung.

- The terms of the Interim Facility including interest rates and fees are consistent with market terms for interim financings in the context of distressed companies and are commercially reasonable in these circumstances when compared to the terms of other court approved interim financing facilities.

23 The Monitor concludes its comments in its Fourth Report by stating that "the interim financing contemplated by the Interim Lending Facility and the Forbearance Agreement will enhance the prospects of a viable restructuring and/or a future SISP being undertaken by the Company. Overall... the Monitor is of the view that, balancing the relative prejudices to the stakeholders, the terms of the Forbearance Agreement and Interim Lending Facility are reasonable in the circumstances and the Monitor supports the Company's application..."

Extension of the Stay

24 I turn now to the reasons for granting the extension of the stay. Subsection 11.02(2) of the *CCAA* provides that the Company may apply for an extension of the stay of proceedings for a period that the court considers necessary on any terms that the court may impose. Subsection 11.02(3) provides:

> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

25 A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the *CCAA*. Justice Deschamps stated at para. 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. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

26 When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The

debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]).

27 It is also appropriate for the company to use the *CCAA* to effect the sale of the company's business as a going concern. While the main focus of the legislation is the reorganization of insolvent companies, a sales and investment solicitation process (SISP) may be the most efficient way to maximize the value of stakeholders' interests and minimize the harm which stems from liquidation: *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]).

28 When *CCAA* proceedings are in their early stages, it is appropriate for courts to give deference when considering extensions of the stay, provided the requirements of s. 11.02(3) have been met. See, for example, *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]).

29 The good faith and due diligence requirement of s. 11.02(3) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process.

30 I am satisfied that it is appropriate to grant the extension of the stay as sought by the Company. I reject the position of the customers that the Company has failed to put forward any kind of plan. The operating plan which the Company has begun to put in place responds to the existing cash flow problems and is intended to put the Company in a position to enhance the prospects of a viable restructuring and/or a future SISP.

31 It is more than a kernel of a plan. It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the Company. None of the parties suggested that the Company is acting with an absence of either good faith or due diligence, and I am satisfied from the evidence of Mr. Lindahl and the comments of the Monitor that the Company is indeed proceeding in a fashion which fulfills its obligations of good faith and due diligence.

The Interim Facility

32 I turn to my reasons for approving the interim financing. Subsection 11.2(4) of the *CCAA* sets out factors which the court must consider in determining whether to grant a priority charge to an interim lender. The factors in that section which are most relevant to this application are:

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> . . .
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report... if any.

33 While the factors listed in that section should be considered, the court may also consider additional factors, which may include the following as set out in *Timminco Ltd., Re*, 2012 ONCA 552 (Ont. C.A.) at para. 6, and I am paraphrasing:

> a) without interim financing would the petitioner be forced to stop operating;
>
> b) whether bankruptcy would be in the interests of the stakeholders; and
>
> c) would the interim lender have provided financing without a super priority charge...

34 In *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at paras. 58 and 59, the Court approved of the following factors which had been considered by the chambers judge:

a) the applicants needed additional financing to support operations during the period of the going concern restructuring;

b) there was no other alternative available and in particular no suggestion that the interim financing would have been available without the super priority charge;

c) the balancing of prejudice weighed in favour of approval of the interim loan facility.

35 When I consider all of these factors, I am satisfied that it is appropriate to approve the Interim Facility. My reasons for doing so include the following:

• The cash flow projections show that the $2.5 million from the Interim Facility will be sufficient to allow the Company to satisfy obligations along with its ongoing revenues from operations through to November 2015. By that time the SISP should be well underway and perhaps concluded.

• I accept the Monitor's comments regarding the Interim Facility and Forbearance Agreement. In other words, I accept that the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations.

• I further accept the Monitor's comment that cessation of the operations would negatively impact the reclamation of the Cantung Mine and tailings ponds and may have a negative impact on the market value of the Mactung property.

• The Interim Facility enhances the Company's prospects of carrying out a successful SISP and presenting a viable plan to its creditors. If it is forced to shut down its operations, the Company will likely not be able to continue these proceedings and could not continue with the SISP.

• Bankruptcy and a forced liquidation of the assets is not in the best interests of any stakeholder.

• It is unlikely that any creditor will be materially prejudiced by the priority financing. There are two significant reasons for this. First, I accept the Monitor's view that the equipment security is likely to be sufficient to satisfy the existing debt to Callidus. Second, to the extent that the payments to Callidus under the Interim Facility cover Post-Filing Payments, those will likely be offset by the fact that the ongoing operations will result in the conversion of substantial inventories of unprocessed ore. That ore is Cantung property and so it is currently subject to the existing Callidus security. Under the operating plan, revenue from that asset will be used for ongoing operations.

• I further accept the comments of the Monitor and the submissions of the Company that keeping the Cantung Mine operating will likely assist the Company in managing its environmental obligations and thus limit the risk that the GNWT will be faced with a significant reclamation project. As counsel for the Monitor indicated, abandonment of the mine is likely to result in greater costs. The situation would undoubtedly be somewhat chaotic.

• Finally, I conclude that the Interim Facility will further the policy objectives underlying the *CCAA* by mitigating the effects of an immediate cessation of the mining operations which would result in the loss of employment for the Cantung Mine workers and negatively impact the surrounding community.

36 Before concluding, I will make one final comment regarding the requirements of the Forbearance Agreement that the Company make the Post-Filing Payments to Callidus. The Initial Order permits such payments to Callidus. Further, there is nothing in the *CCAA* which prohibits these payments. In the circumstances I have already outlined above, the use of the inventories of unprocessed ore to fund ongoing operations would only be possible with the approval of the Interim Facility. In other words the Post-Filing Payments may be offset by the revenues earned from that asset, which would be a benefit to all creditors.

37 In summary, I am granting the extension of the stay. I believe the request was to July 17, 2015. I will hear from counsel on that issue if there is some other date that is preferred. Further, I approve the Forbearance Agreement and the Interim Facility in the amount of $2.5 million, and as previously indicated, the Gap Advance is not included in that.

38 What about the date for an extension of the stay?

39

MR. SCHULTZ: Yes, My Lord. So that'll turn a little bit on your availability actually, as was indicated by Mr. Sandrelli, the Company anticipates bringing an application to coincide with the end of the stay for a further extension and approval of a SISP. The Company is also hopeful that an application to approve as was alluded to some further financing from Callidus in respect to the GTP receivable. So I guess I am in your hands a little bit as to whether you might be available on the 17th for an hour to hear those.

40

THE COURT: I can be available, but it would have to be by telephone. I am in Williams Lake next week.

41

MR. SCHULTZ: Okay.

42

THE COURT: So I think that we should proceed with that because the next couple weeks after that I am probably not available.

43

MR. SCHULTZ: Okay. In that case then the 17th is probably the best day, and that would be the day we will be seeking the extension to for now.

44

THE COURT: All right. The stay is extended to July 17, 2015.

Applications granted.

2007 NSSC 347
Nova Scotia Supreme Court

Federal Gypsum Co., Re

2007 CarswellNS 629, 2007 NSSC 347, 163 A.C.W.S. (3d) 689, 261 N.S.R. (2d) 299, 40 C.B.R. (5th) 80, 835 A.P.R. 299

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 the Applicant, Federal Gypsum Company

A.D. MacAdam J.

Heard: November 5, 2007
Oral reasons: November 5, 2007
Written reasons: January 29, 2008
Docket: S.H. 285667

Counsel: Maurice P. Chaisson, Graham Lindfield for Federal Gypsum Company
Carl Holm, Q.C. for BDO Dunwoody Goodman Rosen Inc.
Thomas Boyne, Q.C. for Royal Bank of Canada
Robert Sampson, Robert Risk for Enterprise Cape Breton Corporation, Cape Breton Growth Fund Corporation
Michael Pugsley for Her Majesty in Right of the Province of Nova Scotia (Nova Scotia Economic Development), Nova Scotia Business Incorporated
Michael Ryan, Q.C., Michael Schweiger for Black & McDonald Limited

Subject: Insolvency; Civil Practice and Procedure

APPLICATION by debtor for permission to increase debtor in possession financing to $1.5 million and for extension of stay termination date.

***A.D. MacAdam J.*:**

1 Federal Gypsum Company, (herein "the Company" or "the Applicant"), having been granted a stay of proceedings pursuant to S. 11 of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-25 (herein "*CCAA*"), and, subsequently approval of arrangements for debtor in possession (herein "DIP") financing and an Order providing for extension of the Stay Termination Date set out in the initial Order, now applies for approval of arrangements for additional DIP financing.

2 The initial Stay Order provided for a 30-day Stay of Proceedings pursuant to s. 11(3) of the *CCAA*. The initial DIP financing application authorized DIP financing in the principal sum of $350,000.00. The time for filing the Plan of Arrangement under the *CCAA* and the Stay Termination Date were extended to November 29, 2007 at 4:00 p.m, by Order dated October 23, 2007. The Order also provided that "the Company shall file an Application before this Honourable Court relating to the consideration of further debtor in possession financing for a hearing on November 5, 2007 at 9:30 a.m." The Order also stipulated that the extension of the Stay Termination Date to November 29, 2007 was "subject to the right of the creditors of the Company to request a review and reconsideration" of the October 23 Order on the application for further DIP financing.

3 The Company now seeks an increase in the DIP financing from the original authorized $350,000.00 to $1,500,000.00.

4 Appearing on the Company's application were a number of secured creditors, including the Royal Bank of Canada, (herein "Royal Bank"), Cape Breton Growth Corporation, (herein "CBGC"), and Enterprise Cape Breton Corporation, (herein "ECBC"), (herein collectively referred to as the "Federal Crown Corporations"); Nova Scotia Business Inc. (herein "NSBI")

(e) finalize the elements of the Plan.

