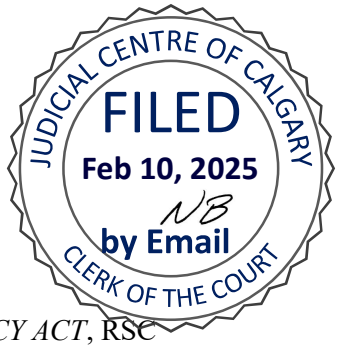

COURT FILE NO.	B301-163430
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CLEO ENERGY CORP.
APPLICANT	CLEO ENERGY CORP.
DOCUMENT	BOOK OF AUTHORITIES OF CLEO ENERGY CORP.

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. G10010664
Attention: Sam Gabor / Tom Cumming

TABLE OF AUTHORITIES

Tab

1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

KeyCite treatment
Most Recently Cited in: John Doe (G.E.B. #26) v. Roman Catholic Episcopal Corporation of St. John's, 2024 NLCA 26, 2024 CarswellNfld 215, 2024 A.C.W.S. 3780, 15 C.B.R. (7th) 42 | (N.L. C.A., Jul 22, 2024)

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4
50.4(1)Notice of intention
Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

50.4(2)Certain things to be filed
Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

50.4(3)Creditors may obtain statement
Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50.4(4)Exception
The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50.4(5)Trustee protected
If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50.4(6)Trustee to notify creditors
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

50.4(7)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

50.4(8)Where assignment deemed to have been made
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

50.4(9)Extension of time for filing proposal
The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

50.4(10)Court may not extend time
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

50.4(11)Court may terminate period for making proposal
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Judicial Consideration (2)

Currency
Federal English Statutes reflect amendments current to September 25, 2024
Federal English Regulations Current to Gazette Vol. 158:20 (September 25, 2024)

R.S.C. 1985, c. B-3, s. 50.6

s 50.6

Currency

50.6

50.6(1)Order — interim financing

On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

50.6(2)Individuals

In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

50.6(3)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

50.6(4)Priority — previous orders

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.

50.6(5)Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

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

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

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

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

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Amendment History
2005, c. 47, s. 36; 2007, c. 36, s. 18

Currency
Federal English Statutes reflect amendments current to September 25, 2024
Federal English Regulations Current to Gazette Vol. 158:20 (September 25, 2024)

End of Document

Tab

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2004 NBBR 168, 2004 NBQB 168
New Brunswick Court of Queen's Bench

Plancher Heritage Ltée / Heritage Flooring Ltd., Re

2004 CarswellNB 358, 2004 NBBR 168, 2004 NBQB 168, [2004]
N.B.J. No. 286, 279 N.B.R. (2d) 1, 3 C.B.R. (5th) 60, 732 A.P.R. 1

In the Matter of The Proposal of Plancher Heritage Ltée / Heritage Flooring Ltd.

Glennie J.

Judgment: July 20, 2004
Docket: 10543, Estate No. 51-114608

Counsel: G. Patrick Gorman, Q.C. for Heritage Flooring Ltd.
Stephen J. Hutchinson, Jeffrey R. Parker, Lee C. Bell-Smith for Royal Bank of Canada

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.6 Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — General principles

Test for whether insolvent company would be able to make viable proposal, if granted extension of stay, is whether it would likely, as opposed to certainly, be able to present viable proposal — Test is not whether or not specific creditor would be prepared to support proposal — Purpose of stay provisions under Bankruptcy and Insolvency Act is to preserve and protect status quo at moment when insolvent party files Notice of Intention to Make Proposal — Intention of stay provisions is to allow insolvent party to continue its business in accordance with its existing authorized credit agreements — Secured creditor cannot unilaterally amend loan or credit agreement relating to secured revolving line of credit by capping available line of credit.

Table of Authorities

Cases considered by *Glennie J.*:

Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219, 1994 CarswellOnt 253 (Ont. Gen. Div. [Commercial List]) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Com/Mit Hitech Services Inc., Re (1997), 1997 CarswellOnt 2753, 47 C.B.R. (3d) 182 (Ont. Bktcy.) — considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

Gene Moses Construction Ltd., Re (1999), 1999 CarswellBC 149, 9 C.B.R. (4th) 275 (B.C. Master) — considered

National Bank of Canada v. Dutch Industries Ltd. (1996), 149 Sask. R. 317, 45 C.B.R. (3d) 103, 1996 CarswellSask 631 (Sask. Q.B.) — referred to

Scotia Rainbow Inc. v. Bank of Montreal (2000), 2000 CarswellNS 216, 18 C.B.R. (4th) 114, (sub nom. *Scotia Rainbow Inc. (Bankrupt) v. Bank of Montreal)* 186 N.S.R. (2d) 153, (sub nom. *Scotia Rainbow Inc. (Bankrupt) v. Bank of Montreal)* 581 A.P.R. 153 (N.S. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 50(1.5) [en. 1992, c. 27, s. 18(1)] — considered

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(8) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — referred to

s. 65.1(1) [en. 1992, c. 27, s. 30] — considered

s. 65.1(4) [en. 1992, c. 27, s. 30] — considered

s. 65.1(4)(b) [en. 1992, c. 27, s. 30] — considered

s. 69 — referred to

ss. 69-69.3(1) — referred to

ss. 69-69.31 — referred to

s. 69(1) — referred to

s. 69(1)(a) — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 244 — referred to

MOTION by insolvent company for extension of stay under s.69 of *Bankruptcy and Insolvency Act* and for order that bank return to it all funds taken from its operating accounts.

***Glennie J.*:**

1 On February 11, 2004, Plancher Heritage Ltee / Heritage Flooring Ltd. ("Heritage") filed a Notice of Intention To Make A Proposal (the "Notice of Intention") pursuant to Subsection 50.4(1) of the *Bankruptcy and Insolvency Act* (the "BIA"). A.C. Poirier & Associates Inc. (the "Trustee") consented to act as Trustee under the proposal. Section 69 of the BIA grants a stay (the "Stay") of all creditor actions and remedies against the insolvent person, which stay in this case was to expire on March 12, 2004. On March 12, 2004, I extended the Stay in this matter to Thursday, March 25, 2004 and advised that I would file written reasons for the granting of such an extension. These are those reasons.

2 There is also another issue, namely whether Heritage's banker, Royal Bank of Canada (the "Bank") operated contrary to the stay by sweeping Heritage's operating account and capping its available line of credit or whether the Bank is authorized to do so by virtue of Section 65.1(4)(b) of the BIA.

Background

3 Heritage manufactured hardwood flooring at its plant in Kedgwick, New Brunswick. It had annual gross sales in the range of five to six million dollars.

4 On January 30, 2001, Heritage accepted an offer from the Bank's Asset Based Finance Division to establish a revolving credit facility in favour of Heritage with a credit limit of two million dollars subject to the limitation that the aggregate amount

of borrowings under the credit facility was at no time to exceed the facility borrowing base which was defined in the offer from the Bank to Heritage as follows:

> "Facility Borrowing Base" means at the date of determination, an amount equal to the aggregate of all Eligible Accounts Receivable multiplied by 85% with an exception for those accounts which are insured by Export Development Corporation, which will be multiplied by 90% until April 30, 2001 at which time the advance rate for Eligible Accounts Receivable will reduce to 85%; and Eligible Inventory, multiplied by 60% capped at $1,500,000.00 reducing to $1,000,000.00 at April 30, 2001, less any stated Reserve, as determined by the Bank from time to time in its sole discretion.

5 The Bank's credit facility was structured as an asset based loan under which the Bank amends its available credit weekly based upon reported details from Heritage on the status of its accounts receivable and inventory.

6 Pursuant to the January 30, 2001 loan agreement (the "Loan Agreement"), the Bank agreed to make financing available to Heritage on the basis of the value of its assets and the security of its accounts receivable and inventory under the Bank's Asset - Based Finance Model (the "ABF model").

7 According to the Bank, the ABF Model is a unique financial product which enables its customers to immediately access increased levels of financing on the basis of the fluctuating value of their inventory and their accounts receivable. According to the Bank, the ABF model is based on aggressive margining, with very few required financial covenants, to highly leveraged businesses. The operative components of the ABF model are as follows:

> (a) receipts from the sale of inventory are deposited to a blocked account for immediate application against the balance outstanding under the customer's operating facility;
>
> (b) an uploaded reporting of inventory/accounts receivable valuation information is provided by the customer to the Bank on a weekly basis;
>
> (c) the inventory/accounts receivable valuation reporting establishes the level of funding available under the operating facility for the upcoming week and
>
> (d) the ongoing monitoring and built in control mechanism imposed through the use of the blocked account enables the Bank to provide immediate advances against the value of the customer's inventory and accounts receivable in amounts substantively higher than would be available under traditional lending models (i.e. eighty-five percent (85%) of eligible accounts receivable and up to a maximum of sixty percent (60%) of inventory values, subject to ongoing appraisals, margined on a weekly basis, compared with the standard margining levels available under the Bank's traditional lending models, which is (75%) of accounts receivable and (50%) of inventory, margined on a monthly basis).

8 In order to monitor and manage its collateral base, it is typical for the Bank to implement this type of cash management arrangement through the blocked account in order to match advances to the value of the underlying assets. Receipts are deposited in the blocked account in order to replace collateral sold in support of previous advances made, until the next opportunity to value the collateral base which is the basis for extensions of credit. At no time is the borrower under the ABF model deprived of the use of its cash since it receives credit for those receipts deposited to the blocked account which are then re-advanced on the basis of the margining formula to which the parties have agreed. Advances are typically made on a weekly basis but can be made on a more frequent basis provided that a calculation of the borrowing base (based upon eligible accounts receivable and inventory) can be made. The Bank charged Heritage a monthly "*monitoring fee*" of $4,500.00.

9 Heritage also entered into a Blocked Accounts Agreement with the Bank as of March 8, 2001. The Blocked Accounts Agreement provided that all cash, including all cheques, money orders, wire transfers and other remittances payable to Heritage on account of its accounts receivable, debts and book debts of any nature, are to be deposited to the blocked account.

10 In order to access funds using the ABF Model, Heritage was required to submit the required weekly upload to the Bank in order to determine current levels of accounts receivable and inventory of Heritage. The Bank's system then calculated the

total amount of available credit based upon the inventory accounts receivable valuation and compared this with the outstanding amount previously advanced under the credit facility. The difference (assuming the total amount of available credit is higher than the amount previously advanced) made up the available credit to Heritage. This amount would then be deposited to Heritage's operating account through which Heritage would access the funds for working capital purposes.

11 On the business day following the deposit of receipts by Heritage to the blocked account, the funds are applied against the outstanding amount under the credit facility in order to replace the collateral used to generate these receipts. For example, if the facility was drawn to $800,000.00 and Heritage deposited $300,000.00 to the blocked account, this amount would be applied against the loan thus reducing the balance to $500,000.00. Heritage would then submit an upload; the Bank would calculate availability based on the current level of eligible inventory and accounts receivable, and assuming the total availability is determined to be $700,000.00, compared to the outstanding debt of $500,000.00, then availability to Heritage would be $200,000.00. This $200,000.00 would then be deposited by the Bank to the operating account for access by Heritage in the ordinary course.

12 The credit facility established by the Loan Agreement was for an initial term of two years ending on January 30, 2003 and was to be automatically renewed for successive 180 day periods unless either Heritage or the Bank gave prior written notice of termination to the other, not less than 90 days in advance of the end of the initial term or successive term.

13 According to the Trustee, Heritage maintained its covenants and margin position with the Bank with the exception of one instance in January of this year when it became out of margin as a result of two large customer receivables extending beyond the authorized 90 day aging period. According to the Trustee, this situation was remedied immediately by Heritage authorizing the Bank to return two cheques that had been presented for payment. However, in a letter to Heritage dated February 2, 2004 from Counsel for the Bank, Heritage was advised that it was in default of the provisions of the margin working Capital Loan Agreement between Heritage and the Bank dated February 14, 2001 "*particularly in connection with its financial covenants thereunder and the financial condition of the Corporation*." The letter went on to state "*The Bank also has concerns regarding the Corporation's continued financial performance and its current financial ratios*."

14 The Bank did not provide details of the alleged default by Heritage nor did it allow Heritage time to remedy such default, but instead advised Heritage that it no longer wished to continue its business relationship with it and then demanded payment of all indebtedness of Heritage to the Bank to be paid in full within 15 days from the date of the February 2, 2004 demand letter.

15 In October of 2003, Heritage requested that the Bank renew the Credit facility for a further year. According to the Trustee, Heritage requested a response from the Bank regarding its extension request at least every two weeks since the request was made. In January of 2004, with no response having been received from the Bank, Heritage began requesting a 90-day extension of the credit facility to April 30, 2004. Heritage says that no response was ever received from the Bank regarding the renewal request. Heritage says that no written response was received from the Bank until it received the letter from the Bank's solicitors on February 2, 2004 containing a demand for payment in full of all of the indebtedness of Heritage to the Bank within 15 days. The demand letter was accompanied by a Notice of Intention to enforce security pursuant to Section 244 of the BIA. It was also dated February 2, 2004.

16 In response to the Bank's demand for payment, Heritage filed its Notice of Intention to make a Proposal pursuant to Subsection 50.4(1) of the BIA on February 11, 2004.

17 It should be noted that in early November of 2003, Claude Alexander, a Senior Manager, Portfolio Risk, of the Bank contacted Gilbert LeBlanc, the President of Direcsys Inc. to ascertain if he might be available to assist Heritage in a restructuring of its business. Mr. Alexander also inquired if funding might be available from the Atlantic Canada Opportunities Agency ("ACOA") and the Province of New Brunswick to pay Mr. LeBlanc's fees. Mr. Alexander's call to Mr. LeBlanc subsequently led to financing being approved for Mr. LeBlanc's fees. As well, an Adjustment Committee, which Mr. LeBlanc described as a mini board of directors was established for Heritage on December 27, 2003. This committee was comprised of various representatives of stakeholders including ACOA, the Province of New Brunswick, the Restigouche Economic Development Corporation and Heritage and Mr. LeBlanc.

18 On February 12, 2004, the Trustee wrote to Counsel for the Bank advising that Heritage had filed a Notice of Intention to Make a Proposal and also that the Trustee expected that the Bank would honour the requirement to allow Heritage to continue to use its operating account at the Bank on a cash basis, in other words, that the Bank would freeze the amount of the account at the close of business on February 11, 2004 and that further activity in the account would be done on a cash basis with Heritage having full access to deposits made on or after February 12, 2004.

