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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	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 TO MAKE A PROPOSAL OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
APPLICANTS / RESPONDENTS	TRAFIGURA CANADA LIMITED AND SIGNAL ALPHA C4 LIMITED
RESPONDENTS / APPLICANTS	GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
DOCUMENT	**BRIEF OF LAW OF THE APPLICANTS, Trafigura Canada Limited and Signal Alpha C4 Limited**
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Clerk's Stamp

BANKRUPTCY AND INSOLVENCY
FILED
by Email
Sep 22, 2023
Calgary
FAILLITE ET INSOLVABILITÉ

C91485

**Hearing via Webex before the Honourable Justice Johnston
on the Commercial List, on September 22, 2023, commencing at 10:00 a.m.**

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I. INTRODUCTION

1. This Bench Brief is submitted by Trafigura Canada Limited ("**Trafigura**") and Signal Alpha C4 Limited ("**Signal**" and collectively, the "**Lenders**"), the first position secured lenders to Griffon Partners Operation Corp. ("**GPOC**").

2. The Lenders also have a secured interest by virtue of various guarantees in Griffon Partners Holding Corp. ("**GPHC**"), Griffon Partners Capital Management Ltd. ("**GPCM**"), Stellion Limited ("**Stellion**"), 2437801 Alberta Limited ("**2437801**"), 2437799 Alberta Limited ("**2437799**"), 2437815 Alberta Limited ("**2437815**"), and Spicelo Limited ("**Spicelo**") (collectively with GPOC, the "**Debtors**").

3. The Debtors filed a Notice of Intention to file a Proposal ("**NOI**") pursuant to Section 50.4 of the *Bankruptcy and Insolvency Act*[1] (the "**BIA**") on August 25, 2023 (the "**NOI Proceedings**").

4. The Lenders are owed almost CAD$51M under a Loan Agreement, which represents by far the largest liability of GPOC. The Lenders have direct recourse for this liability against Spicelo. Spicelo is a holding company with no direct corporate relationship with GPOC. Spicelo's only significant asset was 1.125M common shares (the "**Greenfire Shares**") in Greenfire Resources Inc. ("**Greenfire**"). On September 20, 2023, Spicelo received 5,506,833 common shares in the capital of New Greenfire (as defined below) in exchange for the Greenfire Shares (the "**New Greenfire Shares**"). The New Greenfire Shares have an estimated value of over CAD$60M.

5. As of the morning of September 21, 2023, the New Greenfire Shares in New Greenfire are publicly listed on the New York Stock Exchange.

6. The Lenders oppose the application brought by the Debtors to, among other things, extend the stay of proceedings until November 8, 2023 (the "**Stay Extension**") on the basis that these NOI Proceedings, especially as they relate to Spicelo, are an improper use of the BIA and a direct attempt to delay and obfuscate the Lender's contractual rights, to the detriment of all other GPOC creditors. Spicelo is not insolvent, and the Lenders could be paid out completely and efficiently if Spicelo is released from these proceedings.

7. GPOC has been in default to the Lenders for almost a year, and despite the Lenders attempts to work with GPOC and assist them in locating capital or a buyer for several months, no capital repayments have been made. The Lenders have a contractual right to pursue a solvent guarantor

[1] RSC 1985, c B-3 [*BIA*] **[Tab 1]**.

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and should be able to control the process for realizing on the New Greenfire Shares without delay or encumbrance.

8. In addition to the Stay Extension, the Debtors seek to pay approximately half of their pre-filing unsecured liabilities (without paying anything to their secured creditors) and encumber the Lender's collateral with unnecessary and excessive Court-Ordered Charges, including administration charges and Director and Officer charges. They also seek to administratively consolidate eight estates, including Spicelo, with the stated intention to file a joint proposal to creditors. The Lenders say the court-ordered changes are excessive, unnecessary and the joint proposal conflates the corporate relationship between Spicelo and the other Debtors, of which there is none.

9. The Lenders are the only creditor who has a direct claim on the New Greenfire Shares. The relationship between Spicelo and the Lenders is separate and apart from any other GPOC creditor. If the Lenders are allowed to proceed directly against Spicelo, they will be paid in full from the New Greenfire Shares and a CAD$51M liability against GPOC will fall away, leaving the subordinate and unsecured creditors of GPOC in a much more favorable position. In this context, a Stay Extension and joint proposal from all eight Debtors does not make economic sense, nor does it preserve value for the general body of creditors.

10. In the event this Honourable Court denies the Stay Extension, the Debtors will be deemed bankrupt as of September 25, 2023, by virtue of Section 50.4(8) of the BIA. In that case, the Lenders bring a cross-application to appoint a receiver over Spicelo to seize and liquidate the New Greenfire Shares (the "**Receivership Application**") with effect on September 26, 2023. In the alternative, the Lenders seek relief from this Honourable Court to terminate the NOI Proceedings immediately against Spicelo in accordance with Section 50.4(11) of the BIA.