18 At para 18 Mr. Simpson continues:

> I believe that if the Stay Termination Date is not extended, some of the creditors of the Company will commence proceedings against the Company in relation to the enforcement of their security. Such proceedings would be highly prejudicial to the interests of the Company and would significantly impair the Company's ability to complete a successful restructuring.

19 Mr. Simpson's Affidavit, in outlining the present circumstances and the efforts of the company since the date of the initial order, also states that the Company "... is presently formulating a plan to present to its various stakeholders- including its creditors". Counsel notes the Company is arranging for an appraisal of its assets and negotiating with a lender to provide additional financing during the "near and medium term". Counsel suggests these factors demonstrate that:

> ... the Company has been proceeding diligently and in good faith since the Initial Order to assemble the elements of a plan to be presented to its stakeholders. There will be several elements to this plan and the Company requires additional time to bring these elements together. The Company's majority shareholder is motivated by the single goal of putting together a plan which will ensure the survival of the Company and, in so doing, protect, to the fullest extent possible, the interests of the stakeholders as a whole.

20 Counsel references *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.), where, at para. 28, Topolniski. J. comments on the supervisory role of the Court on such an application:

> The court's role during the stay period has been described as a supervisory one, meant to: '... *preserve the status quo and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure*.' That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.

21 The application for an extension of the Stay Termination Date was opposed on the basis that the performance by the Company did not generate confidence it had turned the corner and was likely to survive. The objecting creditors viewed the performance of the Company as further prejudicing their position in respect to the secured positions they held on the various assets of the company. They took this view, notwithstanding the Monitor's assessment that the Company, by its actions, appeared to be acting in good faith and with due diligence and moving forward towards the preparation of a Plan of Arrangement, and that the actual net cashflow of the Company was not adverse to the cashflow plan as presented on the initial Order. On the Application for the Stay Extension, counsel for the Nova Scotia Crown Corporations did not object to the extended Stay, but expressed a concern about the proposed increase in the DIP financing.

22 Considering the position of the creditors and the representations on behalf of the Company, the Stay Termination Date was extended to November 29, 2007 with the proviso that on the Application for further DIP financing the creditors could request a review and reconsideration of the extension.

Issue

23 At issue is whether the Company's application for approval of Arrangements for additional DIP financing should be approved, including the proposed payout of the Royal Bank operating loan, and whether the Court should reconsider the extension of the Stay Termination Date to November 29, 2007.

The Present Applications

Reconsidering the Extension of the Stay Termination Date

24 In respect to the Company's application to extend the Stay Termination Date, counsel on behalf of the Royal Bank had indicated the Bank's opposition both in writing and in oral submission. Counsel noted the burden of proof was on the Applicant. Counsel for the Company suggested circumstances existed that made it appropriate to extend the initial Order, in that the Applicant had acted, and continued to act in good faith and with due diligence. In this respect counsel refers to *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), where Farley, J. observed :

> The good faith and due diligence of the Applicant are not questioned.

25 On the reconsideration application, counsel for the Royal Bank acknowledged that neither the good faith nor due diligence of the Applicant were questioned, but said the Company had failed to show circumstances that made it appropriate to extend the initial Order. Counsel suggested that to cover the losses for the first seven months of 2007 the Company would have to increase its net sales by over 65%, and if one were to include all expenses and only the repayment of $1,000,000.00 per year on the total liabilities of more than $32,000,000.00, the Applicant would have to increase its net sales by 92%. Counsel noted the difficulties the Company has had in marketing its products and that in fact there has been a "decrease in sales from expected levels with a resulting decrease in accounts receivables". Counsel added that in the Monitor's second report he indicated sales were over $150,000.00 less than budget and expressed concern about the trend in sales. Counsel submitted that there is no evidence of a plan, referring again to reasons of Justice Farley in *Inducon Development Corp.*, *supra*, where he stated:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be a requisite for the germ of a plan.

26 Counsel for the Royal Bank suggested it is inappropriate to continue CCAA protection where the Company does not have, "at the least, a minimum outline of a plan".

27 In response to the Company's suggestion that the creditors "will not be materially prejudiced as the company continues to operate ....", Counsel said there is real prejudice, including:

> (a) interference with the rights of secured creditors to deal with their security and to maximize their recovery;
>
> (b) changing market conditions and the loss of potential purchasers of the assets;
>
> (c) deterioration in the value of assets through on-going use;
>
> (d) in the case of Royal Bank of Canada, the eroding of and loss of its security interest through the collection and use of accounts receiveable [sic] to fund the operations of the Applicant during the Stay;
>
> (e) costs of professionals in maintaining these proceedings, which in the case of the Applicant are recognized to be as great as $300,000;
>
> (f) professionals costs to the creditors; and
>
> (g) delay with regard to unsecured creditors in recognizing losses and the decisions that they must make in dealing with their own creditors on a go forward basis.

28 Counsel notes as unique the reality that the Company has never been profitable, whereas in many of the cases where *CCAA* orders are granted, the Companies have been in business for some period of time and, through circumstances, have suffered adversity which may be overcome through forgiveness and restructuring of debt obligations and the injection of equity to enable them to return to a state of profitability. The Company, counsel suggests, has never generated enough sales to even meet its operating expenses. Counsel adds that no evidence has been presented to the Court to indicate such a level of sales can be reached. As a result, counsel concludes, the Company has no reasonable expectation of reaching the required level of sales.

29 Notwithstanding the forceful submission of counsel for the Royal Bank, it is clear that although net sales have declined, the Company has also incurred lower expenses and has used less of the authorized DIP financing than had been projected in the cashflow projections filed on the initial DIP financing application. Like with the Monitor, I am concerned with the failure of the Company to meet the projected sales. There are, however, some positive indications from the information filed in the Monitor's report and outlined in the Affidavit of Rhyne Simpson, Jr., President and a Director of the Applicant. I am not satisfied the Company has reached the stage of "the last gasp of a dying company" or is in its "death throes ", although clearly any Plan of Arrangement will require compromise and cooperation between the Company and its stakeholders. During the course of submissions, counsel for the Company acknowledged that if additional DIP financing was not obtained the inevitable consequence would be the demise of the Company. The effect on the Company of terminating the extension of the Termination Date, as it relates to the opportunity for the preparation and presentation of a Plan of Arrangement, is evident. The prejudice to the creditors, although evident, is perhaps not so fatal. Although not necessarily indicative of the position of the Royal Bank, should, in due course, the Company fail, nevertheless on the financial information filed by the Monitor from information obtained from the Company's officers, it would not appear that there has been a substantial deterioration in the Royal Bank's secured position to date.

30 As a consequence I am prepared to grant the Order continuing the Stay Termination Date until November 29th, 2007, provided the Company is successful on the application for additional DIP financing.

The Additional DIP Financing

31 On the Application to extend the Stay Termination Date and to set the date for filing the Plan of Arrangement, counsel for the Company acknowledged that if the Company was unsuccessful in obtaining approval of arrangements for additional DIP financing, notwithstanding the extension, the Company would not be able to continue in operation while preparing and presenting to its creditors its proposed Plan of Arrangement. On the Application for the $1,500,000.00 DIP financing, the Monitor appointed on the initial application, in his third report to the Court, indicated the purpose was to replace the previous DIP lender, pay out the Royal Bank working capital loan, and provide additional DIP funds to allow the Company to continue operations and provide time to finalize and file a Plan of Arrangement for consideration by the creditors. The Monitor reported that its weekly cashflow projections, as prepared by the Company, indicated the requirement for DIP financing for the week of November 26, 2007 would be approximately $83,000.00 in excess of the present DIP financing approval limit. The report further indicated that beyond the Stay Termination Date of November 29, 2007 the requirement for DIP financing would increase significantly in the month of December 2007.

32 With the sole exception of the Royal Bank, the secured creditors oppose the application for additional DIP financing. The Royal Bank, in view of the stipulated intention to use the additional DIP financing to pay down its working capital loan, leaving only a second loan secured on certain leases, does not oppose the additional DIP financing. Absent the provision for repayment of its working capital loan, it is clear from the representations of counsel, both on this and earlier applications, that the Royal Bank would not consent to nor support the request for additional DIP financing.

33 On the application, counsel for the Company advised that the proposed DIP lender had stipulated certain changes in the terms of the proposed financing to require the first DIP lender to advance the remainder of the amounts authorized under the initial DIP Order and that the full amount of $350,000.00 be subordinated to its charge. There were changes relating to the "borrowing base" for the loans and a requirement that the priority of the "Administration Charge", which priority was provided for in the initial Order, was not to exceed the sum of $75,000.00. During the course of the application counsel also advised that other changes had been approved by the DIP lender, including verification of the amount upon which the lender was entitled to charge fees over and above the interest provided for in the offer of financing.

34 Counsel for the applicant, referencing the comment by C. Campbell, J. in *Manderley Corp., Re*, *supra*, at para 27, acknowledged the Court must engage in "the balancing act that is the hallmark of DIP financing". He notes Justice Glennie applied this balancing in considering the approval of super-priority funds, beyond those initially requested, when, in *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 244 (N.B. Q.B.), at para 9, he declared:

2009 CarswellOnt 4699
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

2009 CarswellOnt 4699, [2009] O.J. No. 3344, 179 A.C.W.S. (3d) 517, 57 C.B.R. (5th) 128

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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (Applicants)

Newbould J.

Heard: August 6, 2009
Judgment: August 11, 2009
Docket: CV-09-8247-00CL

Counsel: A. Duncan Grace for GE Canada Leasing Services Company
Daniel R. Dowdall, Jane O. Dietrich for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP
Sean Dunphy, Katherine Mah for Monitor, Ernst & Young Inc.
Kevin McElcheran for Toronto-Dominion Bank
Stuart Brotman for Independent Directors

Subject: Insolvency

MOTION by creditor for order to delete employee retention plan provisions in initial order.

***Newbould J.*:**

1 KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

2 GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

3 The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

4 The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

5 Grant Forest has total funded debt obligations of approximately $550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately $400 million. The second lien lenders are owed approximately $150 million.