19 On February 16, 2004, Counsel for the Bank wrote to the Trustee as follows:

> *As you and I have discussed and as I mentioned in my recent voicemail message to you, the Bank wishes Heritage all the best in its endeavours to restructure its business and is willing to cooperate as much as possible with a view to Heritage reaching these goals. In this regard, the Bank has agreed that during the stay period, Heritage may continue to use its operating account with the Bank on a cash-basis, but that the Bank will not provide overdraft privileges. The Bank also acknowledges the maintenance of the status quo during the period of the stay, and is happy to allow Heritage the time to consider and develop its Proposal.*
>
> *As you may know, the Bank has security over all property, real and personal, of Heritage and margins the company's inventory and accounts receivable pursuant to the credit facility made available to Heritage by the Bank, by way of a Margin Working Capital Loan Agreement dated January 30, 2001 (the "Agreement"). This arrangement contemplates the deposit of all monies received by Heritage in payment of its accounts receivable to a blocked account, which ensures that the Bank's security position is maintained on a steady basis, such that credit made available based upon eligible inventory, for example, is directly secured by the account(s) generated by the sale of that inventory. This is the only way in which such an asset-backed loan may remain secured, and the only way, in the current situation, that the Bank's security position will not be materially prejudiced during the stay period. The Bank therefore requires that this procedure be continued, and that all remaining financial and other reporting by Heritage pursuant to the Agreement continue, including, without limitation, a detailed weekly perpetual inventory listing, as contemplated thereby. The Bank has capped the amount of available credit pursuant to the facility as of the date of the filing of the Notice, and as such, when deposits are made to the blocked account, utilization of the facility will be reduced accordingly. The balance, constituting the difference between the capped facility amount and the amounts so deposited to the blocked account, shall be made available to Heritage, upon the same margins and subject to the same conditions of the existing arrangement pursuant to the Agreement.*
>
> *As you know, the* Bankruptcy and Insolvency Act *(Canada) provides that a creditor shall not be materially prejudiced by the operation of the stay pursuant to the Proposal provisions thereof, and that the security position of a secured creditor shall remain materially unaffected thereby. Therefore, while the Bank is willing to cooperate as much as possible with Heritage and the trustee in connection with the ongoing situation, it will obviously not allow its secured position to be prejudiced by the dissipation of secured assets, without replacement thereof so as to maintain the status quo.*

20 On February 20, 2004, the Trustee wrote to Counsel for the Bank as follows:

> You advised us that the Royal Bank had taken funds from the Debtor's account. This morning, the Debtor advised us that your client has seized over $200,000 from the Debtor's account, without any authorization. The Royal Bank has, in our view, enforced its security in contravention of the stay of proceedings that is in place by virtue of section 69 of the Bankruptcy and Insolvency Act.
>
> We are also dismayed by the Royal Bank's actions as we were in discussions with you regarding alternative ways to satisfy the Royal Bank that it's position was not being materially prejudiced. In addition, we wrote to you on February 13, 2004 advising that we were advising the Debtor that it was safe to deposit funds into their account as the Bank would honor the cash based operation of the account. A copy of that letter is attached. In our view, the Royal Bank's has acted in bad faith towards the Trustee in the Proposal and towards the Debtor who is legitimately attempting to restructure its affairs in accordance with the provisions of the Bankruptcy and Insolvency Act.

> Based on the actions of the Royal Bank, we have advised the Debtor that they should make no more deposits to the Royal Bank.
>
> We request that the funds seized by the Royal Bank be returned immediately to the Debtor's account. The failure to return the funds may cause irreparable harm to the Debtor's efforts to restructure its affairs and may cause damage to the Debtor and to other stakeholders affected by the Royal Bank's actions.

21 On February 23rd, Counsel for the Bank responded to the Trustee advising that, in his opinion, the Bank had not exercised secured remedies and that the Bank was acting in accordance with the contractual arrangements in place between the Bank and Heritage where under the Bank agreed to make financing available to Heritage under the security of its accounts receivable and inventory under the Bank's ABF model. The letter went on to state:

> *The Notice of Intention To Make A Proposal under the BIA was filed by Heritage on February 11, 2004. On that date the upload which had been provided to the Bank by Heritage on February 10, 2004 confirmed Heritage was entitled to the $1,283,444.74 outstanding under the operating facility. In accordance with Section 65.1(4)(b) of the BIA, the Bank capped the operating facility at this amount and has agreed, subject to Heritage's compliance with the terms of the asset backed model, to provide Heritage with ongoing access to the operating facility up to this amount.*
>
> [Emphasis added.]
>
> *Funds in the appropriate amount of $200,000.00 were deposited with the Bank by Heritage subsequent to February 11, 2004 and were applied by the Bank against the operating facility in the usual course. The Bank did not make a demand, exercise any remedy or take any action to enforce its security, it simply continued to act in accordance with the established contractual arrangement. Heritage submitted a further upload of financial information to the Bank on February 20, 2004. This upload revealed a decrease in the Bank's security position of approximately $140,000.00 in the nine days subsequent to the filing of the Notice of Intention. Based upon this upload and the $200,000.00 deposited by Heritage with the Bank during the same period, Heritage has current availability under its operating facility in the amount of $61,317.00. These funds would not have been made available to Heritage in the normal course until two days following receipt of the upload. The Bank facilitated the immediate availability of these funds to Heritage on February 20, 2004 as a consequence of your advice that Heritage required an immediate advance of funds. The Bank also processed a debit memo earlier on February 20, 2004, in respect Heritage's payroll, with a view to avoiding any disruption in Heritage's business operations.*
>
> *Notwithstanding the foregoing, you have now demanded that Heritage be provided with immediate access to the $200,000.00 deposited by Heritage with the Bank subsequent to the filing of the Notice of Intention. You appear to be proceeding on the basis the "asset backed model" is not of application following the filing of the Notice of Intention. We note that if the Bank were to acquiesce to this request, the effect would be that the Bank's security position would have deteriorated by approximately $140,000.00 in nine days since the filing of the Notice of Intention. We do not regard this position as tenable or reasonable and believe it is expressly contrary to the status quo intent of the BIA. We note the Bank is not seeking to improve its position, and remains willing to make funding available to Heritage on the basis of the "asset lending model" on the go forward. Compliance with your request would prejudice the Bank's position and in effect constitute a further advance of credit, which the Bank is not required to provide pursuant to subsection 65.1(4)(b) of the BIA. The bottom line is Heritage cannot pursue its restructuring through a systematic erosion of the Bank's security position.*
>
> *As previously discussed, the Bank is willing to co-operate with Heritage in its goal of restructuring its business pursuant to the proposal provisions of the BIA. However, the Bank cannot be materially prejudiced in the process and Heritage cannot expect to finance its restructuring by eroding the value of the Bank security. We understand that you have advised Heritage to make no further deposits with the Bank.*
>
> *The Bank requires that Heritage confirm that all cash receipts on a go-forward basis shall continue to be deposited to the blocked account, that uploads continue to be made on a weekly basis and Heritage continue to comply with the terms of its asset lending model arrangement with the Bank.*

22 On February 25, 2004, Heritage filed a motion seeking an extension of the stay and also an order that the Bank return to it all funds taken from its operating accounts since February 11, 2004 and that the Stay be extended to April 12, 2004.

23 The Bank opposed Heritage's motion and subsequently filed its own motion seeking an order declaring the 30-day period for filing a proposal terminated pursuant to Sections 50.4(11)(b) and (c) of the BIA or, in the alternative a declaration that Sections 69 to 69.3(1) of the BIA no longer operate in respect of the Bank pursuant to Section 69.4 of the BIA and, in the further alternative, an order determining the classes of secured creditors pursuant to Subsection 50(1.5) of the BIA and in so doing determine that the Bank does not fall within the same class of secured creditors as Business Development Bank of Canada and Farm Credit Corporation.

24 Counsel for the Bank argued that Heritage would not likely be able to make a viable proposal before the expiration of the 30-day period that will be accepted by the creditors of Heritage and that the Bank is likely to be materially prejudiced by the continued operations of Sections 69 - 69.31 of the BIA.

25 The Bank argued that its level of security decreased significantly after the filing by Heritage of the Notice of Intention. The Bank says that in the nine days following the filing, its level of security decreased in the approximate amount of $140,000.00. Five days later, on February 25, 2004, the Bank says its position had been eroded by a further amount of approximately $38,000.00.

26 Immediately prior to the filing of the Notice of Intention, Heritage was entitled to draw upon its credit facility at the Bank in the amount of $1,283,444.74. Subsequently, Heritage made significant deposits to its Canadian dollar operating account and its U.S. dollar operating account. On the date of filing of the Notice of Intention, the Bank capped Heritage's credit facility at the then current outstanding balance of $1,283,444.74.

27 Subsequent to the filing of its Notice of Intention, Heritage made deposits to its Canadian account and its U.S. account totalling $209,944.03. Subsequent to the deposits being made by Heritage, the Bank transferred the deposited funds to the blocked account and swept the funds in what the Bank says was in accordance "*with the existing contractual arrangements with Heritage*." The balance outstanding under the credit facilities was thus reduced to $1,080,589.38. The Trustee advised counsel for the Bank that the Bank's action offended the Stay in place as a result of the filing of the Notice of Intention. He went on to state, "*the actions of the bank could have a damaging affect on the debtor's ability to restructure*." The Trustee notified counsel for the Bank that Heritage had confirmed to him that the Bank had seized $205,445.01 from Heritage's account and the Trustee requested the immediate return of the funds.

28 The Bank argued that if it had not reduced the amount of the loan balance through the sweep of the account in the usual process. The Bank says it would, as of March 1, 2004, have been in a margin deficit of $179,984.88 in the 14 days since the filing of the Notice of Intention due to a decrease of the level of the Bank's security from $1,283,529.43, as of the date of filing of the Notice, to $1,103,544.55 as of the February 25, 2004 upload. The Bank argued that a decrease of approximately $180,000.00 in the level of its security over a period of 14 days amounted to material prejudice and that the stay should not be allowed to continued.

29 The Trustee takes the position that the Bank's action in sweeping the account was in contravention of the Stay and that the Bank should be ordered to replace the funds and be restrained from taking any further action in this regard without further order of this Court. The Trustee also asserts that the Bank has not been materially prejudiced.

The Application For An Extension Of Time

30 Subsection 50.4(9) of the BIA provides:

> 69.(1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

31 I am satisfied, on a balance of probabilities, that as of March 12, 2004 Heritage met the following criteria to grant an extension: a) It had acted, and continued to act, in good faith and with due diligence; b) It would likely be able to make a viable proposal if the extension were to be granted; and, c) no creditor of Heritage would be materially prejudiced if the extension were to be granted.

32 The test for whether Heritage would likely be able to make a viable proposal, if granted the extension, is whether it would likely, as opposed to certainly, be able to present a viable proposal. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]), Justice Farley was of the opinion that "viable" means "reasonable on its face" to a reasonable creditor and that "likely" did not require certainty but meant "might well happen", "probable" or "to be reasonably expected." See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S. S.C.).

33 In support of its motion, the Bank relied on Section 50.4(11)(c) of the BIA and argued that Heritage would not be able to make a proposal before the expiration of the 30-day period that would be accepted by the majority of its creditors. It relied upon *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]) in support of its argument. In *Cumberland Trading Inc.*, Skyview International Finance Corporation represented 95 percent of the value of the claims of secured creditors of Cumberland and 67 percent of all creditors' claims. Skyview therefore had a veto power on any vote on a proposal and it asserted that there was no proposal which Cumberland could make that it would approve. Justice Farley allowed Skyview's motion and declared terminated the 30-day period in which to file a proposal.

34 Similarly, in *Com/Mit Hitech Services Inc., Re*, [1997] O.J. No. 3360 (Ont. Bktcy.), Toronto Dominion Bank ("TD Bank") was owed more than 90 percent of the debtor's total indebtedness and brought a motion pursuant to Section 50.4(11) of the BIA requesting a declaration that the 30-day period provided in Section 50.4(8) be terminated. Justice Farley allowed TD Bank's application, recognizing that TD Bank was the overwhelming creditor and thus was in a veto position with respect to any proposal.

35 However, in the present case, the Trustee has advised that the Bank would be outside the terms of any proposal and would in fact be paid out. As well, Gilbert LeBlanc testified that Group Savoie, which has expressed an interest in acquiring all of the outstanding shares of Heritage, understands that the Bank would have to be paid out. Accordingly, the Bank's argument that it is in a position to veto any proposal put forth by Heritage must fail since the Trustee has advised that the Bank will not be in a position to veto any proposal since it will be outside the terms of any proposal and would not be included in any class of creditors of Heritage.

36 In granting an extension of the stay, I relied on the fact that Groupe Savoie Inc. expressed a desire to negotiate with the shareholders of Heritage for the purpose of structuring a transaction whereby it would acquire all of the outstanding shares of Heritage. It was anticipated that negotiations would take place from March 15th to March 17, 2004 "*with a formal letter of intent to be provided no later than Monday, March 22, 2004 and open for acceptance by the shareholders of the Company until 5:00 p.m. on Tuesday, March 23, 2004*." Groupe Savoie is an arms length corporation with substantial assets.

37 At the time of the hearing of Heritage's motion, I was satisfied that Heritage established on a balance of probabilities that an extension was justified. Accordingly, I allowed Heritage's application for an extension of the Stay to March 25, 2004.

The Availability of Credit

38 The next issue to be addressed is whether the Bank acted contrary to the Stay provisions of Section 69 of the BIA by sweeping Heritage's operating account and capping its operating facility subsequent to the date Heritage filed its Notice Of Intention. Heritage argues that by so doing the Bank in effect executed a remedy contrary to Section 69.(1) of the BIA.

39 Section 69 of the BIA provides:

> 69.(1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> > (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

40 In *Gene Moses Construction Ltd.* (1999), 9 C.B.R. (4th) 275 (B.C. Master) the Court held that a secured creditor could not remove money from the debtor's account after the filing of a Notice of Intention. The debtor's motion for an order that the funds be returned was granted. The Court held that "*remedy*" in Section 69 must be given a broad interpretation.