II. ISSUES

11. The issues before this Honourable Court are:

(a) whether the Debtors' Stay Extension Application should be denied;

(b) in the alternative, whether the NOI Proceedings should be terminated against Spicelo now to permit the Lenders to make the Receivership Application;

(c) whether it is just and convenient to appoint a Receiver over Spicelo;

(d) whether this Court should grant certain Court-ordered charges;

(e) whether the estates of the Debtors should be consolidated; and

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(f) whether this Court should grant the Proposal Trustee's application for a sealing order for Confidential Appendix to the First Report of the Proposal Trustee dated September 19, 2023 (the "**First Report**").

III. FACTUAL BACKGROUND

A. The Parties

12. The Applicant, Trafigura, is a corporation incorporated pursuant to the federal laws of Canada and extra-provincially registered in the Province of Alberta.[2]

13. The Applicant, Signal, is a corporation incorporated pursuant to the laws of Jersey. The Lenders provide capital to Canadian businesses, including lending within the oil and gas industry in Western Canada.[3]

14. The Respondents, GPOC, GPCM and GPHC (collectively, the "**Griffon Entities**"), are each corporations incorporated pursuant to the laws of the Province of Alberta.[4]

15. GPOC carries on the business of exploration and production of oil and gas and holds related assets in the Viking formation in western Saskatchewan and eastern Alberta. GPHC and GPCM are each holding companies, have no assets other than their direct or indirect ownership in GPOC, and do not carry on any active business operations. None of the Griffon Entities have employees.[5]

16. Each of the Griffon Entities (other than GPHC) had four directors: Elliott Choquette ("**Choquette**"), Jonathan Klesch ("**Klesch**"), Trevor Murphy ("**Murphy**"), and Daryl Stepanic ("**Stepanic**"). On or about September 15, 2023, Choquette and Murphy resigned as directors from the Griffon Entities.[6]

17. The Respondents, Stellion, 2437801, 2437799, and 2437815 (collectively, the "**Shareholder Corporations**"), are each wholly owned by one of the four directors of GPOC. Other than Stellion, which is a corporation incorporated pursuant to the laws of the Republic of Cyprus, the Shareholder Corporations are corporations incorporated pursuant to the laws of the Province of Alberta. The Shareholder Corporations are each holding companies, have no assets other than their indirect ownership in GPOC, and do not have employees or carry on any active business operations.[7]

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[2] Affidavit of Dave Gallagher, sworn on September 19, 2023 at para 3 [Gallagher Affidavit].
[3] *Ibid* at para 4.
[4] *Ibid* at para 5.
[5] *Ibid* at para 6.
[6] *Ibid* at para 7.
[7] *Ibid* at para 8.

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18. The Respondent, Spicelo Limited ("**Spicelo**"), is an investment corporation incorporated pursuant to the laws of the Republic of Cyprus. Spicelo's only asset is the Greenfire Shares. Spicelo is unrelated to the Griffon Entities and Shareholder Entities, is a holding corporation for the Greenfire Shares, and does not have employees or carry on any active business operations. Further, unlike the rest of the Guarantors (as defined below), Spicelo is not a direct or indirect shareholder of GPOC.[8]

19. GPCM, GPHC, Spicelo, Stellion, 2437801, 2437799, and 2437815 are collectively referred to herein as the "**Guarantors**" and each as a "**Guarantor**".

B. The Credit Agreement

20. On July 21, 2022, a loan agreement was executed among GPOC, as borrower, GPCM and GPHC, as guarantors, Trafigura and Signal, as lenders, and GLAS USA LLC and GLAS Americas LLC, as administrative agent and collateral agent (collectively, the "**Collateral Agent**"), respectively (the "**Credit Agreement**").[9]

21. Pursuant to the Credit Agreement, the Lenders agreed to advance financing to GPOC in the aggregate amount of USD$35,869,565.21 (the "**Commitment**") (allocated as to Trafigura in the amount of USD$10,869,565.21 and allocated as to Signal in the amount of USD$25,000,000).[10] The Commitment was advanced in order to partially fund GPOC's acquisition of certain oil and gas assets from Tamarack Valley Energy Ltd. ("**Tamarack**" and the "**Tamarack Acquisition**").[11] GPOC received the remainder of the requisite funding from Tamarack in the form of a CAD$20,000,000 promissory note.[12] The Tamarack Acquisition was completely funded by the Lenders and Tamarack, with GPOC contributing no cash equity.[13]

22. Pursuant to the Credit Agreement, GPOC agreed to monthly amortization payments of USD$1,328,502.415 starting on October 1, 2022 and ending on January 31, 2025, at which point the Commitment was to be repaid in full, along with all accrued unpaid interest, fees, and all other obligations in connection with the Credit Agreement (including, *inter alia*, any applicable MOIC Amount owing to the Lenders).[14]

[8] *Ibid* at para 9.
[9] *Ibid* at para 16.
[10] *Ibid* at para 15.
[11] *Ibid* at paras 11-14.
[12] *Ibid* at para 15.
[13] *Ibid*.
[14] *Ibid* at para 17.