6 Grant Forest has unsecured trade creditors of over $4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. $6.5 million.

7 The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately $50 million for debt financing provided to the business.

Analysis

8 Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

9 In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

10 I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

11 The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

12 Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

13 It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Ltée/ Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.). In that case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from *Warehouse Drug Store Ltd., Re*, [2006] O.J. No. 3416 (Ont. S.C.J.), that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

14 I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Nortel Networks Corp., Re*, [2009] O.J. No. 1188 (Ont. S.C.J. [Commercial List]), Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

15 In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

16 It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

17 It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors.

These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

18 A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

19 The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

> 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.

20 The first lien security holders owed approximately $400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

21 With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately $400 million are consenting and the second lien lenders owed approximately $150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately $50 million, supports the KERP provisions for Mr. Lynch.

22 In his work, *Canadian Insolvency in Canada*, *supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

23 In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy

submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

24 I have been referred to the case of *MEI Computer Technology Group Inc., Re* (2005), 19 C.B.R. (5th) 257 (C.S. Que.), a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

25 The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

Motion dismissed.

2018 ONSC 6980
Ontario Superior Court of Justice [Commercial List]

Aralez Pharmaceuticals Inc. (Re)

2018 CarswellOnt 19784, 2018 ONSC 6980, 299 A.C.W.S. (3d) 462, 65 C.B.R. (6th) 149

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 ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC. (Applicants)

S.F. Dunphy J.

Heard: November 16, 2018
Judgment: November 21, 2018
Docket: Toronto CV-18-603054-00CL

Counsel: Maria Konyukhova, Kathryn Esaw, for Applicants
Jeffrey Levine, for Official Committee of Unsecured Creditors
David Bish, for Monitor, Richter Advisory Group
Danish Afroz, for Deerfield Management Company, L.P.

Subject: Insolvency

Headnote

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

Key employee retention and incentive plans — Debtors were pharmaceutical companies that were granted protection under Act — Matter proceeded towards managed liquidation from start, and it was possible that two related secured creditors would be sole beneficiaries — Debtors proposed key employee retention plan (KERP) with respect to three employees and key employee incentive plan (KEIP) with respect to nine employees — Debtors brought motion for approval of KERP and KEIP — Motion granted — There was substantial evidence that process of negotiating and designing both plans had benefited from significant arm's length and objective oversight — Monitor had been consulted extensively, and monitor's recommendations were entitled to very significant weight — Secured creditors took no objections to plans — Design of plans demonstrated appropriate regard for criterion of necessity and were not over-broad — Inclusion of three employees in KERP was condition of purchaser under stalking-horse bid, and timing and amount of payments under KERP were well in line with precedent — This was classic case for well-designed KEIP — Targets in KEIP were realistic and appropriate and served to align interests of employees with stakeholders in appropriate manner, and incentive amounts were reasonable in all circumstances.

MOTION by debtors for order approving key employee retention plan and key employee incentive plan.

***S.F. Dunphy J.*:**

1 This case raises for determination the always-troubling question of Key Employee Retention Plans (or "KERPs") and Key Employee Incentive Plans (or "KEIPs"). At the conclusion of the hearing. I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

2 For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

3 The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies' Creditors Arrangement Act*, R.S.C. 1990, c. C.-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the same corporate group sought relief pursuant to Chapter 11 of the United States Bankruptcy Code on the same day. The Chapter 11 case is being managed by Justice Glenn in the United States Bankruptcy Court for the Southern District of New York. Both courts have adopted a cross-border protocol.

4 As their names suggest, the Aralez group of companies are in the pharmaceutical industry. The debtor companies have operated in an integrated manner and have 41 employees at the Canadian entities and 23 in the Chapter 11 entities.

5 In addition to being operationally integrated, Aralez has an integrated capital structure as well. The secured credit facility is secured by substantially all of the assets of the debtor companies on both sides of the border. The secured creditors — Deerfield Partners L.P. and Deerfield Private Design Fund III, L.P. — possess security on substantially all of the assets of the debtor companies on both sides of the border. The security in Canada has been subjected to independent review by the Monitor and its counsel and no issues have arisen nor have any creditors objected to their claims.

6 These cases have been targeting a managed liquidation from the start. On September 18, 2018, the Canadian and US entities entered into three stalking horse agreements and, pursuant to a court-ordered sales process order, are in the process of completing a bid process in the coming days. The three stalking horse bids place a "floor" under sale proceeds of approximately $240 million subject to possible adjustments. This compares to the secured claim of Deerfield that is approximately $275 million.

7 I understand that a motion may be brought in the United States to challenge some aspects of Deerfield's security in that jurisdiction (no such motion has been suggested in Canada to date). However, as things currently stand, the bid process underway would have to yield a fairly significant improvement from the existing stalking horse offers in order to result in surplus being available for junior creditor groups. The point of this analysis is merely to establish that Deerfield's input into the process of design of the KEIP and KERP programs before me is a material factor. Any funds diverted to KEIP or KERP programs have a substantial likelihood of coming out of Deerfield's pocket in the final analysis and any improvements or de-risking to either cash flow or sales proceeds will enure very substantially to Deerfield's benefit.

8 Stated differently — Deerfield has significant "skin in the game" when it comes to a KERP or KEIP.

9 Deerfield's interest acquires somewhat greater weight when one considers that one of the stalking horse bids (in the United States) is a credit bid whereas the Canadian stalking horse bid involves a sale of the assets of Aralez Pharmaceuticals Inc., resulting in the unsecured creditors of subsidiary Aralez Pharmaceuticals Canada Inc. being granted effective priority over Deerfield despite Deerfield's secured claims. Deerfield is thus very likely to be one of the only Canadian creditors substantially impacted by the KEIP or KERP.

10 This does not imply that the Court is a rubber stamp as to whatever Deerfield may have approved nor does it imply that other voices have no weight. It does imply that some comfort can be taken that this process has been subject to arm's length market discipline. Deerfield has an interest in getting as much as possible in the way of value-added effort out of the employee group and they have an interest in getting that effort at as low a cost as they can bargain for.

11 The KERP program involved only three employees, was reported upon extensively by the Monitor and was not opposed by any stakeholder. I approved it at the hearing with reasons to follow (these are those reasons). The KEIP program affects nine senior management employees whose services are provided to both the Canadian and United States debtors and was accordingly presented to both courts for approval. I am advised that Justice Glenn approved the KEIP program for purposes of the United States debtors on November 19, 2018.

12 While the KERP and KEIP programs were presented to me separately, they have many features in common. Were this not a transnational proceeding, it is quite likely that I should have had but a single combined KERP-KEIP program before me since these are not commonly differentiated in this jurisdiction. Different considerations obtain in the United States where KERP

programs for some categories of employees are not allowed and KEIP programs are subject to specific rules one of which is that the predominant purpose of a KEIP must be *incentive* and not *retention*. Both are appropriate criteria in our process. In approving the KEIP program for the United States debtors, Justice Glenn indicated that he was satisfied that the KEIP program was designed primarily to incent the beneficiaries of the program.

13 The Canadian KERP impacts three employee of Aralez Pharmaceuticals Canada Inc. The KERP would provide these three with a retention bonuses of between 25% and 50% of salary. The total amount payable under the proposed program would be $256,710 and payment is to be made on the earlier of termination without cause, death or permanent disability and the closing of a sale of the Canadian assets.

14 The KEIP impacts nine senior management employees of the Canadian debtors who provide services (in all but one case) that benefit both estates. None of the KEIP participants are expected to have on-going roles once the bankruptcy sales process is completed. The program is designed to incent participants to assist in achieving the highest possible cash flow during the bankruptcy process (thereby reducing the need to rely upon DIP financing) and to achieve the highest level of sales proceeds. Cash flow is measured relative to the DIP budget and nothing is payable until sales are completed.

15 The affected individuals are members of the senior management team that can be expected to be in a position to achieve a positive impact upon both criteria (cash flow and sales proceeds), but their roles are such that the level and value of the contributions of each towards those targets are difficult to measure with precision. Total payouts under the "super-stretch" targets could rise to as much as $4,058,360. This figure may be compared to the stalking horse bids that establish a floor price of $240 million.

16 Since all but one of the participants in the KEIP program are providing services for the benefit of both United States and Canadian debtors, the KEIP program has been designed such that costs will be shared by the two estates regardless of residence.

17 The design of the two programs was supervised by Alvarez & Marsal Inc, the financial advisor to the United States and Canadian debtors. The Compensation Committee of the parent company's Board was involved as was the debtor's counsel. The Monitor was consulted at every step in the process and provided significant input that was taken into account. The Board of Directors of each affected entity has approved the plans.

18 The programs were disclosed to the proposed beneficiaries at or near the outset of the bankruptcy process. At the request of the DIP Lender, court approval of these programs was not sought at that time as is relatively common. The stalking horse bids were several weeks away from being finalized and significant effort from the affected employees would be needed to but those transactions to bed. The sales process that followed also needed to be put on the rails and the all hands were needed to ensure that the business passed through the initial stages of the bankruptcy filing without undue adversity. In short, the affected employees were asked to acquiesce in the deferral of approval of these programs with the understanding that the employer would pursue their approval in good faith.

19 With only a few weeks remaining until the expected end of the sales process, it is fair to observe the employees have more than delivered on their end of the bargain. Cash flow has held up very well and the stalking horse bids have been firmed up at a favourable level.

20 The motion for approval of the KEIP (not the KERP) was opposed by the Official Committee of the Unsecured Creditors appointed pursuant to the United States Chapter 11 process. I shall not review here the nature of their standing claim — and the dispute of that claim. Their intervention has been focused, their arguments precise and the prospect of harm in the form of unnecessary delay or expense is minimal. Without prejudice to the position of everyone on the status of this committee in other contexts, I agreed to hear them and receive their written arguments. The cross-border protocol that both courts have approved affords me discretion to allow the Official Committee standing on a case-specific or *ad hoc* basis.