41 In *National Bank of Canada v. Dutch Industries Ltd.* (1996), 45 C.B.R. (3d) 103 (Sask. Q.B.), National Bank unsuccessfully applied to the Court to lift the Stay imposed by the filing of a Notice of Intention to Make a Proposal. National Bank had continued to demand the debtor meet its margin requirements and continued to take the funds from the debtor's bank account. The Court stated at ¶ 10:

> ... The applicant argued that s. 69(1)(b) of the Act did not prevent it from insisting upon, not did it release the debtor from the obligation of complying with the margining requirements arising under the credit agreements existing between the parties. Section 69(1)(b) provides that no provision in a security agreement which provides that in these circumstances the insolvent ceases to have rights to use and deal with assets secured under the agreement "as he would otherwise have" has any force and effect. It appears the margin requirements imposed by the Bank under the existing arrangements would result in its seizing or having the right to seize the cash receipts of the business. In such circumstances the respondents would be unable to continue its business. As such a situation would effectively negate the stay of proceedings, it cannot be allowed to prevail. However, the respondents must be prevented from allowing the material erosion of the security of the Bank and s. 69(4) gives the Court power to make provisions for protection of the creditor, suspending the stay fully or upon a qualified basis if the creditor is likely to be materially prejudiced by the stay.

42 As was the situation in the case of Heritage, Dutch Industries opened an account at another bank and started making its deposits to that account. The Court allowed that arrangement to continue, provided an accounting was made daily to National Bank and subject to other terms and conditions imposed by the Court.

43 The stay of proceedings provisions contained in Section 69 of the BIA are designed to prevent proceedings by a creditor which might give that creditor an advantage over other creditors. See: *The 2004 Annotated Bankruptcy and Insolvency Act* by Lloyd W. Houlden and Jeffery B. Morawetz, at F § 53.

44 Counsel for the Bank argued that in accordance with Section 65.1(4)(b) of the BIA, the Bank had kept the operating facility at the amount outstanding on February 10, 2004, the date prior to the date of Heritage's filing of its Notice of Intention. In other words, it capped the credit facility at that moment in time. As a consequence of the capping of available credit, utilization by Heritage of its credit facility would be reduced accordingly when it made deposits to its blocked account. The Trustee demanded that Heritage be provided with immediate access to the funds deposited by Heritage with the Bank subsequent to the filing of the Notice of Intention. Counsel for the Bank argued that the Bank was not seeking to improve its position and remains willing to make funds available to Heritage on the basis of the "*Asset Lending Model on the go forward*." He went on to state, "*compliance with your request would prejudice the Bank's position and in effect constitute a further advance of credit which the Bank is not required to provide pursuant to Subsection 65.1(4)(b) of the BIA*."

45 Section 65.1(4) of the BIA provides as follows:

> (4) Certain acts not prevented - nothing in subsections (1) to (3) shall be construed
>
> > (a) as prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed; or

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

46 There is an obvious contradiction in the position taken by the Bank with respect to the continued use by Heritage of its operating account with the Bank. On the one hand the Bank "*acknowledges the maintenance of the status quo during the period of the stay*." On the other, the Bank capped the amount of available credit pursuant to the credit facility as of the date of filing of the Notice of Intention and would only provide Heritage with ongoing access to its operating facility up to that amount. The Bank has stated that under the ABF model, at no time would the borrower be deprived of the use of its cash since it receives credit for those receipts deposited to its blocked account "*which are then re-advanced on the basis of the margining formula to which the parties have agreed*."

47 The Bank asserts that it has the authority to cap the operating facility by virtue of Section 65.1(4)(b) of the BIA. It argues that compliance with the request of Heritage would "*in effect constitute a further advance of credit, which the Bank is not required to provide pursuant to Subsection 65.1(4)(b)*." I disagree with the Bank's interpretation in this regard.

48 I interpret the provisions of Section 65.1(4)(b) of the BIA to mean that the status quo is intended by the BIA to be protected and preserved. Neither party to a loan agreement can unilaterally amend its terms. Failure to maintain the status quo would be contrary to the fundamental objective of the stay provisions of the BIA as they relate to an insolvent person being authorized to file a Proposal.

49 In interpreting the scope of the BIA's rights and remedies, the modern approach to statutory interpretation should be applied. 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: *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.), at para 26, citing E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

50 In my view, the purpose of the relevant stay provisions legislated by the BIA is to preserve and protect the status quo at the moment in time an insolvent person files a Notice Of Intention To Make A Proposal. In this particular case, I am of the view that Heritage was entitled to avail itself of the revolving credit facility it accepted from the Bank on January 30, 2001 subject to the terms and conditions contained therein. That facility should continue to be operated in accordance with its terms and conditions notwithstanding the filing by Heritage of a Notice Of Intention. The capping by the Bank of the amount available to Heritage would in effect constitute a unilateral change or amendment to those terms and conditions.

51 In the February 23rd letter from Counsel for the Bank to the Trustee, it is stated that the Bank "*remains willing to make funding available to Heritage on the basis of the 'asset lending model' on the go forward*." The stay of proceedings protection established by the BIA maintains the status quo. In my opinion, by capping the revolving line of credit, the Bank in effect exercised a remedy against Heritage contrary to the BIA's stay provisions. The intention of the stay provisions contained in the BIA is to allow an insolvent person to continue its business in accordance with its existing arrangements with its creditors, which in the case of a bank or other secured creditor would be in accordance with its existing authorized credit agreements. In my view, a secured creditor cannot unilaterally amend a loan or credit agreement relating to a secured revolving line of credit by capping the available line of credit particularly during the reasonable period of time to repay timeline. Obviously, there is a dispute between the Bank and Heritage with respect to whether Heritage was in default of any of its covenants to the Bank at the time of the issuance of the Bank's Demand for payment. There is also the issue of the inventory discrepancy which came to light during the hearing. As a consequence of that discrepancy, it is not possible to determine the issue of whether the Bank should return the money it swept from Heritage's account. It is only possible to comment generally on the availability of credit in a case such as this which involves a revolving line of credit.

52 In *Com/Mit Hitech Services Inc., Re*, *supra*, TD Bank sought a declaration under Section 50.4(11) of the BIA that the 30 day period be terminated, or, alternatively, an order that Section 69 of the BIA no longer operated in respect of TD Bank. As

mentioned, TD Bank's motion was allowed. The debtor cross-applied for an order restraining TD Bank from interfering with the banking relationship. The cross-motion was dismissed.

53 Justice Farley writes at ¶ 11:

> *The Bank's extension of credit was on a demand basis. The Debtor is in material breach of the terms of that demand loan. There would not appear to me in the circumstances to be any requirement of continuing the line of credit intact including allowing the Debtor to call upon the unused portion thereof given the breach and additionally because of the demand. Section 244(2) of the BIA is aimed at providing enforcement of security not at the provision of new money. Section 65.1(4)(b) provides that s. 65.1(1), (2) and (3) do not require "the further advance of money* or *credit" (emphasis added). In respect of the demand, it should be noted that I am not commenting upon whether the line of credit should continue to exist during the "reasonable period of time to repay" period. However, in that regard I would note that the Bank continued to honour cheques for 6 days after its demand. But as well to my mind it is important to appreciate that there were material breaches of a number of important covenants and that it was a demand as opposed to term loan. I do not see that there is any validity to the Debtors claim for relief; I would dismiss its cross motion*.

54 It is relevant to note that in *Com/Mit Hitech Services Inc.*, Justice Farley found that the debtor in that case was not acting in good faith and with due diligence. There were material breaches of a number of important covenants. The character of the debtor as a borrower from TD Bank had changed significantly from when the banking relationship commenced and more importantly from when the then existing loan arrangements were made. TD Bank demanded payment and issued a Section 244 Notice pursuant to the BIA on July 10, 1997. On December 12, 1996, TD Bank advised the debtor that it was in breach of its credit conditions. On January 15, 1997, TD Bank offered an amended arrangement which was accepted by the debtor. The debtor was to fulfill certain conditions, but only carried out one of those conditions. In fact, Justice Farley concluded that the debtor was "*going essentially in a 180° way against what was agreed to in January, 1997*."

55 In the present case, the letter dated February 2, 2004 from the Bank's lawyers refers to Heritage's Credit Facility as a "*Revolving Demand Operating Facility*" [Emphasis added.] The offer of the facility from the Bank dated January 30, 2001 offered Heritage "*a revolving credit facility*" with the word '*demand*' noticeably absent. The Default provisions provide that in the event of a default under any agreement in respect of the borrowed money or if there was "*in the Bank's opinion*", a material adverse change in the "*financial condition, or operation or ownership*" of Heritage, all indebtedness of Heritage to the Bank would, at the option of the Bank, become immediately due and payable.

56 The February 2, 2004 demand for payment states that Heritage was in default of the "*Margin Working Capital Loan Agreement*" between Heritage and the Bank and that the Bank also had concerns regarding Heritage's "*continued financial performance and its current financial ratios*." It does not specify what the default was nor does it afford Heritage time to cure the default. The demand letter went on to state that the Bank no longer wished to continue its business relationship with Heritage and required payment in full of all indebtedness of Heritage to the Bank within 15 days.

57 The purpose of the BIA's stay provisions as incorporated in Section 69 is to maintain the status quo. In my opinion, maintaining the status quo does not include the capping of a debtor's secured revolving line of credit during which would otherwise be available to the debtor had it not filed a Notice Of Intention to Make a Proposal. The receipts deposited by Heritage to its blocked account should have continued to be re-advanced to Heritage by the Bank on the basis of the margining formula to which the parties had agreed. The Bank has stated that under the ABF model a Borrower would "*at no time*" be deprived by the use of its cash, since cash receipts are re-advanced based upon the margining formula. The Bank is protected because it has set the margin requirements for Heritage's revolving line of credit. Its security, the receivables and inventory, continue to revolve and if there is a reduction of either, the amount of credit available would accordingly be reduced based upon the margining formula established by the Bank. Counsel for the Bank stated in a letter to the Trustee, "*The bottom line is Heritage cannot pursue its restructuring through a systematic erosion of the Bank's security position*." In my opinion, as long as the margin requirements are being met, there would be no erosion of the Bank's security on Heritage's inventory and receivables.

58 In *Com/Mit Hitech Services Inc.*, Justice Farley was of the view that the debtor was not acting in good faith and with due diligence. On the issue of whether the debtor could avail itself of a continuing line of credit, he concluded that in the circumstances of that case, there did not appear to be any requirement of continuing the line of credit intact including allowing the debtor to call upon the unused portion thereof given the material breaches of a number of covenants and that it was a demand as opposed to a term loan.

59 In the present case, the Credit Facility offered by the Bank to Heritage and accepted by it on January 30, 2001 was for an initial term of two years ending on January 30, 2003 and then automatically renewed itself for successive 180 day periods unless either Heritage or the Bank gave prior written notice to the other not less than 90 days in advance of the end of the initial term or successive term.

60 As mentioned, the Bank's February 2, 2004 demand letter cited that Heritage was in default of the Margin Capital Loan Agreement but does not specify what the default was nor does it afford Heritage an opportunity to cure or remedy the default. It also stated the Bank had concerns regarding Heritage's "*continued financial performance and its current financial ratios*." These ratios were not specified, nor was the default.

61 It must also be remembered that it was the Bank that took the initiative to put Mr. LeBlanc in place to try to find a buyer for Heritage. The Bank's initiative also resulted in the appointment of an advisory committee which was in place at the time the Bank issued its demand for payment.

62 I mention this because it goes to the issue of what a reasonable period to meet the demand for payment might have been in this case. At the time the demand for payment was issued by the Bank, there were no payments overdue since it was a revolving line of credit. The Trustee says Heritage was not in default of its loan conditions.

63 Although the Bank asserted in the letter from its Counsel dated February 2, 2004 that Heritage was in default of the Margin Capital Loan Agreement, Heritage claimed that it maintained its covenants and margin position with the exception of one instance in January 2004 which it claims was remedied "*immediately*." The Trustee stated that Heritage's Credit Facility with the Bank did not have an expiration date until January 31, 2004.

64 I acknowledge there is an inventory discrepancy problem in this case which was not discerned until after the various motions in this matter were filed. As a consequence of this discrepancy, it is not possible to determine on the limited evidence before me if the Bank ought to return the funds it swept from Heritage's account after February 11, 2004.

65 The most that can be said is that both a debtor and a secured creditor have defined rights under the BIA which must be applied to the facts of each individual fact situation.

66 On the one hand, there is a secured creditor's right to call a loan and demand payment and to issue a Notice of Intention to Enforce Security pursuant to Section 244 of the BIA, provided it is entitled to do so in accordance with the loan agreements in place between it and its debtor. On the other, there is the debtor's right to file a Notice of Intention to Make a Proposal pursuant to Section 50.4(1) of the BIA.

67 In my opinion, the issue of the type of loan, namely demand, term, or revolving, is relevant in the context of whether a secured creditor is required to continue to operate existing credit agreements in accordance with loan agreements in place with the debtor.

68 In Houlden and Morawetz, *Bankruptcy and Insolvency Analysis* The authors, the Hon. L.W. Houlden and Geoffrey B. Morantz, write:

> *If the security which the secured creditor wishes to enforce is a demand loan, it would seem that the security holder should make a demand for payment before giving the notice under s. 244(1), because it could be argued that until the demand period has expired, the creditor cannot have "and intention to enforce his security". If the security agreement calls for term payments and a payment is overdue, then there seems no reason why the notice under s. 244(1) could not be combined with*

a Lister v. Dunlop notice: Prudential Assurance Co. (Trustee of) v. 90 Eglinton Ltd. Partnership supra; *Delron Computers Inc. v. Peat Marwick Thorne Inc.*, *[1995] 5 W.W.R. 174, 31 C.B.R. (3d) 75, 1985 CarswellSask 5 (Sask.Q.B.)*.

69 In an article entitled '*Enforcement of Security - The Battle of the Notices*' by Andrew B. Laidlaw, 37 C.B.R. (3d), the author writes at page 282:

The loan may be expressed to be repayable in full on a specified date, or by instalments, each due on a specified date. In such cases, there is no place for the common law doctrine of reasonable time to pay, because the borrower knows in advance when his or her payment obligations become due.

A different situation arises when a loan agreement provides that the whole of the outstanding loan will immediately become due and payable without the need for demand upon the occurrence of a specified default, for instance, the failure to pay an instalment of principal or interest, the breach of a financial covenant, or failure to pay a sum due under another agreement. In Kavcar, *McKinlay J.A. said, at p. 17:*

> I am satisfied that so long as the debtor is not misled, the creditor may rely on any default by the debtor when making a demand for payment whether or not the specific default is outlined in the letter of demand. However, I do not accept Aetna's argument that some types of default permit enforcement of the security without any demand for payment being made. In my view, the law has developed to the point where, regardless of the wording of a debenture security, it cannot be enforced without, first, the making of a demand, and second, the giving of a reasonable time within which to pay the indebtedness. This was the opinion of Fawcus J. in *Royal Bank v. Cal Glass Ltd.* [(1979), 18 B.C.L.R. 55], at p. 68, and I agree.