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23. As security for payment of the Commitment, GPOC executed a fixed and floating term debenture over all GPOC's present and future real and personal property (the "**GPOC Debenture**").[15]

C. The Guarantees and Guarantor Security

24. Concurrent with the execution of the Credit Agreement and the GPOC Debenture, the Guarantors each executed guarantees along with supporting security in favour of the Collateral Agent, whereby they guaranteed the obligations of GPOC under the Credit Agreement (the "**Guarantees**"). Included amongst these is a Limited Recourse Guarantee and Securities Pledge Agreement dated July 21, 2022 between Spicelo and the Collateral Agent, as amended by a first amending agreement dated August 31, 2022 (the "**Spicelo Guarantee**"), the collateral of which was the Greenfire Shares.[16] The collateral also includes all substitutions and replacements of, increases and additions, consolidations, or reclassifications of the Greenfire Shares.[17]

25. In the event of a default on the Credit Agreement by GPOC, the Lenders are entitled to seek repayment from Spicelo as a separate and distinct obligation and, in the event of non-payment by Spicelo, are entitled to seek enforcement via the Greenfire Shares. Specifically, the Spicelo Guarantee allows the Lenders to, *inter alia*, assume control, sell, transfer, use or otherwise deal with the Greenfire Shares. The Spicelo Guarantee also allows the Lenders to appoint a receiver over the Greenfire Shares.[18]

D. Defaults and Demands for Payment

26. Pursuant to the Credit Agreement, GPOC was required to adhere to certain terms concerning repayment of the Commitment and other financial matters, including, *inter alia*, the following:

27. starting on October 1, 2022, to pay, on the first of every month, USD$1,328,502.42 as principal amortization payment (the "**Principal Amortization Payments**");

    (a) starting on October 1, 2022, to pay, on the first of every month, all interest accrued on the outstanding principal (the "**Interest Payments**"); and

    (b) to adhere to various other financial covenants.[19]

[15] *Ibid* at para 20.
[16] *Ibid* at para 23.
[17] *Ibid* at para 53.
[18] *Ibid* at para 54.
[19] *Ibid* at para 25.

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28. On November 1, 2022, GPOC defaulted on the Credit Agreement by failing to make that month's Principal Amortization Payment and by failing to meet certain other related financial covenants (collectively, the "**Defaults**").[20]

29. On December 31, 2022, GPOC entered into a waiver agreement with the Lenders (the "**Waiver Agreement**") whereby the Lenders agreed to waive the Defaults.[21]

30. However, since the Waiver Agreement, GPOC has continued to default on the Credit Agreement as follows:

    (a) aside from a USD$400,000 payment made on February 1, 2023, GPOC has failed to make any Principal Amortization Payments since December 31, 2022; and

    (b) beginning in August 2023, GPOC has failed to make any Interest Payments (collectively, the "**Continued Defaults**").[22]

31. The Lenders have provided GPOC ample time to raise capital and cure the Continued Defaults. The Lenders allowed GPOC to engage in approximately eight months of capital raising efforts, however, none of these efforts were ultimately successful and GPOC has to date failed to put forward a viable solution to resolve the Continued Defaults or plan for how it will remain in good standing with the terms of the Credit Agreement in the future.[23]

32. The Lenders also attempted to negotiate a forbearance agreement with GPOC and the Guarantors. On May 18, 2023, the Lenders sent an initial draft of a forbearance agreement to GPOC and the Guarantors but received no feedback. On August 8, 2023,[24] the Lenders sent an updated forbearance agreement to GPOC and the Guarantors and communicated that if the document was not signed by August 11, 2023, then the Lenders would pursue enforcement measures. GPOC and the Guarantors failed to execute the forbearance agreement.[25]

33. As a result, on August 16, 2023, the Lenders issued formal demands for repayment from GPOC and the Guarantors (the "**Demands**") concurrently with notices to enforce security pursuant to section 244 of the BIA.[26]

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[20] *Ibid* at para 26.
[21] *Ibid* at para 27.
[22] *Ibid* at para 28.
[23] *Ibid* at paras 29-32.
[24] This was incorrectly listed as August 8, 2016 in the Gallagher Affidavit.
[25] Gallagher Affidavit, *supra* note 2 at paras 33-34.
[26] *Ibid* at para 35.

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E. NOI Proceedings and Outstanding Indebtedness

34. Without notice to the Lenders, GPOC and the Guarantors filed NOIs on August 25, 2023 and were granted an initial stay period of 30 days (the "**Initial Stay**").[27] On September 14, 2023, the Lenders received GPOC's application to grant the Stay Extension and supporting Affidavit of Daryl Stepanic (the "**Stepanic Affidavit**"). Aside from seeking an extension of the Initial Stay, the Stay Extension Application further seeks, *inter alia*, the following:

    (a) an administrative charge of CAD$500,000;

    (b) a D&O charge of CAD$250,000;

    (c) authorization for GPOC to make payments of up to CAD$1,000,000 to pre-filing unsecured creditors deemed necessary for the ongoing operations of GPOC for goods and services rendered prior to the filing of the NOIs; and

    (d) procedurally consolidating the estates of GPOC and the Guarantors.