21 In the view of the Official Committee, the KEIP program bonuses are too high and too easily earned. I shall address both of these arguments below.

Issues to be determined

22 Ought this court to exercise its discretion to approve the KERP or KEIP programs as proposed by the applicants?

Analysis and discussion

23 KERP/KEIP programs throw up a number of thorny issues that must be grappled with because there are a number of potentially conflicting policy considerations to balance.

24 The early stages of an insolvency filing are chaotic enough without having added pressures of trying stem the hemorrhage of key employees. "Key" is of course an elastic concept. Everyone is key to someone. Employees are not hired to amuse management but to perform necessary functions. Sorting out "key" in the context of the organized chaos that is the early days of an insolvency filing requires a weathered eye to be cast in multiple directions at once:

- restructuring businesses often have inefficiencies that need identifying and resolving that may impact some otherwise "key" employees;

- with the levers of traditional shareholder oversight blunted in insolvency, the risks of management resolving conflicts in favour of self-interest are acute;

- it is easy to overstate the risk of loss of key employees if a "bunker mentality" causes management to take counsel of their fears rather than objective evidence, such evidence to be informed by a recognition that *some* degree of instability is inevitable; and

- "business as usual" is a goal, but never a perfectly achievable one and small amounts of stability acquired at high cost may be a bad investment.

25 While the risks of abuse or wasted effort are easily conjured, the legitimate use of an appropriately-calibrated incentive plan are equally obvious:

- Employees in newly-insecure positions are easy prey to competitors able to offer the prospect of more stable employment, sometimes even at lower salary levels, to people whose natural first priority is looking after their families;

- There is a risk that the most employable and valuable employees will be cherry-picked while the debtor company may find itself substantially handicapped in trying to compete for replacement employees;

- Whether by reason of internal restructuring or a court-supervised sales process, employees may often find themselves being asked to bring all of their skills and devotion to the task of putting themselves out of work; and

- Since many employers use a mix of base salary and profit-based incentives, employees of an insolvent business in restructuring may find themselves being asked to do more — sometimes covering for colleagues who have being laid off or who have left for greener pastures - while earning a fraction of their former income.

26 What is wanting to sort out these competing interests is one thing that the court — on its own at least — is singularly ill-equipped to provide. It is here that the essential role of the Monitor as the proverbial "eyes and ears of the court" comes to the fore. The court cannot shed its robe and wade into the debate in a substantive way. The Monitor on the other hand can shape the manner in which the debate is conducted and in which the decisions presented to the court for approval are made.

27 What the court is unable to supply on its own can be summed up in the phrase "business judgment". Outside of bankruptcy, the debtor company is entitled to exercise its own business judgment in designing such programs subject to the oversight of shareholders and the directors they appoint. Inside bankruptcy, the oversight of the court is required to assess the reasonableness of the exercise of the debtor company's business judgment. In my view, the court's role in assessing a request to approve a KERP

or KEIP program is to assess the totality of circumstances to determine whether the process has provided a reasonable means for *objective* business judgment to be brought to bear and whether the end result is objectively reasonable.

28 Perfect objectivity, like the Holy Grail, is unattainable. However, where business judgment is applied in a process that has taken appropriate account of as many of the opposing interests as can reasonably be brought into the equation, the result will adhere most closely to that unattainable ideal.

29 My review of the limited case law on the subject of KERP (or KEIP) approvals suggests that there are no hard and fast rules that can be applied in undertaking this task. However the principles to be applied do emerge. Morawetz J. suggested a number of considerations in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) (CanLII), relying on the earlier decision of Newbould J. in *Grant Forest Products Inc., Re* [2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])], 2009 CanLII 42046 [1] . I reproduce here the synthesis of Morawetz J. (*Cinram*, para. 91):

1 See also Pepall J. (as she then was) in *Canwest Global Communications Corp., Re* [2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List])], 2009 CanLII 55114 at para. 49-52.

> a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
>
> b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
>
> c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
>
> d. the employees' history with and knowledge of the debtor;
>
> e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
>
> f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
>
> g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
>
> h. whether the payments under the KERP are payable upon the completion of the restructuring process.

30 I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:

> (a) *Arm's length safeguards*: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process — from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.
>
> (b) *Necessity*: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in

the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.

(c) *Reasonableness of Design*: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

(a) Arm's length safeguards

31 In my view, there is substantial evidence that the process of negotiating and designing both programs has benefitted from significant arm's length and objective oversight in the negotiation, design and implementation phases of these two programs.

32 The process leading to both programs began prior to the insolvency filings on August 10, 2018. Aralez had engaged A&M as its financial advisor for the restructuring process and asked A&M to help formulate both the key employee incentive and retention programs. A&M worked on program design in consultation with the debtor's legal counsel and with input from the compensation committee of the Aralez Pharmaceuticals Inc. Board of Directors, none of whom are beneficiaries of either program.

33 The Monitor has been consulted extensively. The Monitor has inquired into the design and objects of the proposed plans and has verified the levels of the proposed incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

34 The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

35 Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

36 The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

37 In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

38 The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

39 Any analysis of whether a program is over-broad must take into account the nature of the business. In some respects, Aralez may be likened to a virtual pharmaceutical company in that it out-sources many functions of a traditional pharmaceutical company such as manufacturing. It thus has relatively few employees compared to its size.

40 In designing the programs and assessing which employees to be included, an assessment was undertaken of each prospective beneficiary in terms of the ease with which they might be replaced, the degree to which they are critical to daily operations of the debtor companies or completion of the sales process and — for the KERP program at least — the perceived level of retention risk. The Monitor's input was sought at each level of the design and finalization of the programs.

41 The KERP program involves three employees in Canada and I am advised that their inclusion in the KERP is a condition of the purchaser under the stalking-horse bid. The loss of these three employees — critical to the Canadian business being sold — would endanger the stalking horse bid process at worst and disrupt the business being sold by requiring the debtor companies to deal with recruiting, transition and similar matters at a juncture where they are least able to deal with them at best. Their departure at this juncture would entail significant additional expenditures in terms of professional time at least if that event did not endanger the stalking horse bid.

42 The KEIP program involves nine members of senior management. They are employees the nature of whose function defies precise description or measurement. They are employees who act in concert with each other as part of a team for whom neither the clock nor the calendar play more than a subsidiary role in dictating their hours of labour. These employees are essential to ensuring the business remains stable and performs well during the restructuring process. They play a key role in helping ensure the sales process achieves the highest level of return. They are also employees most of whom are laboring under the near certainty that the more efficient and successful they are in their efforts, the sooner they will be out of a job.

43 At such a high level, personal reputation and professional pride remain as significant motivators to be sure. While a job well done may be its own reward, appropriate financial incentives are not without their place. This is a classic case for a well-designed incentive program.

44 I am satisfied that the design of these programs satisfies the criterion of necessity.

(c) Reasonableness of design

45 The KERP program provides for retention bonuses ranging from 25% to 50% of annual salary. The aggregate compensation available is $256,710, a figure that may be contrasted to the stalking horse bid for the Canadian assets of $62.5 million. Payment is made on the earlier of termination without cause by the company, death or permanent disability and the completion of the sales transaction.

46 The timing of payments and the amount of the payments provided for, relative both to the salary of the individuals and to the value of the company, are both well in-line with precedent.

47 The KEIP program provides for incentive payments to participants based on the debtors' performance relative to target established for cash flow targets during the bankruptcy proceedings and relative to the achieved asset sale proceeds. Failure to reach targets results in no bonus, while four levels of bonus are possible (Threshold [2] , Target, Stretch and Super Stretch).

2 The threshold incentive based on cash flow was removed after discussions with the United States Trustee.

48 The real controversy on the motion was in respect of the KEIP.

49 It is true that the cash flow performance of the debtors to date plus the projections of cash flow over the coming weeks put the KEIP participants well on track to achieving the highest "super-stretch" level of incentive. It is also true that if *no* bids are received in the sales process now underway and only the stalking horse bids are completed, the participants will be comfortably within the "target" level of incentive for asset sales. Combined, this means that that total incentives of approximately 81.25% of salary appears to be all but assured to KEIP participants. In the circumstances, the Official Committee objects that these incentives are simply too easily earned.

50 They also object to the level of incentives relative to salary as being unacceptably high.

51 The answer to both of these objections lies in the peculiar facts of this case.

52 The KERP and KEIP programs were both conceived of and designed primarily in the period leading up to the initial filings made in August 2018, although alterations have been made following the input of, among others, the United States trustee. The employees selected for inclusion in both programs have been operating in the expectation that the employer would proceed in good faith to seek court approval as soon as practicable. At the request of the DIP Lender, the process of seeking court approval was deferred to put priority on the process of securing and finalizing the stalking horse bids and getting the sales process underway. At the time these plans were first offered to employees, forecasting cash flow in bankruptcy and sales proceeds was looking through a glass darkly. It is only hindsight — and the past efforts of the employees — that has made the targets appear to be such an easy goal.

53 Of course, the employer could not promise and the employee could not expect that court approval of these plans would be a rubber stamp. That does not mean that this court should not take into account the circumstances prevailing when the plans were first offered to employees and the good faith of the employees in continuing to apply their shoulders to the wheel without causing disruption to the process when it could least afford it. It would be fundamentally unfair to penalize the affected employees for their good faith and constructive behavior in this case. It would also be counter-productive as such a precedent would not fail to alter behavior in future cases.

54 I am satisfied that the targets were realistic and appropriate at the time they were set and served to align the interests of employees with stakeholders in an appropriate manner.

55 The level of incentive is also less than meets the eye when the facts are examined more closely. While the combined cash flow plus asset sale incentives could result in incentives of up to 125% of salary, that figure is premised on base salary. In the case of the employees within the proposed KEIP program, base salary has been but one portion of their total compensation. When historical compensation is taken into account, the incentive payments recede to levels significantly below the 80% level calculated by the Official Committee to something closer to 50%.