This judicial statement should not be read as meaning that a loan cannot immediately become due and payable without demand, or as meaning that security cannot become enforceable without demand: McKinlay J.A. is simply saying that a secured creditor cannot actually enforce its security without making demand and then giving the debtor a reasonable time to pay.

70 In the case of Heritage, the Bank demanded payment of its indebtedness within 15 days from February 2, 2004. Whether or not 15 days is a reasonable time period in the circumstances of this case is not to be determined on this motion. I mention this issue in this context because, in my opinion, the Bank should have continued operating Heritage's revolving line of credit in accordance with agreements in effect at the time of the Bank's demand. In other words, I am of the view that the Bank had no authority to cap Heritage's line of credit as of the day immediately proceeding the filing by Heritage of its Notice of Intention to Make a Proposal. The revolving line of credit should have continued to be operated in accordance with the terms and conditions agreed to between the Bank and Heritage. The Bank established the receivable and inventory margins at the outset when it offered the revolving line of credit to Heritage.

71 The BIA establishes the Stay of Proceedings provision in Section 69(1). Clearly, a secured creditor can not enforce its security during the stay period. The intention of the legislation is to maintain the status quo while the debtor attempts to reorganize.

72 Section 65.1(1) of the BIA provides that where a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement with the insolvent person, or claim an accelerated payment under any agreement with the insolvent person.

73 The section goes on to provide that this is not to be construed as "*requiring the further advance of money or credit*." However, in the case of a revolving line of credit, such as in this case, in my view the Bank would be re-advancing Heritage's receipts which it had deposited to its blocked account. In other words, it is not advancing additional credit, rather it is simply a revolving process operating in accordance with the margins and conditions agreed to by both Heritage and the Bank. In the February 23rd letter from Counsel for the Bank to the Trustee, it is stated that the Bank "*remains willing to make funding available to Heritage on the basis of the 'asset lending model' on the go forward*." As mentioned, the Bank has stated that under the ABF model, a borrower would at no time be deprived of the use of its cash since it receives credit for those receipts

deposited to its blocked account "*which are then re-advanced on the basis of the margining formula to which the parties have agreed*." [Emphasis added.] That is the essence of a revolving line of credit. Section 65.1(4) of the BIA must be read in context of the Bank's agreements with Heritage. The Bank is required to "*re-advance*" the cash receipts received by Heritage in accordance with the margining formula.

74 On the one hand, the Bank is not permitted to amend its loan agreements with Heritage by, for example, capping the available line of credit, however, it is not required to make a further advance of money or credit. As can be seen, this issue is somewhat complicated in the case of a revolving line of credit. Based upon the agreed formula for inventory and receivable margins, the Bank is in effect allowing Heritage to use the funds it has collected from its customers and deposited to its blocked account with the Bank. The Bank has represented that "*at no time is the borrower under the ABF model deprived of the use of its cash since it receives credit for those receipts deposited to the blocked account which are then re-advanced on the basis of the margining formula to which the parties have agreed*." [Emphasis added.] In my view, this process is simply the use by Heritage of the funds it has collected from its customers and deposited to its blocked account. As the Bank has stated, it is the borrower's "*cash*." In other words, the Bank is not making a fresh advance of its money or giving new credit over and above that which was agreed to and in full force and effect at the time of filing by Heritage of its Notice of Intention to Make a Proposal. It is simply giving Heritage credit the receipts it deposited to the blocked account.

75 In any event, if a secured creditor is in doubt as to its obligations due to the interplay between the Stay of Proceedings provision contained in Section 69(1) of the BIA and the notwithstanding provisions contained in section 65.1(1), it can apply for an order declaring the thirty day period for a debtor to file a proposal terminated pursuant to Section 50.4(11) of the BIA or a declaration that Sections 69 to 69.31 of the BIA no longer operate in respect of that creditor pursuant to Section 69.4 of the BIA.

76 Section 69.4 provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

77 This is the procedure the Bank followed in this case, namely a motion seeking a termination under Section 50.4(11) and a declaration pursuant to Section 69.4 of the BIA.

78 In *Cumberland Trading Inc.*, *supra*, Justice Farley comments on the meaning of the words "*materially prejudiced*" as contained in Section 69.4 of the BIA. He writes at paragraph 11:

> ¶ Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one - i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor qua person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Cumberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of $450,000 and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no

erosion of Skyview's position by, say, getting cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

79 In *Com/Mit Hitech Services Inc.*, *supra*, Justice Farley writes at ¶ 7:

¶ 7 I considered the question of material prejudice as to s. 50.4(11) and s. 69.4 in Re Cumberland Trading Inc. (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.). In this present case, there was no evidence as to value either on a going concern, liquidation or other basis. Based upon the worst cash flow information given by the Debtor, the erosion of assets would be approximately $50,000 per month. Thus before the Bank would have the opportunity of opposing an extension of time to make the proposal would only be another three weeks (with a possible erosion on that basis of some $35,000 - $40,000). Given the relative magnitudes, I do not see that the Bank has made out the aspect of material prejudice. There was no specific argument as to s. 69.4(b) regarding "it is equitable on other grounds to make such a declaration." Thus it would not appear to me that the Bank should succeed on the basis of s. 50.4(11)(d) or its alternate request for relief under s. 69.4.

Conclusion

80 At the time of the hearing of Heritage's motion for an extension of the stay, it had established that such an extension was justified, and was so granted.

81 With respect to the availability of credit, I am of the view that Heritage would be entitled, notwithstanding its filing of a Notice Of Intention under the BIA on February 11, 2004, to avail itself of the revolving credit facility established by the Loan Agreement in accordance with its terms under the ABF model, and in particular in accordance with the margin requirements established by the Bank.

82 In my opinion, the Bank was not entitled to sweep Heritage's operating account and cap the amount available to Heritage as of the date of its filing of a Notice Of Intention to Make a Proposal. Heritage was entitled to the use of its cash receipts which it had deposited to the blocked account in accordance with its agreement with the Bank. By unilaterally capping Heritage's revolving credit facility, the Bank exercised a remedy contrary to the stay provisions of the BIA. To conclude otherwise would negate the purpose of the stay provisions of the BIA and the fundamental objective of maintaining the status quo while an insolvent person attempts to reorganize.

83 The terms and conditions of the revolving credit facility in place between the Bank and Heritage should have remained in full force and effect notwithstanding the filing by Heritage of a Notice Of Intention To Make A Proposal

Motion granted.

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3

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131

Date:20200406
Docket: No. 43999
Registry: Halifax
Estate Number: 51-2624515

In the Matter of: The Proposal of Scotian Distribution Services Limited

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	March 27, 2020, in Halifax, Nova Scotia (via Teleconference)
Counsel:	Tim Hill, QC, for the Applicant

Balmanoukian, Registrar:

[1] The word “Bankrupt” is derived from the Italian “*banca rotta*.” In times of yore, an insolvent merchant’s place of business would be trashed by irate creditors; the result was a “broken bench.”

[2] In Nova Scotia, the Bench will not break.

[3] During the Great Plague of 1665-6, the Court in London moved from Westminster to Oxford (as did Parliament). But yet, they persisted.

[4] In 2020, we are blessed with far greater modalities of communication and administration. As circumstances direct they are being, and will be brought, to bear in the interests of delivering both justice and access to justice.

[5] As I write, and with a hat tip to Mr. Yeats, mere anarchy is loosed upon the world.

[6] It is not business as usual. Virtually nothing is.

[7] On March 19, 2020, the Supreme Court of Nova Scotia adopted an “essential services” model in response to the Covid-19 pandemic. This has meant that only matters deemed urgent or essential by the presiding jurist will be heard

until further notice; and those, by the method of least direct personal interaction that is consistent with the delivery and administration of justice. This can, in appropriate instances, include written, virtual, electronic, telephone, video, or other modalities, and adaptations of procedures surrounding filing of affidavit and other material.

[8] On March 20, 2020, I issued a memorandum to all Trustees in Nova Scotia reflecting this as it applies to this Court, and underscoring the "urgent or essential" standard. It can be obtained from the Deputy Registrar whose contact coordinates, in turn, are posted on the Court website (courts.ns.ca).

[9] "Essential" means such matters that must be filed, with or without a scheduled hearing, to preserve the rights of the parties – such as those which face a legislative limitation period. "Urgent" means matters that simply cannot wait, in the opinion of the presiding jurist.

[10] Both the Chief Justice of Nova Scotia, the Honourable Chief Justice Michael J. Wood, and the Chief Justice of the Supreme Court of Nova Scotia, the Honourable Chief Justice Deborah K. Smith, have been clear that this does not mean that Courts, being an essential branch of government and the guardian of the

rule of law, cease to function. It means that they operate during this global emergency – and its local manifestation – on an essential services basis.

[11] Accordingly, scheduled matters are deemed to be adjourned *sine die* unless brought to my attention in accordance with the memorandum noted above and I (or a presiding Justice) deem the standard to be met.

[12] Against that backdrop, evolving in real time, I faced the present application. It is a motion for an extension of time to file a proposal, pursuant to Section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). That section reads:

> **(9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> > **(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;
> >
> > **(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
> >
> > **(c)** no creditor would be materially prejudiced if the extension being applied for were granted. [emphasis added]

[13] The present motion had been scheduled for March 27, 2020. The applicant's Notice of Intention had been filed on February 28, 2020, meaning that its expiration, 30 days thereafter, was at the end of March, 2020 (BIA s. 50.4(8)). The

scheduled motion was therefore at the very end of this timeline, and the lack of an extension would result in a deemed assignment in bankruptcy (BIA s. 50.4(8)).

[14] The applicant sought to have the matter heard by teleconference. After a review of the file material, I agreed. The Deputy Registrar, with my gratitude, arranged for recording facilities; this is still an open Court of record. Affected entities are still entitled to notice, and they are still entitled to be heard. As well, our open court principle remains and is at least as important as ever.

[15] To that end, the applicant was directed to provide affected entities, including creditors, with particulars of the conference call, including time and call-in particulars. That was done, and a creditor (who did not object to the application) did indeed avail itself of this facility.

[16] I note that the affidavit of service, and other material, was filed electronically. That is perfectly in order in accordance with the current directives in effect at present.

[17] I have granted the order based on the following factors:

[18] First, I am satisfied that the ‘urgent or essential’ threshold was met. The limitation period in BIA 50.4(8) was nigh. The deemed assignment would be

automatic. As I will recount below, such an assignment would at least potentially have impacts that run beyond solely the individual interests of the corporate debtor.

[19] Section 50.4(9) requires the Court to be satisfied that the applicant meets a three part test each time it is asked for an extension: that it has and continues to act with due diligence; that there is a likely prospect of a viable proposal; and that no creditor would be materially prejudiced by the extension. The burden is on the applicant each time, to meet each test.

[20] The applicant's affidavit evidence is that the applicant continues in operation and is diligently pursuing the proposal process; the evidence of the current status of the process (ie the engagement of MNP Ltd., review of operations, and review of assets and liabilities) satisfies me, at present, of the good faith requirement.

[21] It has employees and contracts. Its operations include transportation operations, which at least for the basis of the current application are important and perhaps essential on both a micro and macroeconomic basis. While "bigger picture" ramifications outside the particular debtor and creditors are not part of the Section 50.4(9) test, I believe I can take them into account when assessing and placing appropriate weight on the benefit/detriment elements which are the overall thrust of that tripartite standard.

[22] No creditor objected, and there is no evidence that the extension would cause material prejudice to any creditor. Although this burden, too, is on the applicant, I can take judicial notice that proposals, if performed, generally result in a greater net recovery to creditors overall; while there is some indication that the applicant will seek to resile from certain obligations, the test is whether the extension would be prejudicial, not whether the proposal itself would be.

[23] This would be the applicant's first extension under 50.4(9), which allows for a series of extensions of up to 45 days each, to a maximum of five months.

[24] To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.

[25] I can take further judicial notice that especially in the current environment, a bankruptcy of an operating enterprise would almost inevitably be nasty, brutish,

and anything but short. Creditors would be well advised to consider the viability and desirability of a proposal through that lens.

[26] This Court will, no doubt, face a considerable additional case load as the economic fallout of the current human disaster works its way through what is and remains a robust legal process. An applicant should have every reasonable opportunity to avail itself of a restructuring rather than a bankruptcy, assuming it otherwise meets the requirements of BIA 50.4(9).

Conclusion

[27] The application is granted, and I have issued the order allowing the time to file a proposal to be extended to and including May 11, 2020.

Balmanoukian, R.

Tab

4

KING'S BENCH FOR SASKATCHEWAN

Citation: **2022 SKKB 236**

Date: **2022 10 28**
Docket: BKY-RG-00228-2022
Judicial Centre: Regina

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED, OF T & C STEEL LTD. AND T & C REINFORCING LTD.

T & C STEEL LTD. and T & C REINFORCING LTD.

Applicants

Docket: BKY-RG-00230-2022
Judicial Centre: Regina

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED, OF UNDER THE SUN GROWERIES INC.

UNDER THE SUN GROWERIES INC.

Applicant

Counsel:

Travis K. Kusch	counsel for the applicants
David J. Smith	for the Canada Revenue Agency
Kelsey J. Meyer	counsel for the proposal trustee
Andrew Basi	for the proposal trustee

FIAT — SCHERMAN J.
October 28, 2022

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[1] Each of T & C Steel Ltd. [TCS], T & C Reinforcing Ltd. [TCR] and Under the Sun Groweries Inc. [UTSG] had given Notices of Intention to Make a

Proposal [NOI] to their unsecured creditors. On the filing thereof, Grant Thornton was named as the Proposal Trustee for each. The applications did not include proposals to their secured creditors.

[2] On September 13, 2022, Gabrielson J. made an order consolidating the proceedings in BKY-RG-00228-2022 and BKY-RG-00229-2022 respecting TCS and TCR into the court file BKY-RG-00228-2022 and granted, pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*], a first extension of the time for those applicants to file their proposal to 11:59 p.m. on October 28, 2022, along with ordering other interim measures. He also made a similar extension order in respect of UTSG.