35. As of August 16, 2023, the Lenders are owed the following amounts:

    (a) the original principal amount plus 1.4x MOIC equaling USD$37,938,054.69 owing under the Credit Agreement, plus interest accruing thereon; and

    (b) legal fees, costs, expenses and other charges which are due and payable pursuant to the Credit Agreement (collectively, the "**Indebtedness**").[28]

36. From the NOIs and related materials filed by GPOC and the Guarantors, it is clear that the Lenders, collectively, are by far the largest creditors of GPOC and represent approximately 68% (CAD$51.413,652.14 of CAD$75,681,542.85) of the claims set forth in GPOC's Notice to Creditors.[29]

37. The second secured creditor of GPOC is Tamarack, who is owed CAD$22,279,188.08. Based on the information available to the Lenders, Tamarack's only source of security is the collateral pledged to them by GPOC, and unlike the Lenders, Tamarack does not have recourse to additional security in the form of a Guarantee and Share Pledge over the Greenfire Shares.[30]

[27] *Ibid* at para 37.
[28] *Ibid* at para 38.
[29] *Ibid* at para 39.
[30] *Ibid* at para 40.

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38. Further, the Lenders represent all or substantially all of the claims set forth in the NOI List of Creditors of the Guarantors. For Spicelo, the Lenders represent approximately 98% (CAD$51,413,652.14 of CAD$52,603,740.74) of the claims set forth in Spicelo's Notice to Creditors.[31]

F. Greenfire Shares

39. The Greenfire Shares, which were pledged as collateral for the Spicelo Guarantee, will imminently participate in an initial public offering pursuant to a Plan of Arrangement whereby, *inter alia*, Greenfire and certain Greenfire subsidiaries will merge (the "**New Greenfire**") pursuant to a Business Combination Agreement dated December 14, 2022 (as amended on April 21, 2023 and June 15, 2023) (the "**Transaction**").

40. The Transaction closed on September 20, 2023, and the New Greenfire Shares are now listed on the New York Stock Exchange and are publicly available for purchase.[32]

41. As part of the Transaction, Spicelo is set to receive a dividend valued at USD$6,600,000 before withholding tax estimated at 15%, for a total of $5,610,000 (the "**Special Dividend**"). Furthermore, as part of the Transaction, Spicelo will receive the New Greenfire Shares in exchange for the Greenfire Shares. According to the Greenfire Proxy Statement for Special Meeting of Stockholders (the "**Proxy**"), the New Greenfire Shares will have an estimated market value of USD$10.10 per share (based on certain assumptions reflected in the Proxy), resulting in a total of USD$55,600,000.[33]

42. Pursuant to Section 37(3) of the Spicelo Guarantee, the Lenders are entitled to automatic payment of 75% of the Special Divided – or $4,207,500 after withholding taxes – to be used as repayment of GPOC's obligations under the Credit Agreement. However, in the event of default, the Lenders are entitled to enforce their security over 100% of the Special Dividend.[34]

43. The aggregate gross value of the consideration that Spicelo is expected to receive at closing of the Transaction by virtue of the Special Dividend and New Greenfire Shares is USD$62,200,000. The Lenders are owed a total of USD$37,938,054.69 (not including interest, expenses or fees). When comparing the value of the Greenfire Shares of USD$55,600,000 to the remaining amount owed to the Lenders of USD$32,988,054.69 (if the Lenders are paid the USD$5,610,000 Special Dividend,

[31] *Ibid* at para 41.
[32] *Ibid* at paras 55-56.
[33] *Ibid* at para 57.
[34] *Ibid* at para 58.

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less withholding taxes), this implies a coverage ratio of 1.72x and confirms that the assets of Spicelo are more than sufficient to repay the Lenders.[35]

44. Other than as described in Schedule "A" to the Spicelo Guarantee, no transfer restrictions apply to the Greenfire Shares. The transfer restrictions listed in Schedule "A" all expired as of September 20, 2023.[36] The right of first refusal (the "**ROFR**") referenced by the Debtors that was binding over Spicelo by virtue of Greenfire's Shareholders Agreement, dated August 5, 2021, became obsolete when the Transaction closed on September 20, 2023.

45. Upon receipt of the Stepanic Affidavit on September 14, 2023, the Lenders were advised for the first time that Spicelo or, alternatively, Klesch had unilaterally executed a Lock Up Agreement ("**LUA**") that restricts Spicelo's Transfer (as defined below) of the New Greenfire Shares. The Lenders are not parties to the LUA and have never agreed to be bound by its terms.[37]

46. For the reasons further described below, the Lenders submit that they are not bound by the LUA.

IV. LAW AND ARGUMENT

A. The Stay Extension Should Not be Granted

(i) ***The Debtors have failed to meet the test in Section 50.4(9)***

47. Pursuant to section 50.4(9) of the BIA, before the expiry of a stay extension, a debtor in a proposal proceeding may apply to the court for an order to further extend the time to file a proposal by a maximum of 45 days and the court may extend the time if it is satisfied 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.[38]

[35] *Ibid* at para 59.
[36] *Ibid* at para 62.
[37] *Ibid* at para 64.
[38] *BIA*, *supra* note 1, s 50.4(9).

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48. The insolvent debtor bears the onus to prove that it satisfies all three elements under section 50.4(9).[39] If the applicant fails on any part of the three-part test, the Court must deny the application.[40]

49. The first element of the section 50.4(9) test is whether the insolvent debtor has acted in good faith and with due diligence.