56 I am satisfied that the incentive amounts are reasonable in all of the circumstances.

Disposition

57 In the result, I confirmed the KERP program at the hearing of the motion on December 16, 2018 and am granting the motion in respect of the KEIP program at this time. My approval extends to the requested priority charges securing the KEIP payments.

58 Order accordingly.

Motion granted.

End of Document

2021 ONSC 7630
Ontario Superior Court of Justice [Commercial List]

Just Energy Group Inc. et al.

2021 CarswellOnt 17465, 2021 ONSC 7630, 339 A.C.W.S. (3d) 303, 95 C.B.R. (6th) 264

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

Koehnen J.

Heard: November 10, 2021
Judgment: November 18, 2021
Docket: CV-21-00658423-00CL

Counsel: Jeremy Dacks, Marc Wasserman, Michael De Lellis, Shawn Irving, Emily Paplawski, Jonah Davids, Michael Carter, for Just Energy Group
Neil Herman, Allyson Smith — U.S. Counsel to the Just Energy Group
Ryan Jacobs, Jane Dietrich, Alan Merskey — Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
David Botter, Sarah Schultz, Anthony Loring — U.S. Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
Heather Meredith, James D. Gage — Canadian Counsel to the Agent and the Credit Facility Lenders
Howard Gorman, Ryan Manns, Travis Torrence, for Shell Energy North America (Canada) Inc. and Shell Energy North America (US)
Robert Kennedy, David Mann — Canadian Counsel to BP Canada Energy Marketing Corp., for BP Energy Company, BP Corporation North America Inc., and BP Canada Energy Group ULC
Tyler Planeta, for Plaintiff, Stephen Gilchrist (in proposed securities class proceeding in SCJ at Toronto, File No. CV-19-627174-00CP)
Steven Wittels, Susan Russell — 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.
Bevan Brooksbank, for Chubb Insurance Company of Canada and Zurich Insurance Company of Canada
Robert Thornton, Rebecca Kennedy, Rachel Bengino, Puya Fesharaki, Paul Bishop, Jim Robinson, for FTI Consulting Canada Inc., as Monitor
John F. Higgins — U.S. Counsel to FTI Consulting Canada Inc., as Monitor

Subject: Civil Practice and Procedure; Insolvency; Insurance

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

As part of transaction under Companies' Creditors Arrangement Act (CCAA) proceedings, one of applicant's affiliates was to be wound up and dissolved, and applicant would receive substantial tax benefits — Affiliate did not strictly meet solvency requirements — Applicant brought motion for order extending stay under CCAA, amending debtor in possession financing term sheet, approving transaction for wind up, second key employee retention plan, and motion for leave to sell shares in private company — Motions granted — Only contentious issue on first motion was proposal for second key employee retention plan (KERP) — CCAA proceeding put employees in highly vulnerable position and this created material risk for employee departures — No one took issue with identity of beneficiaries or importance of successful restructuring — Applicant's business was complex and highly regulated and it would not be easy to find replacements if employees left — KERP extended well beyond senior management and was supported by creditors; only objections came from class action plaintiffs, but their action was not yet certified — KERP approved with sealing order made over employee's names and compensation details — Applicant acted with due diligence so extensions sought were granted — Objective of wind up was to realize tax losses and this would not prejudice creditors — Transaction that was subject of second motion was best opportunity applicant had and approval was somewhat academic given shares were subject to drag along right that would compel their sale when approved by board and shareholders anyway — Solvency requirements in CCAA were breached only if viewed in isolation and divorced from transactions as whole, and end result generated net benefit to applicant by making more assets available — There was no prejudice to stakeholders.

MOTION by company for order extending stay under *Companies' Creditors Arrangement Act*, amending debtor in possession financing term sheet, approving transaction for wind up and second key employee retention plan, and motion for leave to sell shares in private company.

***Koehnen J.*:**

1 The applicants Just Energy Group Inc. and its affiliates bring two motions. The first is for an order extending the stay under the *Companies' Creditors Arrangement Act*, [1] amending its Debtor in Possession Financing Term Sheet, approving a transaction for the wind up of Just Energy Finance into Just Energy and approving a second key employee retention plan (the "Second KERP"). On the second motion, Just Energy and its relevant affiliates seek leave to sell shares in a private company. As part of that transaction one of the Just Energy affiliates would be wound up and dissolved. Doing so would allow Just Energy to capture over $6 million in tax benefits. Strictly speaking, however, the affiliate does not meet the solvency requirements that corporate law imposes before a corporation can be wound up. At the end of the hearing I approved orders granting the relief requested in respect of both motions with reasons to follow. These are those reasons.

1 Companies' Creditors Arrangement Act, RSC 1985, c. C-36

The First Motion

I. The Second KERP

2 The only contentious element of the first motion is Just Energy's proposal for a second KERP in the amount of $4,381,934.

(a) The Request for an Adjournment

3 Ian Wittels appeared as US counsel for a group of class action plaintiffs who have commenced a complaint in the United States. The complaint alleges that one or more of the applicants has fraudulently overcharged American consumers for their energy needs. He sought an adjournment to consider his position on the KERP and indicated that he may be objecting to it

because it removes assets from the CCAA estate which could otherwise be used for the benefit of his clients. I declined the adjournment.

4 The class action claim was filed in the US courts approximately 2 $^{1}/_{2}$ years ago. This was long before the CCAA proceeding began in early March 2021. The class-action plaintiffs have therefore had the possibility to investigate matters and seek Canadian legal advice for some time. They did not object to the first KERP that was approved in March 2021 and which provided for total payments of $6,679,625.

5 The motion materials for the second KERP were served seven days before the hearing. The class action plaintiffs raised no objections until the hearing before me on November 10. This is a large CCAA proceeding with a significant number of stakeholders who have appeared throughout, including at the hearing on November 10.

6 I was not given any satisfactory reason for which the class action plaintiffs were unable to raise concerns with the applicants or the Monitor before the hearing on November 10. After declining the adjournment, I invited Mr. Wittels to make submissions opposing the Second KERP.

(b) Objections to the Second KERP

7 The factors to consider in determining whether to approve a KERP include (i) the approval of the Monitor; (ii) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP is not approved; (iii) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company; (iv) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and (v) the business judgment of the board of directors of the debtor. These factors were found to support the first KERP. They are equally relevant in determining whether to approve the second KERP.

(i) Approval of the Monitor:

8 The Monitor supports the Second KERP. Indeed, it was developed with input and feedback from the Monitor.

(ii) Likelihood of Employee Departures

9 The class action plaintiffs submit that the applicants have introduced no evidence that employees would actually leave without a Second KERP, and that any evidence in that regard is speculative.

10 The applicants have described the increased hardship that key employees have suffered since the commencement of the CCAA proceeding. In addition to carrying on their regular duties as Just Energy employees, key employees have assumed the considerable burden of administering the CCAA proceedings and advancing the prospects of a plan. This has been no easy task. Just Energy is a highly regulated business. The company is subject to separate regulatory regimes in each state or province in which it operates. It has complex commercial arrangements with suppliers and a number of secured and unsecured lenders. The integrity of those arrangements in turn depends on Just Energy's compliance with regulatory requirements. Developing a plan in these circumstances involves complex, detailed discussions with regulators, suppliers, and creditors. These discussions have become even more cumbersome and time-consuming than they would ordinarily be because of the Covid 19 pandemic. This has led Just Energy management to have serious concerns about employee burnout.

11 As a practical matter, it would be extremely difficult, if not impossible, to introduce hard evidence that employees will leave without a KERP. As an equally practical matter, however, CCAA proceedings put employees into a highly vulnerable position. They have no idea what will become of their employment at the end of the CCAA proceeding. They do not know whether they will retain their positions or whether the enterprise will be merged with another entity which will rationalize its human resources requirements resulting in the termination of a significant number of key employees. They do not know whether the Just Energy entity that emerges from the plan will have the same manpower needs as it currently has or whether it will also materially reassess its human resources requirements. In those circumstances, it is very tempting for an employee to accept a

position with another employer that seems to offer more job stability than an entity in CCAA proceedings can. That creates a material risk of employee departures.

(iii) Are Beneficiaries of KERP Critical to a Successful Restructuring

12 Both the applicants and the Monitor believe the beneficiaries of the KERP are critical to the success of the restructuring.

13 The first KERP was approved in March. Since then no one has taken issue with the identity of the beneficiaries or their importance to a successful restructuring.

(iv) Ease of Replacing Departing Employees

14 While employees can always be replaced, finding a replacement with equal skill and knowledge of Just Energy's business and operations is very difficult in the time pressured atmosphere of a CCAA proceeding.

15 This is particularly so with Just Energy. As noted in paragraph 10 above, it is a complex, highly regulated business. That makes bringing new employees up to speed a more time-consuming process. Time in a CCAA proceeding translates into cost and potential prejudice to a plan.

(v) Business Judgment of the Board

16 The Board of Just Energy has concluded that the Second KERP is required to promote a plan. The KERP extends well beyond senior management. This is not a situation of the Board keeping its friends in management happy. Rather, the KERP appears to be a considered plan to identify employees throughout the enterprise whose retention is important for the plan.

17 In addition to the business judgment of the Board, I would add the business judgment of the creditors. The principal lenders and suppliers to Just Energy are highly sophisticated entities. They have no interest in having Just Energy dissipate its assets on wasteful employee bonus schemes. They do have an interest in recovering on their debt. They have concluded that the best way to do that at the moment is to proceed with the Second KERP. This includes unsecured lenders with loans of approximately (US) $300 million. Those are creditors with hard claims for monies already advanced. The class action plaintiffs, on the other hand have an unliquidated claim for damages in a class action that has not yet been certified, let alone tried.