[3] Each of the applicants now asks the court to order an extension of the time to file their respective proposals to creditors to December 9, 2022.

Applicable Legislation and Authorities

[4] Section 50.4(9) of the *BIA* states as follows:

> **Extension of time for filing proposal**
> **50.4 (9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c)\ no creditor would be materially prejudiced if the extension being applied for were granted.

[5] In light of this provision, before granting the requested extension, I have to be satisfied that:

a. The respective applicants are acting in good faith and with due diligence;

b. They are likely able to make a viable proposal to their respective creditors if the extensions are granted; and

c. No creditor would be materially prejudiced if the respective extensions are granted.

[6] In *Cantrail Coach Lines Ltd. (Re)*, 2005 BCSC 351, 10 CBR (5th) 164 [*Cantrail*], the British Columbia Supreme Court said the following in respect of this section:

> [11] I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *Re: N.T.W. Management Group Ltd.* [1993] O.J. No. 621, a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the Act and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.
>
> [12] I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

[7] In *Enirgi Group Corp. v Andover Mining Corp.*, 2013 BCSC 1833, 6 CBR (6th) 32 [*Enirgi Group*], the Court said:

> [66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": *Cumberland* [[1994] OJ No 132 (Ont Ct J)] at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The

> proposal need not be a certainty and "likely" means "such as might well happen." (*Baldwin* [[1994] OJ No 271 (Ont Ct J)], paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): *Baldwin* at para. 3; *Cantrail* at paras. 13-18).

[8] Then more recently the Nova Scotia Supreme Court said the following in *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131 [*Scotian Distribution*]:

> [24] To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.
>
> [25] I can take further judicial notice that especially in the current environment, a bankruptcy of an operating enterprise would almost inevitably be nasty, brutish, and anything but short. Creditors would be well advised to consider the viability and desirability of a proposal through that lens.

The Position of Interested Parties

[9] Counsel for the applicants says that the affidavits of Chad Joinson, the sole director and shareholder of each of the applicants, provides evidence that they are acting in good faith, with due diligence and that no creditor would be materially prejudiced. He adds that given there is no evidence presented by any interested party disputing this evidence, these requirements are satisfied. Thus, counsel says the remaining issue is whether I am satisfied the applicants are likely able to make a viable proposal to their respective creditors if the extensions are granted.

[10] The only interested parties appearing were the Royal Bank of Canada [Royal Bank] through their legal counsel Mr. Olfert and David Smith for Canada Revenue Agency [CRA]. The Court was advised that the Royal Bank takes no position in respect of the applications. This is understandable since no compromise of

the debts to it are proposed.

[11] David Smith advised the Court that the CRA does not take issues with the good faith or diligence of the applicants, nor was he able to say that the ongoing obligations of the applicants to the CRA (there being no current indebtedness) are prejudiced. However, he takes the position that the extensions sought should not be granted, because he argues that on the basis of the information available to the Court, I should not be satisfied the applicants are likely able to make a viable proposal to their respective creditors.

My Analysis and Conclusions

[12] The affidavits of Chad Joinson make no express statement that the applicants are likely able to make a viable proposal to their respective creditors. The furthest he goes is to state: "It is my honest belief that a viable proposal will be made in this matter". He provides no factual basis for his stated honest belief, nor does he speak to whether the financial information and projections the applicants were providing to the Proposal Trustee were accurate and truthful. This is significant because the Proposal Trustee relied on the financial information and projections provided for its reports to the Court.

[13] The best information that I have in respect of the prospects for a viable proposal are contained in the Proposal Trustee's Second Report in respect of the applications. Their reports are not evidence, but proposal trustees have a status akin to officers of the court in *BIA* proceedings. The Second Report respecting TCS and TCR contains the following statements:

> 7. To date, nothing has come to the Proposal Trustee's attention that would cause it to question the reasonableness of the information and explanations provided to it by the Companies and their management. The Proposal Trustee has requested that

> management bring to its attention any significant matters which were not addressed in the course of the Proposal Trustee's specific inquiries. Accordingly, this Report is based on the information (financial or otherwise) made available to the Proposal Trustee by the Companies.
>
> …
>
> 25. The Proposal Trustee's review of the Second Cash Flow Statement consisted of inquiries, analytical procedures and discussions related to information supplied to the Proposal Trustee by management of T&C. Since hypothetical assumptions need not be supported, the Proposal Trustee's procedures with respect to such assumptions were limited to evaluating whether they were consistent with the purpose of the Second Cash Flow Statement. The Proposal Trustee has also reviewed the support provided by management for the probable assumptions and the preparation and presentation of the Second Cash Flow Statement. Based on the Proposal Trustee's review, nothing has come to its attention that causes it to believe that, in all material respects:
>
> (a) the Probable and Hypothetical Assumptions are not consistent with the purpose of the Second Cash Flow Statement;
>
> (b) as at the date of the Second Cash Flow Statement, the Probable and Hypothetical Assumptions developed by management were not suitably supported and consistent with the Companies' plans or do not provide a reasonable basis for the Second Cash Flow Statement, given the Probable and Hypothetical Assumptions; or
>
> (c) the Second Cash Flow Statement does not reflect the Probable and Hypothetical Assumptions.
>
> …
>
> 28. The Proposal Trustee believes that granting an extension of time to file a proposal and the continuation of these Proceedings is in the best interest of stakeholders, and preferable to a liquidation in a bankruptcy and/or receivership.

[14] The Second Report in respect of UTSG contains the same statements but paragraphs 25 and 28 quoted above are found at paragraphs 27 and 30 of this Report.

[15] Each Second Report has attached, as Appendix 2, a Report on the Actual Cash Flow over the Period September 3 to October 14, 2022, and, as Appendix 3, a Cash Flow Forecast for the period October 15 to January 13, 2022 [*sic*] (presumably 2023 was intended).

[16] By way of summary, these appendices provide the following information:

a. Re the consolidated operations of TCS and TCR:

i. Its cash flow over the period September 3 to October 14 was a negative $125,699 and was some $273,000 less than the projected cash flows the applicants had previously provided; and

ii. Its projected cash flow from operations October 15 to January 13 is stated to be $251,684 before professional costs and $138,684 after the professional costs associated with the proposal.

b. Re UTSG:

i. Its cash flow from operations over the period September 3 to October 14 was $207,064, some $195,000 less than the projected cash flow the applicants had previously provided; and

ii. Its projected cash flow from operations October 15 to January 13 is $22,094 before professional costs and a

> negative $90,406 after the professional costs associated with the proposal.

[17] Thus, the applicants had failed by some significant measure to achieve their projected cash flows for the period to October 14 with somewhat mixed projections going forward. This information leaves me with serious reservations as to whether the applicants are viable businesses.

[18] In their Second Reports, Grant Thornton, in carefully limiting and curiously phrased statements, say that having reviewed the support provided by management for the probable assumptions and the preparation and presentation of the Second Cash Statements:

> 25. … Based on the Proposal Trustee's review, nothing has come to its attention that causes it to believe that, in all material respects:
>
> (a) the Probable and Hypothetical Assumptions are not consistent with the purpose of the Second Cash Flow Statement;
>
> (b) as at the date of the Second Cash Flow Statement, the Probable and Hypothetical Assumptions developed by management were not suitably supported and consistent with the Companies' plans or do not provide a reasonable basis for the Second Cash Flow Statement, given the Probable and Hypothetical Assumptions; or
>
> (c) the Second Cash Flow Statement does not reflect the Probable and Hypothetical Assumptions.

[19] The Proposal Trustee then end their Second Reports with the following conclusion:

> 28. The Proposal Trustee believes that granting an extension of time to file a proposal and the continuation of these proceedings is in the best interests of the stakeholders, and preferable to a liquidation in a bankruptcy and/or receivership.

and recommend the Court approve the stay extensions sought.

[20] I find the evidentiary and informational basis provided to the Court in support of the extension application to barely meet the test of a likelihood of being able to make a viable proposal. As stated in *Scotian Distribution,* on a first extension, the test "will likely not be a difficult standard to meet". But this is not a first extension.

[21] It is only by giving regard to:

a. the statement in *Enirgi Group* to the effect that '"likely' means 'such as might well happen"';

b. the direction in *Cantrail* quoted above to the effect that is important for the Court to take a broad approach and look at a number of interested and potentially affected parties, including employees and unsecured creditor;

c. recognizing that Grant Thornton is, in providing to the Court their reports, effectively an officer of the court in respect of the conclusions and recommendations they provide, notwithstanding my concerns about the limitations inherent in their reports; and

d. my opinion that the creditors should, where a reasonable possibility of acceptance of a proposal exists, be given the opportunity to decide, since they are the ones who will be primarily affected;

that I am able to conclude that I am satisfied that the applicants "would likely be able to make a viable proposal" if given additional time. I recognize that creditors might view what I might perceive as unviable as to them being viable and acceptable.

[22] Accordingly, I am granting the extensions sought and direct that orders shall issue in the form of the draft orders filed on October 21, 2022, on each of the files.

[23] In granting the requested second extensions, I wish to make it clear that should the applicants fail to complete their proposals within the time limits set forth in the orders I have made and come to the Court seeking a further extension, they should expect the Court will be requiring better and focused evidence and information on the likelihood of a viable proposal, given the problematic cash flow projections in turn based on unknown "probable and hypothetical assumptions".

[24] Because of the attention I have given to these matters and the concerns expressed herein, and in the interests of judicial efficiency, I will remain seized of any future application for a further extension of time.

"B. Scherman" J.

B. Scherman

Tab

5

SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: Nautican v. Dumont, 2020 PESC 15

Date: May 8, 2020
Docket: S1-GS-28836
Registry: Charlottetown

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by NAUTICAN RESEARCH AND DEVELOPMENT LTD. Pursuant to Section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by CARELI MARINE CORPORATION LIMITED pursuant to Section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

AND IN THE MATTER OF: a Motion by NAUTICAN RESEARCH AND DEVELOPMENT LTD. and by CARELI MARINE CORPORATION LIMITED for Orders pursuant to Sections 50.4(9), 64.2(1), 64.2(2), 50.6(1) and 50.6(3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Before: The Honourable Justice James W. Gormley

Appearances:
Michael G. Drake and Sean Corcoran on behalf of Nautican Research and Development Ltd. and Careli Marine Corporation Ltd.
David W. Hooley, Q.C. and Melanie McKenna on behalf of David Dumont and Outboard Engineering Group LLC

Place and date of hearing

Charlottetown, Prince Edward Island
October 31, 2019

Place and date of judgment

Charlottetown, Prince Edward Island
May 8, 2020

HEADNOTE: Bankruptcy and insolvency-proposal-time period to file-extension of time-administrative consolidation of proceedings-debtor-in-possession financing.

Insolvent companies filed notice of intention to make a proposal and sought extension of time to file proposal, administrative consolidation of proceedings, administrative security and debtor in possession loan. Applicants partially successful court refused to grant debtor-in-possession loan.

CASES CONSIDERED: ***Mustang GP Ltd. (Re)***, 2015 ONSC 6562; ***Convergix Inc., Re***, 2006 NBQB 288; ***H & H Fisheries Ltd., Re***, 2005 NSSC; ***Colossus Mineral Inc., Re***, 2014 ONSC 514

STATUTES CONSIDERED: Prince Edward Island ***Rules of Civil Procedure*** rule 1.04; ***Bankruptcy and Insolvency Act,*** R.S.C., 1985, c. B-3; ss. s. 50.4(1), 50.4(9)(a), s. 50.6, 50.6(5)(c), 64.2(1), and (2)

Gormley, J.:

Introduction

[1] Nautican Research and Development Ltd. (hereinafter "Nautican") and Careli Marine Corporation Limited (hereinafter "Careli") seek the following relief:

a. an order abridging the time for the notice and service of the motion and associated documentary evidence;

b. an order for an administrative consolidation of the bankruptcy proceedings of Nautican and Careli pursuant to s. 3 of the Bankruptcy and Insolvency General Rules (hereinafter "BIGR") and Rule 1.04 of the Prince Edward Island ***Rules of Civil Procedure***;

c. an order extending the time for Nautican and Careli to file their respective proposals for an additional period of 45 days, from the 27th day of October, 2019, to and including the 11th day of December, 2019, pursuant to s. 50.4(9) of the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3 (hereinafter "***BIA***")

d. an order establishing an administrative security charge to a maximum amount of $100,000 over assets of the debtors pursuant to s. 64.2 (1) and 64.2(2) of the ***BIA***; and

e. an order authorizing the debtors to borrow from Elizabeth Boyd in her personal capacity pursuant to s. 50.6(1) and s. 50.6(3) of the ***BIA***, being and intended to be a debtor in possession loan (hereinafter the "DIP Loan").

Background

[2] Nautican is a private company incorporated in British Columbia, which carries on business in Prince Edward Island. It engineers and manufactures hydrodynamic solutions for marine industry clients. Careli is a holding company, which holds all of the issued outstanding common shares of Nautican. Careli has no employees, no bank accounts or business activities.

[3] Outbound Engineering Group LLC (hereinafter "Outbound") is the primary creditor of Nautican. Outbound is located in the state of Washington. The president and sole operator of Outbound is David Dumont. Mr. Dumont is a secured creditor of Nautican and Careli. On November 19, 2018, Outbound and Dumont sued Nautican and Careli for outstanding secured debts. On December 3, 2018, Nautican and Careli filed a Notice of Intent to Defend and subsequently on January 9, 2019, a Statement of Defence. On February 7, 2019, the parties entered into a Memorandum of Settlement, which included a forbearance agreement and consents to judgment in the event of default.

[4] The parties continued to pursue settlement subsequent to the Memorandum of Settlement and had settled upon a third party arbitration process which was scheduled to be heard on October 1, 2019. On September 27, 2019, Nautican and Careli filed a Notice of Intention to Make a Proposal pursuant to s. 50.4(1) of the ***BIA***.

[5] Price Waterhouse Coopers Inc. (hereinafter "PWC") is acting as the trustee pursuant to the Notice of Intention.

[6] Effective September 27, 2019, both Nautican and Careli received the benefit of the stay of proceedings for 30 days in accordance with the ***BIA***, which in the normal course was set to expire on October 28, 2019. In order to allow Outbound and Dumont to respond to the motion to extend, the parties consented to a short extension pursuant to s. 50.4(9) which I signed on October 25 and was in force until October 31, 2019, being the day of the hearing of the motion. If the motion was not heard and the decision rendered on October 31, Nautican and Careli would be statutorily deemed to be bankrupt.