50. The Lenders submit that the Debtors have not acted, and are not acting, with good faith or due diligence. The filing of NOIs by GPOC and the Guarantors, and specifically Spicelo, is purely a delay tactic designed to restrict the Lenders from enforcing their right of repayment pursuant to the GPOC Debenture and the Guarantees.

51. GPOC has been in default of its obligations under the Credit Agreement since at least November 2022.[41] As a last recourse, the Lenders attempted to a negotiate a forbearance agreement with the Debtors, which was ultimately unsuccessful.[42] This left the Lenders with no other choice but to issue the Demands and notices to enforce security pursuant to s. 244 of the BIA (the "**244 Notices**") on August 16, 2023.[43]

52. Thereafter, the Debtors filed the NOIs one day prior to the expiry of the 10-day statutory notice period. Such filings were done without notice to or consultation with Lenders. The Debtors require the support of the Lenders to approve any proposal in these NOI Proceedings. It is customary in insolvency proceedings to give notice to the primary secured creditor, whose interests are most effected by a creditor protection filing. The primary reason for giving such advance notice is to ensure that the restructuring will be a successful effort where creditors and debtors work towards a mutually acceptable result – not a sandbagging effort.

53. The necessary result of the NOI filings is that the Lenders have been deprived of their contractual right to enforce their security and, in the case of Spicelo, right to seize the Greenfire Shares prior to closing of the Transaction (described further below). The timing of these events on the eve of the Transaction is another example of how the Debtors have failed to act in good faith.

54. The second element under the stay extension test is whether the insolvent debtor can show that it is likely able to make a viable proposal if the stay extension is granted. For the purpose determining the likelihood of a viable proposal, the Court has said "viable" means reasonable on its face to a

[39] *H&H Fisheries Ltd, Re*, 2005 NSSC 346 at para 12 [*H&H Fisheries*] **[Tab 2]**.
[40] *Entegrity Wind Systems Inc, Re*, 2009 PESC 33 at para 5 [*Entegrity*] **[Tab 3]**.
[41] Gallagher Affidavit, *supra* note 2 at para 26.
[42] *Ibid* at paras 33-34.
[43] *Ibid* at para 35.

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reasonable creditor and "likely" does not require certainty but means "might well happen" or "probable".[44] It is an objective test and does not depend on whether a specific creditor would be prepared to support the proposal.[45]

55. The Debtors argue that, if given 45 more days, a Refinancing Advisor will be able to canvas the market, identify potential transactions, and negotiate a deal for them, which can be put into a proposal for consideration the creditors.[46] While this plan seems reasonable on its face, it completely ignores the fact that the Debtors have already been engaged in such efforts since January 2023, when they hired Imperial and ARCO to source M&A and capital raising options and explore debt refinancing.[47] It has now been nearly 9 months since those efforts commenced and the Debtors have been unable to present a single viable solution to resolve the Continued Defaults.

56. Given this history, the only thing the likely to be accomplished in the next 45 days are additional professional fees by a Refinancing Advisor to achieve the exact same result as ARCO and Imperial. There is no indication that the Debtors will suddenly be able to source a capital opportunity of the magnitude it requires to resolve GPOC's liabilities. Accordingly, this proposal proceeding should not be extended, because it is not likely or even probable for the Debtors to make a viable proposal within the next 45 days. If the Lenders are truly "overcollateralized", then any viable proposal must see them paid out 100 cents on the dollar. There is no indication (based on past efforts) that such a result can be achieved by a new Refinancing Advisor.

57. The third and final aspect of the test is whether there is any creditor who would suffer material prejudice as a result of the stay extension. To the extent that the BIA contemplates prejudice to the creditors, Justice Goodfellow in *H&H Fisheries* laid down the threshold of the material prejudice element within section 50.4(9)(c) to be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept.[48] Material prejudice is "an objective prejudice, as opposed to a subjective one – ie. it refers to the degree of 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".[49]

58. Through this NOI proceeding, the Lenders' position as primary secured creditor is being unnecessarily primed by various professional fees, administrative charges, levies and potentially

[44] *Baldwin Valley Investors Inc, Re* (1994), 23 CBR (3d) 219 (Ont Ct J (Gen Div)) at para 4 **[Tab 4]**.
[45] *Ibid* at paras 3-4.
[46] Brief of the Debtors, dated September 19, 2023 at para 52 [Debtors' Brief].
[47] Gallagher Affidavit, *supra* note 2 at paras 29-32; Affidavit of Daryl Stepanic, sworn on September 14, 2023 at paras 44-46 [Stepanic Affidavit].
[48] *H&H Fisheries*, *supra* note 39 at para 37.
[49] *Cumberland Trading Inc, Re* (1994), 23 CBR (3d) 225 at para 11 **[Tab 5]**.

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DIP charges. The Debtors now also seek permission to pay $1M to its unsecured creditors in priority to the Lenders position.[50]

59. Additionally, GPOC, an oil and gas company, has seen declining production across its assets.[51] As a result of this continued decline, the value of the Lenders' collateral is steadily shrinking, and the Lenders believe that they will be materially prejudiced if the Stay Extension is granted.