18 Mr. Wittels submits that there are millions of American consumers who have been disadvantaged by the allegedly fraudulent conduct of the applicants. In those circumstances, he submits that the court "should be putting the brakes" on payments to employees. He further submits that the plaintiffs' ability to recover on their $2 billion claim will be reduced if corporate funds are siphoned off by payments to employees under the Second KERP.

19 The principle behind the KERP is not to deprive creditors of recovery but to improve creditor recovery by maintaining the applicant's ongoing business by retaining key employees.

20 A KERP can be seen as an investment in the ongoing enterprise. If the investment is successful, there will be much more to distribute to creditors as a result of a plan than there would be without the KERP. Whether a plan might have been possible without a KERP can only be assessed after the fact. Entities in CCAA protection do not, however, have that luxury. They may equally find out after the fact that employees have fled leaving them incapable of advancing a plan. At that point it is too late to implement a KERP.

21 Like any other investment, KERPs have risk. There is a risk that the KERP will not result in larger creditor recovery at the end of the day. The applicants served their motion on 400 parties including secured and unsecured creditors. All but the class action plaintiffs appear to agree that the best way forward is to continue the CCAA proceeding with a Second KERP.

22 The First KERP was developed based on the expectation that the restructuring would be largely concluded but for regulatory approvals by the end of 2021. It was therefore structured to provide employees with payments in September and December 2021. The size and complexity of the proceeding have not allowed the plan to advance as much as Just Energy would

have liked to. Approximately 80% of the payments on the first KERP have already been paid out. The balance will be paid out in December 2021 and March 2022.

23 Just Energy estimates that it requires employees to remain until at least June 2022. There is significant concern that the balance of the First KERP does not provide sufficient incentive for key employees to remain until June 2022.

24 The Second KERP is designed to incentivize employees to remain. It envisages paying retention bonuses to nonexecutive employees in March and September 2022. If a successful restructuring occurs before September, the final KERP would be paid at that time. Executive KERP recipients will receive one instalment in March 2022 and a second success-based payment on completion of a successful restructuring.

25 In light of the foregoing considerations, I am satisfied that the Second KERP should be approved.

(c) The Sealing Order

26 As part of the approval of the Second KERP, the applicants also seek an order sealing details of the amounts paid to individual employees.

27 In *Sherman Estate v. Donovan*,[2] the Supreme Court of Canada held at para. 38 that an applicant for a sealing order must establish that:

2 2021 SCC 25

> (i) court openness poses a serious risk to an important public interest;
>
> (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.

28 All 3 factors are satisfied here. The documents the applicants seek to seal contain the names of the KERP recipients and the amounts each will receive. Publicly disclosing employee compensation violates the privacy interest of those employees. The employees themselves have not initiated any court proceeding that would require production of that information. Broad publication of confidential income data could create risks for employee retention in this and other CCAA proceedings.

29 In *Ontario Securities Commission v. Bridging Finance Inc.*[3] Chief Justice Morawetz recently granted a sealing order over the details of a KERP in similar circumstances. I am satisfied that it is equally appropriate to make that order here. The limitation on the open courts principle is minimal. The order is proportional. It benefits in protecting privacy interests of non-party employees outweigh the very limited impact on the open courts principle.

3 2021 ONSC 4347 at paras. 25-27.

II. The Stay Extension

30 There is no opposition to the request to extend the CCAA stay from December 17, 2021 to February 17, 2022. The court has discretion to extend the stay if circumstances exist that make doing so appropriate and if the applicant continues to act in good faith and with due diligence towards a plan.[4] I am satisfied from my review of the Fourth Report of the Monitor that the applicant is doing so. In addition, the Just Energy cash flows produced on the motion demonstrate that the applicants have sufficient funds to continue operations until February 17, 2022. As a result, I extend the stay until February 17, 2022.

4 CCAA, ss. 11.02(2) -11.02(3)

III. The Amended DIP Term Sheet

31 The applicants seek to extend the term of their DIP loan from December 31, 2021 to September 30, 2022. They do not seek to increase the amount of the loan. The extension involves payment of a 1% financing fee which amounts to a payment of approximately (US) $1,250,000.

32 No one opposed the DIP extension. That said, the payment of the extension fee raises the same issues about potentially reducing the size of the estate available to the class action plaintiffs as does the Second KERP. I will therefore proceed on the basis that the class action plaintiffs oppose the DIP extension even though Mr. Wittels did not expressly raise that argument. I take this approach because it struck me that the class action plaintiffs may have become alive to the issues that the CCAA poses for them fairly late in the day.

33 To the extent that a CCAA proceeding ultimately fails, there is always the risk that the cost of the financing fee associated with the extension will further diminish the pool of assets available for creditors. As with the KERP, however, the ultimate goal is to have more money available for creditors in a CCAA proceeding than would be available in a bankruptcy.

34 Section 11.2 (4) provides that the court should consider, among other things, the following factors when considering interim financing:

> (a) the period during which the company is expected to be subject to proceedings under the CCAA;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the view of the monitor.

35 Those factors are also appropriate to consider when considering amendments to DIP financing. [5]

5 *Re* Laurentian University of Sudbury, 2021 ONSC 3545, at para. 39

36 Applying those factors here, I am satisfied that the DIP extension should be approved.

37 The applicants expect to finalize a plan some time between June and September of 2022. The applicants have the support of their creditors. To date, no creditor has spoken against the DIP extension or any other issue involving management of the Just Energy group. The expiry of the DIP facility on December 31, 2021 would put an end to Just Energy's ability to arrive at a plan. The extension of the DIP facility would considerably enhance the prospects of a viable plan. The monitor supports the extension of the DIP facility. The monitor specifically references the extension fee in its report and believes it to be reasonable. Just Energy continues to be a significant enterprise with hundreds of employees. The company has been moving in good faith towards a plan, but the business is of such a complexity that it has taken longer than initially anticipated. This is not surprising. The company is subject to a myriad of regulatory regimes across the United States and Canada. It has complex commercial arrangements with suppliers and a number of secured and unsecured lenders, the integrity of which in turn depends on Just Energy's compliance with regulatory requirements.

38 In the foregoing circumstances, I am satisfied that the DIP loan should be extended.

IV. The Just Energy Finance Transaction

39 The applicants seek court approval to undertake a transaction that would wind up JE Finance into Just Energy and subsequently file articles of dissolution in respect of JE Finance. The applicants seek approval of the transaction because JE Finance and Just Energy are applicants in this proceeding and because paragraph 13 (c) of the Second Amended and Restated Initial Order dated May 26, 2021 prevents the applicants from reorganizing a material portion of their business without court approval.

40 The ultimate objective of the Finance dissolution is to realize tax losses in Just Energy Hungary (a wholly owned subsidiary of JE Finance). As part of the proposed transaction certain intercompany loans will be set off against each other and all remaining assets and liabilities of JE Finance will be rolled into Just Energy. No creditors will be prejudiced by that transaction and no creditors oppose it. The Monitor supports the transaction.

41 The transaction is consistent with the objectives of the CCAA, principally because it maximizes the value of the debtor's assets for the benefit of all stakeholders. In those circumstances, I am satisfied that the JE Finance transaction and its subsequent dissolution should be approved.

The Second Motion: The ecobee Transaction

42 Just Management Corp. ("JMC") is a wholly owned subsidiary of Just Energy. JMC owns shares in ecobee Limited ("ecobee"). ecobee has entered into a proposed transaction with Generac Power Systems Inc. which it proposes to conclude by way of a plan of arrangement. JMC would like to support that transaction and seeks an order authorizing it to enter into a Support Agreement pursuant to which it would agree to be bound by the arrangement and would dispose of its ecobee shares pursuant to the arrangement.

43 The notice of motion seeking approval of the ecobee transaction was delivered only the day before the hearing. The relief it seeks was, however, set out in an affidavit that was served a week earlier. Given the nature of the transaction which is described below and the description of it in the earlier affidavit, I was prepared to consider it on November 10 despite the short notice.

44 Court approval is required because the Initial and subsequent Orders require court approval for any refinancing, restructuring, sale, or reorganization of the Just Energy entities' businesses. A further issue arises because the *Canada Business Corporations Act*[6] (the "CBCA"), pursuant to which JMC is incorporated, makes dissolution available only to solvent corporations. Given that JMC is an applicant in this proceeding and given that it will have transferred its only valuable asset, the ecobee shares, to Just Energy before dissolution, it fails to meet the solvency requirement for a dissolution.

6 Canada Business Corporations Act, RSC 1985, c C-44

45 In deciding whether to grant authorization under subsection 36(1) of the CCAA for a sale of assets outside the ordinary course of business, the CCAA court will consider the following non-exhaustive factors:

(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. [45]

46 I am satisfied that those factors have been met.

47 Just Energy acquired the ecobee shares in 2012 for approximately $6.4 million. Just Energy has been trying to sell its ecobee shares for several years without success. As a result of the arrangement, Just Energy anticipates receiving approximately $61,000,000. Of that, approximately $18,000,000 will be received in cash on completion of the Arrangement. The remaining $43,000,000 will be received in publicly traded shares of Generac. Just Energy will be free to dispose of those shares immediately. They are not subject to any hold provision. In addition, if certain performance targets are met, Just Energy has the potential to receive an additional $10,000,000 of Generac shares in 2022 and 2023.

48 Ecobee has also been looking for a strategic transaction for quite some time. The Generac transaction is the best opportunity that has presented itself.

49 The Monitor approves the sale of the shares and has filed a report stating that, in its view, the sale of the shares would be more beneficial to creditors than any other transaction. No creditors oppose the transaction. The effect of the proposed sale is highly beneficial to creditors because it will inject significant amounts of cash into the CCAA estate.

50 Moreover, to some extent the question of approval of the sale of the shares is academic because they are subject to a drag along right which would compel Just Energy to sell the ecobee shares pursuant to any transaction that is approved by the ecobee board and a majority of the votes cast by each class of ecobee shareholders. The majority of each class has already committed to support the proposed Arrangement.

51 This brings me to the proposed wind up and dissolution transaction that is proposed as part of the sale of the ecobee shares.