[7] I provided orders on the 31st of October with reasons to follow. These are those reasons.

Issue #1 – Should an order abridging time for service of the motion be granted?

[8] Both parties acknowledged the necessity for an order to abridge the time for service of the motion under the ***Rules***. I agree that this is an appropriate situation to abridge the formal requirements of the ***Rules***, particularity considering the very tight timelines under which the parties were operating. I therefore order the abridgement of time as requested. I would note that both parties consented to such an abridgement of time.

Issue #2 – Should an order for administrative consolidation of the bankruptcy proceedings of Nautican and Careli pursuant to s. 3 of the BIGR and Rule 1.04 of the *Rules of Civil Procedure* be granted?

[9] Nautican and Careli seek an administrative consolidation of their respective bankruptcy proceedings. Counsel for Nautican and Careli referred to ***Mustang GP Ltd. (Re)***, 2015 ONSC 6562 which states as follows:

> [25] The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations…

In this matter a consolidation will avoid a multiplicity of proceedings thereby providing the most just, expeditious and least expensive determination of the issues. In this case the two debtors are closely aligned. Careli holds all issued shares in Nautican. Careli has no employees, no bank account, and no active business activities. The managing director for both Nautican and Careli are one and the same person, Elizabeth Boyd. Both companies share the same major secured creditor. I can find no prejudice apparent if such an order is granted. In fact, counsel for the major creditor, Outbound, indicates their agreement that such an order be granted. In these circumstances, there are sound reasons to order an administrative consolidation and no cogent reasons to oppose such an order, therefore, I grant the order for administrative consolidation as requested.

Issue #3 – Should an order to extend time to file a proposal be granted?

[10] Section 50.4(9)(a) of the ***BIA*** sets out the three constituent elements that need to be present for the court to consider ordering an extension in these circumstances. The three elements are:

a) the insolvent corporations have acted, and are acting in good faith and with due diligence;

b) the insolvent corporations would likely be able to make a viable proposal if the extension is granted; and

c) no creditor of the insolvent corporations would be materially prejudiced if the extension is granted.

Sub-issue A – Have Nautican and Careli acted in good faith and with due diligence?

[11] Counsel for Nautican and Careli refer to the decision of ***Convergix Inc., Re***, 2006 NBQB 288, wherein Glennie J. stated as follows:

> [36] The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forth a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: ***Doaktown Lumber Ltd.**, Re* (1996), 1996 CanLII 4791 (NB CA), 39 C.B.R. (3d) 41 (N.B.C.A.) at paragraph 12.
>
> ...
>
> [38] In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See ***Re Cantrail Coach Lines Ltd.*** (2005), 2005 BCSC 351 (CanLII), 10 C.B.R. (5th) 164.

[12] I agree that the focus at this stage of the proceedings should be through a rehabilitative lens rather than a liquidation lens. Otherwise, there is little point having such a legislative provision.

[13] I note the following actions have been undertaken by Nautican and Careli:

i) they have retained the professional services of David Boyd of PWC as proposal trustee;

ii) they have retained Mr. Drake of McInnes Cooper to assist in their restructuring; and

iii) since the stay commenced, they are addressing current lease requirements, assessing current employee levels and reviewing client contracts. They have also reduced operating costs and worked with PWC to assess options and formulate viable proposals to creditors.

[14] I also note that the proposal trustee states that the debtors have been acting in good faith and have prepared projected statements of cash flow, which have been provided to their creditors.

[15] Outbound and Mr. Dumont have raised their concerns of the "possibility" that Nautican may have or is attempting to divert contracts to its US subsidiary to avoid its creditors. Mr. Dumont also has a "feeling" that he was not receiving the same good faith bargaining from Nautican and Careli that he was offering. Although the creditors have concerns, which may or may not be based in fact, they have not produced sufficient evidence to overcome the evidence provided by Nautican and Careli that their activities have been demonstrative of acting in a good faith manner and with due diligence with respect to the preparation of a viable proposal. I find Nautican and Careli have met the first prong of the three part test.

Sub-issue B – Will Nautican and Careli likely be able to make a viable proposal if the extension is granted?

[16] I refer again to ***Convergix Inc., Re*** wherein Glennie J. states as follows:

> [40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well happen" and "probable" "to be reasonably expected". See also ***Scotia Rainbow Inc. v. Bank of Montreal*** (2000), 18 C.B.R. (4th) 114 (N.S.S.C.).

[17] Clearly, this creates an objective standard for the court to consider, which is not tied to a specific creditor and particularly in this case, the creditor opposing the request for an extension.

[18] The test requires me to consider what a reasonable creditor might expect to happen or what might reasonably be expected to occur. This test requires a dispassionate evaluation, not the position of an advocate of a specific creditor. Nautican and Careli are seeking 45 days to allow the process a chance at success. They have retained consultants, one of which has expressed his opinion that the debtors will likely be able to make a viable proposal if the extension is granted. Nautican and Careli have made efforts in the first 30 days of the stay. This is not a situation of inactivity by the debtors. Although the evidence is not overwhelming on this aspect of the test, it is sufficient to meet the legislative requirement on a balance of probabilities.

[19] Although it is clear that Nautican, Careli and Outbound have been involved in lengthy, contentious negotiations and that Outbound believes no viable proposal will be made during the term of the extension, the test is not a subjective one and I find that the evidentiary record provided by Nautican and Careli is sufficient to meet this aspect of the test.

Sub-issue C – If the extension is granted, will any creditors be materially prejudiced?

[20] It is clear from the affidavit of Dumont that the major creditors of Nautican and the major creditor of Careli vehemently oppose the motion and argue their position will be materially prejudiced if I order an extension.

[21] I note the decision of ***H & H Fisheries Ltd., Re***, 2005 NSSC 346 wherein Goodfellow J. stated as follows:

> [37] This section of the *Act* contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to

> accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

[22] I agree that the term "material prejudice" must be interpreted on an objective basis as Goodfellow J. describes. If it were not so interpreted, it would be inconsistent with the other objective portions of the same statutory provision. It would also allow a major creditor to thwart the provisions, which are to be interpreted in a remedial fashion. I would also reference the following evidence provided in the Dumont affidavit, which states:

> 47. It is evident to me that the only tangible assets of Nautican (its equipment and IP located at Slemon Park) are fully encumbered by my Security which has been seized / tagged by the Sheriff as at December 31, 2018. It is also evident there is little or nothing else in the way of material assets to secure the Debtors ongoing legal and accounting fees and Nautican's likely continuing operating losses as is being sought by way of an Administrative Charge and DIP financing in the Motion. *In short, it appears that I am the only creditor who would be prejudiced if the relief sought was granted.*

[23] I note that Dumont indicates that all tangible assets of the debtors are securely under his control pursuant to the seizure. The only assets that are at risk according to Dumont are the intangible assets, which will be of diminished value if the debtors are deemed bankrupt. In other words, if an extension is granted and a viable proposal is not found, Dumont and Outbound will suffer very little in the way of prejudice from their present position as they now have effective control over all of the tangible assets. In fact, the creditor's position is improved if a proposal can be reached, that the matter not be dealt with by way of a liquidation basis, and that any goodwill be retained in the process. I also note Dumont's contention that he will be "the only creditor" prejudiced, but that is not the test. I do not believe that the information provided by the creditor amounts to a material prejudice.

[24] It is important to recall that the trustee provided uncontradicted evidence that no creditor would be materially prejudiced if the extension were granted. I recognize Dumont's concern that Elizabeth Boyd may be using Nautican US in an evolving fashion to distribute contracts between Nautican and Nautican US. It is not possible on this limited record for me to determine the strength or weakness of Dumont's position in regards to that concern. I do have confidence that the trustee having been made aware of Dumont's concerns with respect to the US entity will appropriately monitor the potential for inappropriate behaviour on behalf of Nautican and Careli. Although the position of Dumont is speculative, what is sure is that a deemed bankruptcy will be the result of the court's refusal to provide an extension, which will result in a concomitant loss of any intangible value in the debtor. When weighing the two scenarios and taking into consideration the objective nature of this test, I find that Nautican and Careli have met the burden on a balance of probabilities and grant the order as requested to allow them the time to file a

proposal. The order will be effective as of the 31st of October, to and including the 11th day of December, 2019.

The Administrative Charge

[25] Nautican and Careli are requesting additional relief pursuant to s. 64.2 of the ***BIA***, which states as follows:

> **64.2(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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> **(b)** any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.
>
> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> **(3)** In the case of an individual,
>
> **(a)** the court may not make the order unless the individual is carrying on a business; and
>
> **(b)** only property acquired for or used in relation to the business may be subject to a security or charge.
>
> ...

[26] Specifically, the request is for all assets of Nautican and Careli be impressed by a security or charge intended to cover the reasonably incurred fees and expenses of the proposal trustee and legal counsel to a maximum of $100,000. This charge is to enjoy priority over the claims of other creditors. I note and agree with Rady J.'s statement in ***Mustang GP Ltd., Re***, 2015 ONSC 6562:

> [33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

[27] I agree with the position of Nautican and Careli that without the administrative charge, the restructuring of the debtors will grind to a halt. These matters have been the subject of intense negotiation between the parties for some period of time. Without the involvement of the proposal trustee and legal counsel on behalf of the debtors, I see no hope or purpose in having provided the extension in time. I note the proposal trustees' position that involvement of professional advisors is critical to any chance at a viable restructuring. As s. 64.2(1)(c) requires, I am satisfied that the security is necessary for the effective participation of the proposal trustee and legal counsel. I am also satisfied that notice has been provided to the interested creditors and that the amount suggested by the experienced proposal trustee is appropriate based on his review of the matters and his considerable experience acting in similar roles in the past.

[28] It is not in any parties' best interest to truncate the proposal stage in these matters. Nautican and Careli should be provided an opportunity to prepare a substantive proposal as a going concern thereby increasing the likelihood that the creditors will recoup the best possible financial outcome.

Debtor in possession loan

[29] The final relief requested by Nautican and Careli is a DIP Loan pursuant to s. 50.6 of the ***BIA*** which states:

> **50.6 (1)** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **Individuals**
>
> **(2)** In the case of an individual,
>
> **(a)** they may not make an application under subsection (1) unless they are carrying on a business; and
>
> **(b)** only property acquired for or used in relation to the business may be subject to a security or charge.
>
> **Priority**
>
> **(3)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.
>
> Priority — previous orders

> **(4)** The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> **Factors to be considered**
>
> **(5)** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[30] I have come to the conclusion that this is not an appropriate situation to order a DIP Loan for a number of reasons. First of all, the DIP Loan is being offered by the sole shareholder of the debtors and the terms requested include a super priority over the interest of all creditors. In other words, the management of the debtors is offering the loan. It is not being offered by a creditor or an arm's length party. This differentiates this situation from the decisions referred to by the debtors including ***Colossus Mineral Inc., Re***, 2014 ONSC 514 (hereinafter "***Colossus***") decision. In ***Colossus***, Wilton-Siegel J. found that a DIP Loan was appropriate in those circumstances. Another difference between ***Colossus*** and the present case is captured in the following statement:

> 5 Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

[31] In ***Colossus***, significant creditors had confidence in the senior management of the debtor. Nautican and Careli do not enjoy the confidence of the significant creditors, being Dumont and Outbound respectively. The major creditors in this case have expressed their lack of confidence in the management of Nautican and Careli. As a result, one of the key factors to be assessed, specifically s. 50.6(5)(c) is thoroughly

lacking in these circumstances. The evidentiary record is clear that the creditors do not have confidence in the debtor's management. I find that this not an appropriate situation to order a DIP Loan. Section 50.6(5)(c) is a subjective test. It requests the court to look at the actual situation of the debtor's management and its relationship to its major creditors. This is unlike the prior objective tests referenced in the other relief sought by Nautican and Careli, and leads to a different result on the same factual context.

Costs

[32] The parties indicated that neither would be seeking costs in this matter as the outcome was mixed, I would not be inclined to grant costs in any case. There will be no order with respect to costs in regards to this matter.

May 8, 2020

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J.

Tab

6

1994 CarswellOnt 254
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 254, 23 C.B.R. (3d) 219 at 223

Re proposal of BALDWIN VALLEY INVESTORS INC. and of VARION INCORPORATED

Registrar Ferron

Judgment: February 3, 1994

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

***Registrar Ferron*:**

1 Baldwin and Varion are described as corporate components of "an entity known as Georgian Equity Corporation which is part of the Georgian group".

2 Baldwin is indebted to the Royal Bank of Canada for about $5,000,000 which constitutes 92% of the Baldwin's total indebtedness while Varion is indebted to the bank for about $1,000,000 which constitutes about 99% of its total indebtedness. Aside from indebtedness to related companies the unsecured debts of both companies are negligible.

3 Royal Bank's indebtedness is secured by Demand Debentures and General Security Agreements which blanket the assets of both companies.

4 Baldwin's only asset is a multi-tenanted building which is now about 50% leased; Varion's only asset is vacant land.

5 In or about November 1993, both Baldwin and Varion defaulted in their obligations to the bank and on November 12, 1993, the Royal Bank demanded payment of its debt from both companies and concurrently served notices of intention to enforce its security. Both companies responded by filing, on November 19, a notice of intention to file proposals.

6 There has been one extension to file a proposal granted to each company on unopposed applications which were made on December 16, 1993. No proposal has yet been filed and the secured creditor opposes this second application for a further extension.

7 The statutory burden on an applicant under s. 50.4(9) of the *Bankruptcy and Insolvency Act* is fourfold. It must be shown that the applicant has, and is acting in good faith, and with diligence adequate in the circumstances. An applicant must also satisfy the court that if an extension or further extension is ordered it would as a consequence likely be able to make a viable proposal and that such an extension will not materially prejudice the creditors of the applicant.

8 The bottom line of these applications is that the secured creditor has made it quite clear that it, as counsel expressed it, has lost all confidence in the debtors and now only wants to enforce its security.

9 Since the bank's debt is about 92% of the total indebtedness of Baldwin and almost 100% of that of Varion, as a practical matter, a viable proposal, that is, a proposal which is capable of implementation is not possible.

10 Both applicants were undoubtedly formed to hold one asset, the commercial building in the case of Baldwin and vacant land in the case of Varion. These applicants carry on no business in the ordinary sense and have no employees. Baldwin is managed by "a related company". Their major, and for all practical purposes only creditor, is a secured creditor and as a matter of fact the applicants have no business to reorganize or to restructure.