60. Furthermore, the value of the Greenfire Shares (which was valued at over USD$60M prior to the Closing Date) is now subject to market fluctuations as a result of becoming publicly traded on the New York Stock Exchange. The extension of the stay puts all the risk of these value fluctuations in a "parked position" for 45 days – the Lenders took a specific share pledge so that they could control that risk, and the stay unnecessarily prejudices them by taking away that ability to control when and how the shares are sold or liquidated.

(ii) *In the alternative, Spicelo Should not be Granted the Stay Extension*

61. In the alternative, the Lenders state that if this Court is so inclined to grant the Stay Extension, it should do so for all Debtors except Spicelo.

62. As noted above, the debtor bears the onus to prove that it satisfies all three elements under section 50.4(9) and, if the debtor fails on any part of the three-part test, the application must be denied.[52]

63. In addition to the above reasons, it is the position of the Lenders that Spicelo cannot satisfy the criteria for an extension because it has not acted in good faith or with due diligence and it is not likely to make a viable proposal in the next 45-days.

64. First, the ability to utilize the proposal provisions within the BIA is predicated on the fact the debtor is an "insolvent person".[53] Spicelo is not insolvent and, therefore, its filing of the NOI is improper and an abuse of process. Spicelo, through its own admission, it's currently in possession of the New Greenfire Shares which have an estimated in value of approximately USD$62M. Spicelo's estimated liabilities in its NOI are CAD$52,603,740.74, of which the Lenders represent 97.73%. Spicelo has sufficient assets to pay its liabilities and is not insolvent.

65. Second, the Greenfire Shares (and now the New Greenfire Shares) are pledged to the Lenders pursuant to the Spicelo Guarantee. No other creditor in these NOI Proceedings have the Greenfire Shares pledged to them. If it were not for Spicelo's NOI filing, the Lenders could have seized the

[50] Stepanic Affidavit, *supra* note 47 at para 3(g).
[51] Stephanic Affidavit, *supra* note 47 at Exhibit F.
[52] *Entegrity*, *supra* note 40.
[53] *BIA*, *supra* note 1, s 50.4(1)

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Greenfire Shares 3 weeks ago and there would be no need for these NOI Proceedings. This is further evidence of Spicelo's lack of good faith dealings.

66. Third and finally, Spicelo is not related to the GPOC Entities or Shareholder Entities and is a holding company. There is nothing to "restructure" within Spicelo that would form a viable proposal. Therefore, it does not need to be dragged along in these NOI Proceedings.

(iii) *The NOI Stay Should be Terminated*

67. In the further alternative, the Lenders seek relief from this Honourable Court to terminate the NOI Proceedings against Spicelo immediately to permit the Lenders to make the Receivership Application.

68. Pursuant to Section 50.4(11), on application by a creditor the Court may terminate the initial period for making proposal before its actual expiration or any extension thereof 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 50.4(8)(a) to (c) thereupon apply as if that period had expired.[54]

69. The important distinction between an application by a debtor under Section 50.4(9) and an application by a creditor under Section 50.5(11) is the requirement that any proposal made by the debtor be accepted by its creditors.

70. In addition to the Lender's submissions concerning Spicelo's lack of good faith in these NOI Proceedings, the Lenders say that Spicelo will not be able to make a viable proposal that will be accepted by the Lenders.

[54] *BIA*, *supra* note 1, s 50.4(11).

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71. The Debtors' provide two plans: (i) the engagement of a Refinancing Advisor, and (ii) a potential purchase transaction that is contingent on Alberta Energy Regulator ("**AER**") approval. Neither are likely to be viable or accepted by the Lenders.

72. With respect to the Refinancing Advisor, the Lenders state that this is not likely to result in a viable proposal because such efforts have been ongoing for nearly 9 months without success. As described above, there is no evidence that a Refinancing Advisor is likely to generate a transaction in the next 45-days sufficient to resolve GPOC's total liabilities.

73. With respect to the potential purchase transaction, there is no evidence provided by the Debtors to suggest when or if the AER will approve the same.

74. Finally, and most importantly, the Lenders are the primary secured creditors of Spicelo and represent 97.73% of the creditor claims of Spicelo. The Lenders have veto power over any proposal by Spicelo and do not support this NOI Proceeding, particularly with respect to the Greenfire Securites.

B. The Appointment of a Receiver is Just and Convenient

75. The Lenders seek the appointment of a Receiver over all assets, undertakings and property (the "**Property**") of Spicelo. Spicelo, unlike the rest of the Debtors, is a separate and distinct entity, whose only asset is the Greenfire Shares. For the reasons set forth below, it is just and appropriate to appoint a receiver to liquidate the Greenfire Shares because it will simplify the NOI Proceedings and serve to benefit all stakeholders.

76. This Court has discretion to appoint a receiver pursuant to both Section 243(1) of the BIA and Section 13(2) of the *Judicature Act*.[55] Under either legislation, the test to be applied by the Court is whether a receiver is "just or convenient".[56]

77. Although the BIA does not provide any factors to determine under what circumstances the appointment of a receiver would be "just or convenient", it is well recognized that the purpose of the appointment of a receiver pursuant to Section 243 of the BIA is to enhance and facilitate the preservation and realization of a debtor's assets for the benefit of all its creditors.