52 The court has jurisdiction to approve the wind up and dissolution transactions pursuant to its general power to make appropriate orders under section 11 of the CCAA. As noted, however, certain aspects of the wind up and dissolution transaction raise further complications. Those include the following:

(i) The stated capital of JMC will be reduced to zero. Although permitted by corporate law, it is potentially subject to a solvency test under section 38 (3) of the CBCA.

(ii) JMC will purchase for cancellation preferred shares that Just Energy Ontario LP holds in JMC. Share repurchases are also subject to corporate solvency tests in subsection 34 (2) of the CBCA. In light of the fact that JMC is a co-guarantor of certain Just Energy indebtedness and is an applicant in this proceeding, the solvency test is most likely not satisfied.

(iii) JMC will be voluntarily dissolved. Section 208 (1) of the CBCA prohibits a corporation that is insolvent from dissolving.

53 Counsel have not been able to direct me to any caselaw or commentary about the policy rationale behind the CBCA's restrictions on insolvent corporations engaging in certain transactions. It would appear that the purpose of those restrictions is to protect creditors or other stakeholders from transactions that would deprive them of assets or other rights that would ordinarily be available to them under insolvency legislation.

54 Those concerns do not arise here. The purpose of the winding up and dissolution transaction is to achieve approximately $6.6 million of tax savings that would otherwise not be available. The only assets of JMC are the ecobee shares and an interest in a dormant partnership that has no value. Those assets will be wound up into Just Energy. At the same time, Just Energy will assume any liabilities owed by JMC.

55 In this case, blind application of the CBCA's solvency requirements would in fact undermine the purpose of those requirements. Oversight by the Monitor and the Court provides additional assurance that the interests of creditors in the dissolution will be protected.

56 In that context, any solvency requirements contained in the CBCA are breached only if they are viewed in isolation and are divorced from the transactions as a whole. The end result generates a net benefit to the Just Energy estate by making more assets available than would otherwise be the case.

57 Gascon J. (as he then was) came to a similar conclusion in *AbitibiBowater* [7] albeit without discussing the point. In that case, the Monitor's 22nd report dated November 19, 2009, noted that certain aspects of the proposed transaction violated the solvency provisions of the CBCA and the Quebec Company's Act. Gascon J. nevertheless issued an order which allowed the transaction to proceed "notwithstanding the provisions of any federal or provincial statute." [8]

7 Order in (Re) AbitibiBowater Inc. (23 November 2009), Montreal, 500-11-036133-094 (Que. S.C.).

8 *Ibid*. at para 12.

58 Section 11 of the CCAA provides the court with broad remedial jurisdiction. It provides:

> **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.**

59 The section gives the court express power to override the *Bankruptcy and Insolvency Act* [9] and the *Winding up and Restructuring Act*. [10] That power was also used to override the priority schemes in provincial statutes by according super priority to DIP lenders before super priority was enshrined in the CCAA. [11]

9 Bankruptcy and Insolvency Act, RSC 1985, c B-3

10 Winding-up and Restructuring Act, RSC 1985, c W-11

11 Skydome Corp., Re, 1998 CarswellOnt 5922; 16 C.B.R. (4th) 118 at paras. 8-9, 13-14.

60 In *Century Services Inc. v. Canada (Attorney General)* [12] the Supreme Court of Canada observed that that judicial discretion has allowed the CCAA to adapt and evolve to meet contemporary business and social needs and that it has called on courts to innovate as restructurings become increasingly complex.

12 2010 SCC 60, [2010] 3 S.C.R. 379 at para 58, 61.

61 In *Rescue! The Companies' Creditors Arrangement Act* [13] Professor Janis Sarra noted that in determining whether and how to exercise its discretion the court should ask itself whether the order will

13 2d edition, Toronto: Carswell, 2013. The

> "usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs." [14]

14 *Rescue!* at page 120

62 That exercise requires the court to balance the interests of and prejudice to various stakeholders. Here, the only stakeholder who is potentially prejudiced is the CRA. It did not appear on the motion. It also has other means of protecting its interests by way of tax reassessments.

63 In circumstances where the proposed transaction would add value to the estate, would not prejudice any stakeholder of the CCAA and does not offend the interests that the CBCA seeks to protect by imposing insolvency requirements, I am satisfied that the winding up and dissolution transaction furthers the effort to avoid social and economic losses that would result from liquidation and should be allowed to proceed.

Disposition

64 For the reasons set out above I signed orders on November 10, 2021 extending the stay under the CCAA, extending the DIP facility, approving the wind up of Just Energy Finance, approving the Second KERP, approving the sale of ecobee shares in proposed plan of arrangement and permitting the ancillary transactions set out in paragraph 52 above to occur, notwithstanding the insolvency of the corporations involved.

Motions granted.

End of Document

2012 ONSC 6403
Ontario Superior Court of Justice [Commercial List]

Futura Loyalty Group Inc., Re

2012 CarswellOnt 14263, 2012 ONSC 6403, 223 A.C.W.S. (3d) 14, 99 C.B.R. (5th) 128

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 The Futura Loyalty Group Inc. Applicant

D.M. Brown J.

Heard: November 13, 2012
Judgment: November 13, 2012
Docket: CV-12-9882-00CL

Counsel: S. Reid for Applicant
G. Azeff, A. Iqbal for Monitor, Harris & Partners Limited
J. Desjardins for DirectCash Payments Inc.
D. Pearlman for Aimia Canada Inc.

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

Headnote

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

Debtor's main source of revenues was from selling Aeroplan Miles to merchants as customer reward programme — Some merchants purchased discounted Miles by prepaying debtor — Court made initial order for protection — Debtor applied for order permitting it to honour merchant prepayments made prior to initial order — Application granted — Order was consistent with and fostered objectives of Companies' Creditors Arrangement Act — Ongoing resale of Miles was essential to debtor's viability as going concern — Honouring prepayments would assist debtor's reorganization efforts to maintain merchants as customers — Order was not opposed by monitor or secured creditors.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Notice

Debtor's main source of revenues was from selling Aeroplan Miles to merchants as customer reward programme — Some merchants purchased discounted Miles by prepaying debtor — Court made initial order for protection — Debtor applied to vary order by deferring notice to prepaying merchants — Application dismissed — Transparency was foundation upon which Companies' Creditors Arrangement Act rested — Initial order had already been posted on monitor's website and notice was published in newspaper — There was no principled basis upon which to exclude one group of creditors — Risk that some merchants would cancel their participation in reward programme was inherent in proceedings under Act — It was up to debtor to persuade its customers that it was in their long-term interests not to abandon it.

APPLICATION by debtor to vary initial order under *Companies' Creditors Arrangement Act* and for additional relief.

***D.M. Brown J.*:**

I. Overview of orders sought under the CCAA

1 By Initial Order made October 16, 2012 [2012 CarswellOnt 12842 (Ont. S.C.J. [Commercial List])], the applicant, The Futura Loyalty Group Inc., obtained the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. By order made October 26, 2012, another judge of this Court approved a proposed Sale and Investor Solicitation Process and granted other relief. Futura now moves for orders (i) extending the Stay Period until January 18, 2013, (ii) increasing the DIP Facility from

$175,000 to $300,000, (iii) permitting it to honour prepayments made for Aeroplan Miles by Prepaying Merchant Customers, and (iv) varying the Initial Order to defer giving notice under section 23 of the *CCAA* to Prepaying Merchant Customers.

II. Extending the Stay Period and increasing the DIP Facility

2 Futura seeks an extension of the Stay Period in order to enable it to work on the SISP which, it hopes, will result in either a going-concern sale or new investment implemented through a plan of compromise or arrangement. The Monitor supports the request and, in its Second Report dated November 9, 2012, expressed the view that Futura has acted and continues to act in good faith and with due diligence. DirectCash Payments Inc., which holds first ranking secured debt of about $300,000, also supported the extension, as did Aimia Canada. I am satisfied that the evidence disclosed that Futura has acted, and is acting, in good faith and with due diligence and the requested extension is necessary to implement the SISP. The updated cash flow forecast filed by Futura shows that with the increase in the DIP Facility, the applicant has sufficient cash to carry on its operations until January 18, 2013. Pursuant to *CCAA* s. 11.02(2) I grant the extension of the Stay Period until January 18, 2013.

3 As to the proposed increased in the DIP Facility, Futura has demonstrated the need for such an increase in order to maintain its operations until the end of the Stay Period. The parties present, including the secured creditor, supported the proposed increase. The evidence filed by the applicant and the Monitor satisfies the requirements of *CCAA* s. 11.2, and I approve the requested increase in the DIP Facility.

III. Prepaying Merchant Customers: request to honour prepayments made prior to the Initial Order

4 As described by David Campbell, Futura's CEO, in his affidavit sworn November 9, 2012, Futura provides "loyalty solutions" for its customers. Its major customer reward program involves selling Aeroplan Miles to merchants under an Aeroplan Coalition Program. Over 75% of the applicant's revenues are generated by the resale of Aeroplan Miles pursuant to the Aeroplan Coalition Program.

5 Under that Program, Merchant Customers of Futura typically pay the applicant monthly, in arrears, for Aeroplan Miles they have issued to their customers in that month. However, prior to the filing of its application under the *CCAA*, Futura on occasion offered Merchant Customers the opportunity of buying Aeroplan Miles at volume discounts. The Merchant Customers would purchase those discounted Aeroplan Miles by pre-paying Futura.

6 Mr. Campbell deposed that as of the date of the Initial Order ten (10) Prepaying Merchant Customers had prepaid to Futura approximately $108,000 for 2.5 million Aeroplan Miles. Futura has calculated that it pays out approximately $20,000 a month to Aeroplan on account of those pre-paid Miles.