11 The cash flow of Baldwin is negative and Varion has no cash flow at all so that the company, in order to make a viable proposal must, pay out the bank either by prospective financing or by equity financing. It has no revenue otherwise on which to found a proposal.

12 In practical terms these options are not available and one must conclude that the applications are merely an attempt to fend off the secured creditor and to protect their only asset rather than to put forth a viable proposal.

13 The applicants accordingly have not met the standard of good faith.

14 There is no equity in the Baldwin asset and to extend the period in which to file a proposal is to permit the insolvent person to speculate. A debtor may not in good faith speculate on an investment asset at the expense of the secured creditor and thereby throw the entire risk of loss on that creditor.

15 I do not accept the argument that the representatives of the Royal Bank entered into an agreement concerning the preparation of the appraisal of the Baldwin property and that the secured creditor having obtained an independent appraisal is acting in bad faith and I find it disingenuous to base the application on the argument that a proposal cannot be formulated until an appraisal is obtained. The applicant was in no way precluded from obtaining an independent appraisal and it does not require the concurrence of the secured creditor to do so. It is the court which must be satisfied and not the secured creditor.

16 In addition, the letter of December 8th sent by W.B. Clunie to the Royal Bank of Canada is not indicative of an agreement. The letter merely suggests that Baldwin Valley Investors Incorporated, "is prepared to allow the bank to conduct an independent assessment including an inspection of the premises to determine its viability, provided the work is completed by a mutually acceptable party at a mutually acceptable fee".

17 Presumably the bank did not accept that offer and has in fact obtained an independent appraisal which is before the court. A perusal of that appraisal, allowing for the fluctuation and value which depends upon the purpose of the appraisal and, in addition, allowing for a generous margin of error the gulf between the value of the Baldwin property and the bank's indebtedness serious and clearly indicates that there is no equity in that property.

18 In the circumstances the applicants have not met the statutory burden and the applications for extension must be refused.

Applications dismissed.

Tab

7

CITATION: Colossus Minerals Inc. (Re), 2014 ONSC 514
COURT FILE NO.: CV-14-10401-00CL
DATE: 20140207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, As Amended

AND IN THE MATTER OF THE NOTICE OF INTENTION OF COLOSSUS MINERALS INC., OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: S. Brotman and D. Chochla, for the Applicant Colossus Minerals Inc.

L. Rogers and A. Shalviri, for the DIP Agent, Sandstorm Gold Inc.

H. Chaiton, for the Proposal Trustee

S. Zweig, for the Ad Hoc Group of Noteholders and Certain Lenders

HEARD: January 16, 2014

ENDORSEMENT

[1] The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

[2] The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has no revenue and has been accumulating losses. To date, the applicant has been unable to obtain

the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

[3] The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

[4] First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

[5] Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

[6] Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

[7] Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

[8] Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

[9] Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

[10] For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

[11] Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

[12] Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

[13] First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

[14] Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

[15] Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

[16] Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

[17] The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

[18] First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

[19] Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

[20] Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

[21] Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

[22] The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

[23] First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

[24] Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

[25] Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

[26] Lastly, the Proposal Trustee supports the proposed SISP.

[27] Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

[28] The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

[29] Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[30] Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

[31] For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

[32] Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

[33] As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

[34] In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

[35] Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

[36] Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

[37] The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

[38] The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

[39] First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

[40] Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

[41] Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

[42] Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

[43] Lastly, the Proposal Trustee supports the requested relief.

Wilton-Siegel J.

Released: February 7, 2014

Tab

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SUPREME COURT OF CANADA

CITATION: Canada *v.* Canada North Group Inc., 2021 SCC 30, [2021] 2 S.C.R. 571

APPEAL HEARD: December 1, 2020
JUDGMENT RENDERED: July 28, 2021
DOCKET: 38871

BETWEEN:

Her Majesty The Queen in Right of Canada
Appellant

and

Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada
Respondents

- and -

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS: (paras. 1 to 74)	Côté J. (Wagner C.J. and Kasirer J. concurring)
CONCURRING REASONS: (paras. 75 to 182)	Karakatsanis J. (Martin J. concurring)

JOINT DISSENTING REASONS: (paras. 183 to 253)	Brown and Rowe JJ. (Abella J. concurring)
DISSENTING REASONS: (paras. 254 to 265)	Moldaver J.

Her Majesty The Queen in Right of Canada *Appellant*

v.

Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. in its capacity as monitor and
Business Development Bank of Canada *Respondents*

and

Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Indexed as: Canada *v.* Canada North Group Inc.

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Bankruptcy and insolvency — Priority — Source deductions — Priming charges — Employee source deductions not remitted to Crown by companies in receivership — Judge supervising restructuring proceedings under Companies' Creditors Arrangement Act ordering priming charges over debtor companies' assets in favour of interim lender, monitor and directors — Order giving priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or provincial statute — Property of debtor companies subject to deemed trust in favour of Crown for unremitted source deductions under Income Tax Act — Whether court has authority to rank priming charges ahead of Crown's deemed trust for unremitted source deductions — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4.1) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2, 11.51, 11.52.

Canada North Group and six related corporations initiated restructuring proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). In their initial *CCAA* application, they requested a package of relief including the creation of

three priming charges (or court-ordered super-priority charges): an administration charge in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred, a financing charge in favour of an interim lender, and a directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The application included an affidavit from one of their directors attesting to a debt to Her Majesty The Queen for unremitted employee source deductions and GST. The *CCAA* judge made an order ("Initial Order") that the priming charges were to "rank in priority to all other security interests, . . . charges and encumbrances, claims of secured creditors, statutory or otherwise", and that they were not to be "otherwise . . . limited or impaired in any way by . . . the provisions of any federal or provincial statutes" ("Priming Charges"). The Crown subsequently filed a motion for variance, arguing that the Priming Charges could not take priority over the deemed trust created by s. 227(4.1) of the *Income Tax Act* ("*ITA*") for unremitted source deductions. The motion to vary was dismissed, and the Crown's appeal to the Court of Appeal was also dismissed.

Held (Abella, Moldaver, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Côté** and Kasirer JJ.: The Priming Charges prevail over the deemed trust. Section 227(4.1) does not create a proprietary interest in the debtor's property. Further, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no

conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case, or between the *ITA* and s. 11 of the *CCAA*.

In general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. The most important feature of the *CCAA* is the broad discretionary power it vests in the supervising court: s. 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This jurisdiction is constrained only by restrictions set out in the *CCAA* itself and the requirement that the order made be appropriate in the circumstances — its general language is not restricted by the availability of more specific orders in ss. 11.2, 11.4, 11.51 and 11.52. As restructuring under the *CCAA* often requires the assistance of many professionals, giving super priority to priming charges in favour of those professionals is required to derive the most value for the stakeholders. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, would defy fairness and common sense.

Her Majesty does not have a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it. Section 227(4.1) does not create a beneficial interest that can be considered a proprietary interest, and it does not give the Crown the same property interest a common law trust would. Without attaching to specific property, creating the usual right to the enjoyment

of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner.

Furthermore, under Quebec civil law, it is clear that s. 227(4.1) does not establish a legal trust as it does not meet the three requirements set out in arts. 1260 and 1261 of the *Civil Code of Québec*. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): no specific property is transferred to a trust patrimony, and there is no autonomous patrimony to which specific property is transferred.

Section 227(4.1) states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3), but court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are not security interests within the meaning of s. 224(1.3). Section 224(1.3) defines "security interest" as meaning "any interest in, or for civil law any right in, property that secures payment or performance of an obligation" and including "an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for". The grammatical structure of this provision evidences Parliament's intent that the list have limiting effect, such that only the instruments

enumerated and instruments that are similar in nature fall within the definition. Court-ordered super-priority charges are utterly different from any of the interests listed in s. 227(4.1) because they were not made for the sole benefit of the holder of the charge, nor were they made by consensual agreement or by operation of law. Instead, they were ordered by the *CCAA* judge to facilitate the restructuring in furtherance of the interests of all stakeholders. This interpretation is consistent with the presumption against tautology, which suggests that Parliament intended interpretive weight to be placed on the examples, and with the *ejusdem generis* principle, which limits the generality of the final words on the basis of the narrow enumeration that precedes them.

Preserving the deemed trusts under s. 37(2) of the *CCAA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Similarly, granting Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full under s. 6(3) does not modify the deemed trust created by s. 227(4.1) in any way. In any event, s. 6(3) comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise.

Finally, whether Her Majesty is a "secured creditor" under the *CCAA* or not, the supervising court's power in s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders. Although ss. 11.2, 11.51 and 11.52 of the *CCAA* may attach only to the property of the debtor's company, there is no such

restriction in s. 11. That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary.

Per Karakatsanis and Martin JJ.: There is no conflict between the *ITA* and *CCAA* provisions at issue in this appeal. The broad discretionary power under s. 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

Section 227(4.1) of the *ITA* provides that a deemed trust attaches to property of the employer to the extent of unremitted source deductions "notwithstanding any security interest in such property" or "any other enactment of Canada". Although this provision clearly specifies that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown, but there is no settled doctrinal meaning of the term "beneficial ownership", and s. 227(4.1) modifies even those features of beneficial ownership that are widely associated with it under the common law.

As a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law. In the case of the deemed trust in s. 227(4.1), there is no identifiable trust property and therefore no certainty of subject matter. Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not

satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278. As a result, s. 227(4.1) traces the value of the unremitted source deductions, capping the Crown's right at that value, and the specific property that constitutes the debtor's estate remains unchanged, with the debtor continuing to have control over it.

The *Bankruptcy and Insolvency Act* ("*BIA*") and the *CCAA* each give the deemed trust meaning for their own purposes. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. To realize these goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process. In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides an exception for deemed trusts that are not true trusts. Section 67(3) provides a further exception by stating that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA* and other statutes. The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors", as required by s. 67(1) of the *BIA*. Section 67 therefore gives content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

In contrast, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies. Due to its remedial nature, the *CCAA* is famously skeletal in nature and there is no rigid formula for the division of assets. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scheme under the *BIA*.

The Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3) of the *CCAA*. Section 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall . . . be regarded as being held in trust for Her Majesty". Although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. Section 6(3) gives specific effect to the Crown's right by requiring that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. As such, the Crown can demand to be paid in full in priority to all "security interests", including priming charges. The remedial goal of the *CCAA* is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*. The fact that the

Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is consistent with the different schemes and purposes of the *BIA* and *CCAA*.

Sections 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property, do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. Instead, that authority comes from s. 11 of the *CCAA*. Section 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the requirements of good faith and due diligence on the part of the applicant. It can be used to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions for two reasons. First, ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. Second, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. Interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could further the *CCAA*'s remedial goals. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

Per Abella, Brown and Rowe JJ. (dissenting): The appeal should be allowed. The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) and the related deemed trust provisions under the the *ITA*, the *CPP*, and the *EIA* (collectively, the "Fiscal Statutes") bear only one plausible interpretation: the Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and 227(4.1) of the *ITA* was clear and unmistakable: it granted this unassailable priority by employing the unequivocal language of "notwithstanding any . . . enactment of Canada". This is a blanket paramountcy clause; it prevails over all other statutes. No similar "notwithstanding" provision appears in the *CCAA*. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) preserves the deemed trusts of the Fiscal Statutes.

The Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*, and the priming charges provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* fall under the definition of "security interest", because they are "interests in the debtor's property securing payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. As the definition of "security interest" in the *ITA* includes "encumbrances of any kind, whatever, however or whenever arising, created, deemed to arise or otherwise provided for", there is no reason that the definition would

preclude the inclusion of an interest that is designed to operate to the benefit of all creditors. This is sufficient to decide the appeal.

This finding does not leave the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*. Section 11 of the *CCAA* contains a grant of broad supervisory discretion and the power to "make any order that it considers appropriate in the circumstances", but that grant of authority is not unlimited. Parliament avoided any conflict between the *CCAA* and the *ITA* by imposing three restrictions that are significant here. First, although s. 37(1) of the *CCAA* provides that "property of the debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision", s. 37(2) provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding. In addition, while the deemed trusts are not "true trusts" and the commingling of assets renders the money subject to the deemed trusts untraceable, tracing has no application to s. 227(4.1). Second, the unremitted source deductions are deemed not to form part of the property of the debtor's company. If there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. However, priming charges can attach only to the debtor's property, so the Crown's interest under the deemed trust is not subject to the Priming Charges. Third, under the definition of "secured creditor" in s. 2 of the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes. That definition must be read as "secured creditor

means . . . a holder of any bond of the debtor company secured by . . . a trust in respect of, all or any property of the debtor company", which makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes.

Giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 of the *CCAA* meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*. Section 6(3) of the *CCAA*, which protects the Crown's claims under the deemed trusts as well as claims not subject to the deemed trusts under the Fiscal Statutes, operates only where there is an arrangement or compromise put to the court. In contrast, the deemed trusts arise immediately and operate continuously from the time the amount was deducted or withheld from employee's remuneration, and apply to only unremitted source deductions. Without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*, because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*. However, s. 6(3) does not explain the survival of the deemed trust or the rights conferred on the Crown under the deemed trust. Their survival is explained by s. 37(2), which continues the operation of s. 227(4.1), or by s. 227(4.1), which provides that the proceeds of the trust property "shall be paid to the Receiver General in priority to all such security interests". Finally, s. 6(3) protects

different interests than those captured by the deemed trusts, and the right not to have to compromise under s. 6(3) is a right independent of the Crown's right under deemed trusts.

Section 11.09 of the *CCAA*, which permits the court to stay the Crown's enforcement of its claims under the deemed trust claims, can apply to the Crown's deemed trust claims, but it does not remove the priority granted by the deemed trusts.

Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. The deemed trust is not a "true" trust and it does not confer an ownership interest or the rights of a beneficiary to the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec*. The requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust as the deemed trust is a legal fiction with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*.

Finally, concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges would not lead to absurd consequences. The conclusion that interim financing would simply end was not supported by the record, and there are usually enough funds available to satisfy both the Crown claim and the court-ordered priming charges. Equally unfounded is the claim that confirming the priority of the deemed trusts would inject an unacceptable level of uncertainty into the insolvency process. Interim lenders can rely on the company's financial statements to evaluate the risk of providing financing.