78. In *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*,[57] Justice Romaine held that in analyzing whether a receiver is "just or convenient" the Court may consider the factors

[55] *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 47 **[Tab 6]**; *BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127 at para 6 **[Tab 7]**.
[56] *BIA*, *supra* note 1, s 243(1); and *Judicature Act*, RSA 2000, c J-2, s 13(2) **[Tab 8]**.
[57] 2002 ABQB 430 **[Tab 9]**.

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enumerated in *Bennett on Receiverships*. The applicability of those factors depends on the particular factual matrix. These factors include:

(a) the risk of harm to the secured lender if a receiver is not appointed;

(b) the risk of to the secured lender of suffering a sizeable deficiency;

(c) the fact that the creditor has a contractual right to appoint a receiver;

(d) the balance of convenience;

(e) the likelihood of maximizing return to the parties; and

(f) the secured lender's good faith, commercial reasonableness and the equities.[58]

79. Moreover, although Canadian courts have recognized that in general, the appointment of a receiver will be regarded as an extraordinary equitable remedy, the same courts have also recognized that such is not the case where the relevant security document permits the appointment of a receiver:

> *...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties*.[59]

80. While some authority indicates that the Court must apply the tripartite test for injunctive relief when considering a receivership application, these requirements are only mandatory when the applicant is not a security holder.[60]

81. In the present case, having regard to all the circumstances, the Lenders respectfully submit that it is both just and convenient for this Court to appoint a receiver over the Property of Spicelo for the following reasons:

(a) The Continued Defaults have occurred and are continuing to occur under the Credit Agreement and Spicelo Guarantee;

(a) The Lenders are secured creditors and delivered 244 Notices and have met the procedural requirements to appoint a receiver;[61]

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[58] *Ibid* at para 27.
[59] *Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866 at para 27 **[Tab 10]**.
[60] *Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43 at paras 16-17 **[Tab 11]**.
[61] *BIA*, *supra* note 1, s 243.

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(b) GPOC has been in default under the Credit Agreement since November 2022, providing sufficient time for the Debtors to consider any strategic options but have been unsuccessful in so doing;

(c) The Lenders have lost faith in the Debtors' ability to implement any strategic or restructuring alternative, which would allow for the payment of the Indebtedness;

(b) The Lenders have, at all times, acted in good faith and have given GPOC and the Guarantors more than ample time to remedy the Defaults;

(d) As of August 16, 2023, the GPOC was indebted to the Lenders in the amount of USD$37,938,054.69, plus interest accrued thereon and other fees payable;

(c) The Spicelo Guarantee allows for the appointment of a receiver in the event of a default;

(d) The social and economic costs of liquidating the Property are minimal based on the fact that Spicelo's only asset is the Greenfire Shares, does not carry any ongoing business, and does not have any employees;

(e) A Bankruptcy Trustee sale will be subject to certain statutory provisions in the BIA, including the application of a Superintendent of Bankruptcy's levy on any sale proceeds;

(f) As a result of the Transaction, the Greenfire Shares are no longer encumbered by any rights of first refusal or other impediments to sale and liquidity, and as a result, a Receiver is best suited to realize on those assets;

(g) There is no other process available to the Lenders that would enable it to adequately protect its interests;

(e) A receivership order would permit an orderly and cost-effective liquidation of the Greenfire Shares, permitting the Lenders the best opportunity to realize on its collateral and potentially be repaid the Indebtedness;

(f) Appointing a receiver will help expedite the sale of the Greenfire Shares;

(g) There are no compelling commercial or other reasons to not appoint KPMG as receiver;

(h) The Lenders' position as primary secured creditor is being unnecessarily impacted by various professional fees, administrative charges, and potentially DIP charges if Spicelo continues in the NOI proceedings;

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(i) There is real risk of harm and loss to the Lenders if a Receiver is not appointed, especially if a Bankruptcy Trustee is not able to sell the assets is a value-maximizing manner;

(j) The balance of convenience supports the appointment of a Receiver;

(h) The draft order sought in the Receivership Application is based on the Alberta model receivership order and the terms respecting the stay of proceedings and receiver's charge are appropriate in the circumstances; and

(k) KPMG has consented to act as a receiver.

82. Furthermore, it is important to emphasize that what is being sought by the Lenders is the appointment of a receiver over Spicelo, not GPOC. If a receiver is appointed over Spicelo and the Greenfire Shares are liquidated to satisfy the Indebtedness, this will free up value in GPOC for the other creditors, especially Tamarack.

83. Considering the above circumstances, the Lender respectfully submits that it is both just and convenient to appoint the Receiver over the entirety of the Property to ensure that the Receiver has full authority over Spicelo and to maximize recovery.

C. The Greenfire Shares are Liquid Assets

(i) *The ROFR Does Not Apply*

84. In response to paragraphs 19, 20, and 21 of the Debtor's Brief, while Lenders do not contest that the Spicelo Guarantee incorporates by reference certain transfer restrictions in respect of the Greenfire Shares, including the ROFR, the Debtors have mischaracterized the status of those transfer restrictions now that the Transaction closed on September 20, 2023.

85. The ROFR arises from a Shareholders Agreement among Greenfire and certain Greenfire shareholders, dated August 5, 2021 (the "**Shareholders Agreement**"). Spicelo was a party to the Shareholders Agreement until the Closing Date. The transfer restrictions and ROFR are incorporated by reference at Schedule "A" of the Spicelo Guarantee.