7 Futura seeks an order of this Court permitting it to honour prepayments made for Aeroplan Miles by those Prepaying Merchant Customers. Mr. Campbell deposed:

> Although payment to Aeroplan on behalf of Prepaying Merchant Customers for prepayments made prior to the date of the Initial Order could be considered to be payment for the benefit of the Prepaying Merchant Customers as unsecured creditors of the Applicant, such payments are necessary in order to maintain the *status quo* and to ensure the continuous ongoing operations of the Applicant's business and the preservation of the Applicant's brand in the marketplace. This would enhance the likelihood of a going-concern sale by the Applicant that would maximize value for the benefit of all creditors.

Mr. Campbell also pointed out that Futura had made a similar request in its October 26 motion to allow the continuous payment of Futura Reward Payments; the court approved that request in its October 26 Order.

8 In its Second Report the Monitor supported Futura's request for an authorization order:

> Futura and the Monitor share the view that such payments are necessary in order to maintain the *status quo*, ensure the continuous ongoing operations of Futura's business and preserve its brand in the marketplace.

9 DirectCash and Aimia Canada supported the relief sought by Futura.

10 Section 11 of the *CCAA* authorizes a court to "make any order that it considers appropriate in the circumstances", "subject to the restrictions set out in this Act". As Morawetz J. observed in *Nortel Networks Corp., Re*, the "*CCAA* is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives..." [1] Although counsel could not point me to a case in which a court had permitted an applicant to satisfy a pre-filing credit or claim enjoyed by a customer outside of the *CCAA* claims process, some precedent exists for permitting the payment of pre-filing obligations in the case of non-critical suppliers.

1 (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 47.

11 In both *Eddie Bauer of Canada Inc., Re* [2009 CarswellOnt 3657 (Ont. S.C.J. [Commercial List])] [2] and *EarthFirst Canada Inc., Re* [3] the courts considered requests to approve payments to creditors in respect of pre-filing obligations. In the *Eddie Bauer* case Morawetz J. granted the approval writing:

2 2009 CanLII 32699

3 2009 ABQB 78 (Alta. Q.B.)

> [22] The proposed order also provides that the Applicants shall be entitled but not required to pay amounts owing for goods and services actually supplied to the Applicants prior to the date of the Order. The RSM Report comments on this point. *The Eddie Bauer Group is of the view that operations could be disrupted and its vendor relationships adversely impacted if it does not have the ability to pay pre-filing obligations to certain vendors and it further believes that the value of its business will be maximized if it can pay its pre-filing creditors. RSM has reviewed this issue and is supportive of this provision as the Eddie Bauer Group believes it is a necessary provision* and the DIP Lenders are supportive of the Restructuring Proceedings. The relief requested in these proceedings is consistent with the relief sought in the Chapter 11 Proceedings. This provision is unusual but, in the circumstances of this case, appears to be reasonable.
>
> (emphasis added)

12 In *EarthFirst Canada* Romaine J. approved the creation of a "hardship fund" to pay prefiling obligations owed to certain suppliers and contractors of the applicant. The evidence in that case revealed that some suppliers and contractors in a remote community had become quite dependent upon the applicant's wind farm project and, if they were not paid, they would "face immediate financial difficulty". Romaine J. wrote:

> [7] While the nature of payments from the hardship fund is different from the issue that was before Farley, J. in *Re Air Canada*, 2003 CarswellOnt. 5296 (at para. 4), and while EarthFirst is not suggesting that recipients of the fund are "critical suppliers" in the usual sense of the term, it appears to be the case that, as in *Air Canada*, the potential future benefit to the company of these relatively modest payments of pre-filing debt is considerable and of value to the estate as a whole. The decision to allow the hardship fund thus outweighs the prejudice to other creditors, justifying a departure from the usual rule.

13 In those two cases the courts were prepared to countenance the payment of pre-filing obligations to suppliers in order to prevent disruption to the operations of the applicant and to maximize the value of the business for purposes of the re-organization or realization process. In the *EarthFirst Canada* case the court engaged in a form of proportionality or cost-benefit analysis, weighing the cost of the pre-payments against the benefit to the estate as a whole.

14 The present case does not involve a request to make payments to suppliers for pre-filing obligations, but concerns a somewhat analogous request to make payments which would satisfy pre-filing credits enjoyed by some important customers. The kind of cost-benefit reasoning undertaken in the *Eddie Bauer* and *EarthFirst* cases offers some guidance. My Reasons granting the Initial Order stated that the book value of Futura's assets was approximately $1.35 million. The most recent cash-flow projection filed by the applicant made allowance for "payments to loyalty currency providers", which included the

payments in respect of the Prepaying Merchant Customers. When compared against projected inflows from the collection of receivables through to January 18, 2013 of approximately $440,000 (the only source of cash apart from the increased DIP Financing), the honouring of $108,000 in pre-paid Aeroplan Miles for the Prepaying Merchant Customers is not an insignificant amount. However, on the other side of the scale is the evidence from Futura that 75% of its revenue comes from the resale of Aeroplan Miles and under its SISP it is seeking to secure a going-concern sale of the company's business.

15 Given the importance of the ongoing resale of Aeroplan Miles to the viability of Futura as a going-concern, the benefit to the company's re-organization efforts of trying to maintain the Prepaying Merchant customers as continuing customers, and the absence of any opposition to the order sought, I conclude that it is appropriate in the circumstances to grant an order "permitting the Applicant to honour prepayments made for Aeroplan Miles by Prepaying Merchant Customers" prior to the making of the Initial Order, as requested in paragraph 5 of Futura's notice of motion. Such authorization, in my view, is consistent with and fosters the objectives of the *CCAA*.

16 Futura submitted a draft order which contained different language of authorization. I informed counsel that the revised language was vague and imprecise, and I would not approve it. Paragraph 5 of Futura's notice of motion was short, sweet and to the point, so the language of the draft order Futura submits for my consideration must reflect that precision.

IV. Dispensing with notice to Prepaying Merchant Customers

17 The Prepaying Merchant Customers were not given notice of this motion. I have made the order authorizing the honouring of their prepayments in any event because it is to their benefit. Futura requests that I vary the *CCAA* s. 23 notice provision in my Initial Order in order to "defer notice to Prepaying Merchant Customers". Again, the Monitor, DirectCash Payments and Aimia Canada support the applicant's request.

18 Section 23(1)(a)(ii)(B) of the *CCAA* requires a monitor, within five days after the making of an initial order, to send, in the prescribed manner, "a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available". In this case the Monitor has not sent such notice to the Prepaying Merchant Customers.

19 Why is that so? No explanation was offered by the Monitor in its Second Report. I am disappointed that none was. In oral submissions Monitor's counsel stated that the Monitor only learned from the applicant on October 27, 2012 that the Prepaying Merchant Customers were creditors of the applicant. Mr. Campbell, in his affidavit, did not explain why it took the applicant almost two weeks after the Initial Order to recognize the Prepaying Merchant Customers as creditors and to so inform the Monitor.

20 Why does the applicant not want the Monitor to give *CCAA* s. 23 notices to the creditor Prepaying Merchant Customers? In his affidavit Mr. Campbell deposed:

> Direct notification of the *CCAA* Proceedings to the Prepaying Merchant Customers could cause them to cancel their participation in the Aeroplan Coalition Program, which would have a detrimental effect on the ongoing operation and value of the Applicant's business.
>
> Since the Applicant is seeking an order allowing it to continue to honour prepayments made under the Aeroplan Coalition Program in the ordinary course, and since a going concern sale of this business may be achieved, it is not currently necessary, and could be detrimental to the Applicant's business, to provide such merchants with direct notice of the CCAA Proceedings at this time. If a going concern sale of its Aeroplan Coalition Program cannot be achieved, such that the Prepaying Merchant Customers may be affected by this proceeding, the Applicant will give notice to such merchants at the relevant time.

In its Second Report the Monitor echoed the position of Futura.

21 I recognize that the October 26 Order contained a variation of the paragraph 43 Initial Order notice provision to exempt, from the Monitor's statutory duty to give notice of this proceeding, "claimants under the Futura Rewards Program". No reasons accompanied that order, so I am unable to understand the basis for the granting of that variation.

22 I am not prepared to vary the Initial Order to excuse the Monitor from providing the requisite creditor notice to the Prepaying Merchant Customers under section 23(1)(a)(ii)(B) of the *CCAA*. Transparency is the foundation upon which *CCAA* proceedings rest - a debtor company encounters financial difficulties; it seeks the protection of the *CCAA* to give it breathing space to fashion a compromise or arrangement for its creditors to consider; in order to secure that breathing space, the *CCAA* requires the debtor to provide its creditors, in a court proceeding, with the information they require in order to make informed decisions about the compromises or arrangements *of their rights* which the debtor may propose. As a general proposition, open windows, not closed doors, characterize *CCAA* proceedings.

23 In the present case the Monitor published, as ordered, a notice in the Globe and Mail shortly after the Initial Order was made and, as ordered, established a website to which the Initial Order was posted. Given that the Monitor has given general public notice of these proceedings as ordered by this Court, I cannot see any principled basis upon which to excuse the Monitor from giving specific notice to one group of creditors — the Prepaying Merchant Customers.

24 Mr. Campbell deposed that giving notice to the Prepaying Merchant Customers "could cause them to cancel their participation in the Aeroplan Coalition Program". Initiating *CCAA* proceedings always carries some risk that the applicant's suppliers or customers may re-think doing business with the debtor. One of the tasks of a debtor's management is to persuade suppliers or customers that in the long-run it would be better to hang in with the debtor than to abandon it. Such persuasion must be done in every *CCAA* proceeding; this one is no different.

25 For those reasons I decline to grant the applicant's request to vary the notice provisions of the Initial Order.

V. Summary

26 By way of summary, I grant the applicant an extension of the Stay Period until January 18, 2013, an increase in the DIP Facility to $300,000, and permission to honour prepayments made for Aeroplan Miles by Prepaying Merchant Customers. I also approve the First and Second Reports of the Monitor and the actions and activities of the Monitor described therein.

Application granted in part.

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