Per Moldaver J. (dissenting): There is substantial agreement with the analysis and conclusions of Brown and Rowe JJ. However, there are two points to be addressed. First, the question of the nature of the Crown's interest should be left to another day. This is because, properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest under s. 227(4.1) of the *ITA* — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

Second, while there is agreement that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, if this interpretation is mistaken, s. 11 is nonetheless restricted by s. 227(4.1), as Parliament has expressly indicated the supremacy of s. 227(4.1) over the provisions of the *CCAA*. The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority. A necessary consequence of the absolute supremacy of the Crown's deemed trust claim is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Unlike s. 227(4.1), which is focused on ensuring the priority of the Crown's claim, s. 6(3) merely establishes a six-month timeframe for payment to the Crown in the event that the debtor company succeeds in staying viable as a going concern. Accordingly, if s. 6(3) gave effect to the Crown's interest, the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim.

Further, as s. 6(3) does not apply where a liquidation occurs under the *CCAA*, the Crown would be deprived of its priority over security interests in such circumstances.

It cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

Cases Cited

By Côté J.

Distinguished: *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; **considered:** *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94; **referred to:** *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368; *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169; *In the Matter of a Plan of Compromise or*

Arrangement of Green Growth Brands Inc., 2020 ONSC 3565, 84 C.B.R. (6th) 146; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299; *Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31; *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758; *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224; *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795; *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567; *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715.

By Karakatsanis J.

Considered: *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; **referred to:** *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166; *Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952; *Town*

of Lunenburg v. Municipality of Lunenburg, [1932] 1 D.L.R. 386; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31; *Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174; *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758; *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70; *Foskett v. McKeown*, [2001] 1 A.C. 102; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273; *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274.

By Brown and Rowe JJ. (dissenting)

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31; *Bank of*

Nova Scotia v. Thibault, 2004 SCC 29, [2004] 1 S.C.R. 758; *R. v. Verette*, [1978] 2 S.C.R. 838; *Toronto-Dominion Bank v. Canada*, 2020 FCA 80, [2020] 3 F.C.R. 201; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425; *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94; *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237; *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278; *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289; *R. v. McIntosh*, [1995] 1 S.C.R. 686.

By Moldaver J. (dissenting)

9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, [2020] 1 S.C.R. 521; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 43(1), 50.4(1), 67, 81.1, 81.2, 86(3).

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23(3), (4).

Civil Code of Québec, arts. 1260, 1261, 1278, 1306, 1313.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1) "secured creditor", 3(1), 6(3), 10(2)(c), 11, 11.09, 11.2, 11.4, 11.51, 11.52, 36, 37 to 39.

Employment Insurance Act, S.C. 1996, c. 23, ss. 23(4), 86(2), (2.1).

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 18(5) "security interest", 116, 153(1), Part XII.5, Part XIII, 222, 223(1) to (3), (5), (6), 224(1), (1.2), (1.3) "secured creditor", "security interest", 227(4), (4.1), (4.2), (9), (9.2), (9.3), (9.4), (10.1), (10.2).

Income Tax Regulations, C.R.C., c. 945, s. 2201.

Income War Tax Act, R.S.C. 1927, c. 97 [previously S.C. 1917, c. 28], s. 92(6), (7) [ad. 1942-43, c. 28, s. 31].

Interpretation Act, R.S.C. 1985, c. I-21, ss. 8.1, 8.2.

Regulatory Impact Analysis Statement, SOR/99-322, *Canada Gazette*, Part II, vol. 133, No. 17, August 18, 1999, pp. 2041-42.

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 6(1).

Authors Cited

Black's Law Dictionary, 11th ed., by Bryan A. Garner. St. Paul, Minn.: Thomson Reuters, 2019, "beneficial owner".

Brender, Mark D. "Beneficial Ownership in Canadian Income Tax Law: Required Reform and Impact on Harmonization of Quebec Civil Law and Federal Legislation" (2003), 51 *Can. Tax J.* 311.

Brown, Catherine. "Beneficial Ownership and the Income Tax Act" (2003), 51 *Can. Tax J.* 401.

Canada. Canada Revenue Agency. *Tax collections policies* (online: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic98-1/tax-collections-policies.html; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC30_1_eng.pdf).

Canada. Department of Finance. *Unremitted Source Deductions and Unpaid GST*. Ottawa, April 7, 1997.

Cuming, Ronald C. C., Catherine Walsh, and Roderick J. Wood. *Personal Property Security Law*, 2nd ed. Toronto: Irwin Law, 2012.

Duggan, Anthony, and Jacob Ziegel. "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 *U.T.L.J.* 227.

Gillese, Eileen E. *The Law of Trusts*, 3rd ed. Toronto: Irwin Law, 2014.

Grenon, Aline. "Common Law and Statutory Trusts: In Search of Missing Links" (1995), 15 *Est. & Tr. J.* 109.

Halsbury's Laws of Canada — Bankruptcy and Insolvency, 2017 Reissue, contributed by Michael J. Hanlon. Toronto: LexisNexis, 2017.

Hanlon, Michael J., Vicki Tickle, and Emily Csiszar. "Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions", in Janis P. Sarra et al., eds., *Annual Review of Insolvency Law 2018*. Toronto: Thomson Reuters, 2019, 897.

Houlden, L. W., G. B. Morawetz, and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 4, 4th ed. rev. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2021, release 3).

Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto: Thomson Reuters, 2021 (loose-leaf updated 2021, release 2).

Lamoureux, Martin. *The Harmonization of Tax Legislation Dissociation: A Mechanism of Exception Part III* (online: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/lamou/harm3.html; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC30_2_eng.pdf).

Le Robert (online: https://dictionnaire.lerobert.com/definition/particulier), "*en particulier*".

McFarlane, Ben, and Robert Stevens. "The nature of equitable property" (2010), 4 *J. Eq.* 1.

Penner, J. E. “The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust” (2014), 27 *Can. J.L. & Jur.* 473.

Prévost, Alain. “Que reste-t-il de la fiducie réputée en matière de régimes de retraite?” (2016), 75 *R. du B.* 23.

Salembier, Paul. *Legal and Legislative Drafting*, 2nd ed. Toronto: LexisNexis, 2018.

Sarra, Janis P. *Rescue! The Companies’ Creditors Arrangement Act*, 2nd ed. Toronto: Carswell, 2013.

Sarra, Janis P., Geoffrey B. Morawetz, and L. W. Houlden. *The 2020-2021 Annotated Bankruptcy And Insolvency Act*. Toronto: Thomson Reuters, 2020.

Simard, Roger P. “Priorités et droits spéciaux de la couronne”, dans *JurisClasseur Québec — Collection droit civil — Sûretés*, vol. 1, par Pierre-Claude Lafond, dir. Montréal: LexisNexis, 2011, fascicule 4 (feuilles mobiles mises à jour novembre 2020, envoi n^{o} 17).

Smith, Lionel D. *The Law of Tracing*. Oxford: Clarendon Press, 1997.

Smith, Lionel D. “Trust and Patrimony” (2008), 38 *R.G.D.* 379.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

Waters, D. W. M. “The Nature of the Trust Beneficiary’s Interest” (1967), 45 *Can. Bar Rev.* 219.

Waters’ Law of Trusts in Canada, 4th ed., by Donovan W. M. Waters, Mark R. Gillen, and Lionel D. Smith. Toronto: Carswell, 2012.

Wood, Roderick J. “Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*” (2020), 63 *Can. Bus. L.J.* 85.

Wood, Roderick J. “The Floating Charge in Canada” (1989), 27 *Alta. L. Rev.* 191.

Wood, Roderick J., and Rick T. G. Reeson. “The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*” (2000), 15 *B.F.L.R.* 515.

Ziegel, Jacob S. “Crown Priorities, Deemed Trusts and Floating Charges: *First Vancouver Finance v. Minister of National Revenue*” (2004), 45 C.B.R. (4th) 244.

APPEAL from a judgment of the Alberta Court of Appeal (Rowbotham, Wakeling and Schutz JJ.A.), 2019 ABCA 314, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111, [2019] A.J. No. 1154 (QL), 2019 CarswellAlta 1815 (WL Can.), affirming a decision of Topolniski J., 2017 ABQB 550, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, [2018] 2 W.W.R. 731, [2017] A.J. No. 930 (QL), 2017 CarswellAlta 1631 (WL Can.). Appeal dismissed, Abella, Moldaver, Brown and Rowe JJ. dissenting.

Michael Taylor and *Louis L'Heureux*, for the appellant.

Darren R. Bieganek, *Q.C.*, and *Brad Angove*, for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor.

Jeffrey Oliver and *Mary I. A. Buttery*, *Q.C.*, for the respondent the Business Development Bank of Canada.

Kelly J. Bourassa, for the intervener the Insolvency Institute of Canada.

Randal Van de Mosselaer, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

[67] Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "[t]he legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

[68] In conclusion, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case. I therefore respectfully disagree with my colleague Justice Moldaver's suggestion that there may be a conflict between s. 11 of the *CCAA* and the *ITA* (para. 258). The Initial Order's super-priority charges prevail over the deemed trust.

C. *Was It Necessary for the Initial Order to Subordinate Her Majesty's Claim Protected by a Deemed Trust in This Case?*

[69] Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court's equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

[70] As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the *CCAA* and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the *CCAA* create "two distinct approaches — one

that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

[71] My colleagues Brown and Rowe JJ. also argue that "priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*" (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the *CCAA* contain this restriction, there is no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "[i]n exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties" (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does

not belong to the debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the *CCAA* is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

[72] That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the *CCAA*. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty's claim to the super-priority charges. Based on Justice Topolniski's reasons for denying the Crown's motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising judge to subordinate Her Majesty's interest to super-priority charges.

[73] It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating *CCAA* proceedings. As this Court recently recognized, *CCAA* proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the *CCAA* regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating *CCAA* proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

VI. Disposition

[74] I would dismiss the appeal with costs in this Court in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

Tab

9

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775

Date: 20111107
Docket: S117098
Registry: Vancouver

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

And

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

And

In the Matter of Pacific Shores Resort & Spa Ltd., Westerlea Sales Consulting Ltd., Aviawest Resorts Inc., Ocean Place Holdings Ltd., Fairfield Ventures Inc. and Parkside Project Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	D.K. Fitzpatrick
Appearing on behalf of the Monitor:	S. Dvorak
Counsel for Fisgard Capital Corporation:	A.A. Frydenlund S. Stephens
Counsel for Unsecured Loan Holders:	D. Toigo
Counsel for Water's Edge Rental Pool Creditors:	K.S. Campbell
Counsel for bcIMC Construction Fund Corp.:	C.D. Brousson
Place and Date of Hearing:	Vancouver, B.C. November 2 and 4, 2011
Place and Date of Judgment:	Vancouver, B.C. November 7, 2011

[1] **THE COURT:** This proceeding was commenced on October 21, 2011. On October 24, 2011, I granted an initial order pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended ("*CCAA*") which included an interim stay of proceedings and a nominal administration charge. At that time, two of the secured creditors, bcIMC Construction Fund Corporation and bcIMC Specialty Fund Corporation (collectively "bcIMC") and Fisgard Capital Corporation opposed the granting of the order. There was, however, insufficient time to fully hear the arguments against the granting of the order, notwithstanding that the statutory requirements of the *CCAA* had been met by the petitioners.

[2] This hearing was intended to stand as a comeback hearing under s. 11.02(2) of the *CCAA*, when the arguments of those secured creditors could be fully heard. At this time, the petitioners seek to extend the stay to December 11, 2011, and to increase the administration charge from $100,000 to $300,000.

[3] Further, the petitioners seek an order authorizing debtor in possession, or DIP, financing in the amount of $600,000 and the imposition of a director's charge in the amount of $700,000.

[4] bcIMC and Fisgard oppose the granting of the order sought, contending that it is not appropriate in the circumstances and that the petitioners are not acting in good faith and with due diligence; in other words, that the petitioners have not satisfied the test in respect of the granting of this further order as that test is formulated under s. 11.02(3) of the *CCAA*. Fisgard also applies to appoint a receiver over the security held by it relating to one of the developments.

[5] As at the time of the application for the initial order, the onus remains on the petitioners at this hearing to satisfy the requirements under s. 11.02(3) of the *CCAA*.

Background Facts

[6] The corporate group, or, as it is known, the Aviawest Group, began its operations in 1990 with the development of the Pacific Shores Resort near Parksville, British Columbia. Over the last 21 years, the business has grown

in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:

> [27] ... I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner.

[42] Further, bcIMC's insistence that it will not cooperate in terms of a refinancing simply does not make sense in light of what has already occurred in relation to bcIMC's debt and the positions and actions they have taken in relation to their debt. Firstly, they have already made the "with prejudice" offer to accept an amount under their first mortgage position only, which would give rise to a loss of approximately $20 million. Secondly, they have investigated the potential sale of their debt, which gave rise to an offer of $20 million.

[43] Both of these circumstances indicate to me that they are open to negotiations with the petitioners and that those negotiations may possibly result in a refinance of their debt that would allow the Group to go forward on some restructured basis.

[44] bcIMC and Fisgard are well known and sophisticated lenders doing business in this jurisdiction. As was stated by the court in *Rio Nevada Energy Inc. (Re)* (2000), 283 A.R. 146 (Q.B.) at para. 25, this is some evidence that bcIMC and Fisgard will not act against their commercial interests and that they will reasonably consider proposals. This distinguishes the case of *Royal Bank of Canada v. Fracmaster Ltd.*, 1999 ABCA 178 at para. 12, 244 A.R. 93, where there was evidence that the lender had valid commercial reasons to vote against the proposal.

DIP Financing

[45] The petitioners seek DIP financing in the amount of $600,000, which is just shy of the $620,000 which the cash flow indicates will be required to see them through to December 11.

retirees who have invested their life savings into the enterprise, although it is also apparent that many pensioners have also invested through bcIMC.

[58] There can be no doubt that a receivership will result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. On this point there is no disagreement, save for Fisgard's somewhat inexplicable argument that a receivership of Pacific Shores Resort would prejudice no one. The prejudice to the other stakeholders in relation to that resort is palpable in the event of a receivership.

[59] In conclusion, it is my opinion that the petitioners have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that the making of a further order extending the stay is appropriate. The order will go as sought, including that the administration charge is increased to $300,000 and that a director's charge is imposed to a maximum of $700,000 in respect of potential obligations that might be incurred post-filing.

[60] In addition, I am satisfied that the requested DIP financing order is appropriate in the circumstances and that it can be structured as has already been discussed between the parties.

[61] Fisgard's application to appoint a receiver is dismissed.

"The Honourable Madam Justice S.C. Fitzpatrick"