86. Pursuant to the terms of the Transaction, *inter alia*, the following occurred on the Closing Date:

(a) the holders of the Greenfire Shares received a number of common shares (the New Greenfire Shares) in the capital of New Greenfire in exchange for their Greenfire Shares;

(b) the share certificates for the Greenfire Shares were cancelled;

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(c) new share certificates for the New Greenfire Shares were issued;

(d) the New Greenfire Shares were listed on the New York Stock Exchange; and

(e) the Shareholders Agreement was terminated.

87. As a result of the termination of the Shareholders Agreement, the Lenders state that the ROFR ceased to exist. Therefore, the 30-day ROFR exercise period no longer applies to the Greenfire Shares.

(ii) *The Lenders are Not Bound by the LUA*

88. As described above, the transfer restrictions and ROFR no longer exist.

89. Up until the Closing Date, the Spicelo Guarantee expressly provided that, other those transfer restrictions set forth in Schedule "A", no other transfer restrictions applied to the Greenfire Shares.

90. Following the Closing Date, by virtue of the cancellation of the Greenfire Shares and issuance of the New Greenfire Shares, the New Greenfire Shares became the collateral pursuant to section 22(c) of the Spicelo Guarantee. The New Greenfire Shares are not subject to the ROFR or the transfer restrictions set forth in the Shareholder Agreement.

91. The Debtors and Proposal Trustee argue that, by virtue of Spicelo entering a LUA in respect of the Transfer of the New Greenfire Shares, the Lenders are unable to enforce their security 180-day period. The Lenders respectfully submit that this position is untenable.

92. First, it is trite law that third parties have no duty to discharge contractual obligations that they are not party to or bound by. No privity of contract exists between the Lenders and New Greenfire. The Lenders are not parties to the LUA and have never agreed to be bound by its terms. As a result, the Lenders are not bound by the Lock Up Period and may enforce their security by liquidating the New Greenfire Shares immediately.

93. Second, the LUA specifically contemplates situations where a Transfer of the New Greenfire Shares may be completed by Spicelo. "**Transfer**" is defined in the LUA as the (i) sale or assignment of, offer to sell, contract or agreement to sell, hypothecation, pledge, grant of any option to purchase or other disposal of or agreement to dispose of; directly or indirectly, or establishment or increase of a put equivalent position or liquidation or decrease of a call equivalent position within the meaning of Section 16 of the *Exchange Act* with respect to, any security, (ii) entry into any swap or other arrangement that transfers to another person, in whole or in part, any of the economic consequences of ownership of any security, whether any such transaction is to be settled by

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delivery of such securities, in cash or otherwise, or (iii) public announcement of any intention to effect any transaction specified in (i) or (ii).

94. The LUA provides at Section 2(b) that, notwithstanding the Lock-Up Period (as defined therein), Spicelo may Transfer the New Greenfire Shares (i) in connection with a pledge of New Greenfire Shares, or any other securities convertible into or exercisable or exchangeable for New Greenfire Shares, to a financial institution, including the enforcement of any such pledge by a financial institution, or (ii) in connection with any legal, regulatory, or other order.

95. It is the Lenders position that the above exceptions apply to the New Greenfire Shares in the circumstances. First, the LUA clearly contemplates the Transfer of the New Greenfire Shares in the case of enforcement proceedings pursuant to a share pledge. Second, the New Greenfire Shares may be Transfer in connection with any order.

96. In either case, the New Greenfire Shares are liquid assets of Spicelo and capable of being realized to satisfy the outstanding Indebtedness.

97. In response to paragraph 30 and 88 of the First Report, the Proposal Trustee contends that liquidating the New Greenfire Shares would result in "significant value deterioration" and has concerns that "this will erode the value for the benefit of all creditors and stakeholders in the NOI Proceedings". In response, the Lenders state that they are the only creditor in these NOI Proceedings that have a secured first priority interest in the New Greenfire Shares. Further, there is no evidence of any kind that suggests that liquidating the New Greenfire Shares immediately will deteriorate their value.

98. The New Greenfire Shares are publicly listed and it will be up to the market to determine their value.

99. In any event, the Greenfire Shares were specifically pledged to the Lenders. It is up to the Lenders to decide the best time and method for sale in order to maximize value. The NOI Proceedings, as they Spicelo, take away from the Lender's contractually bargained for right.

D. The Charges on the Estate are Excessive and Unnecessary

(i) ***The Administration Charge***

100. The Debtors seek an administration charge of $500,000 to secure the fees of certain administrative professionals (the "**Administration Charge**"). In support of this quantum, the Debtors assert that the Administration Charge is appropriate given the "size and complexity of the Debtors' business."[62]

[62] Debtors' Brief, *supra* note 46 at para 99.

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The Lenders submit that the Administration Charge sought by the Debtors is inappropriate for two key reasons: (1) the scale of the Debtors' business operations do not warrant such a large quantum, and (2) GPOC has positive cashflow and is perfectly capable of paying its administrative professionals.

101. Of the Debtors, GPOC is the only entity with active business operations. As admitted by the Debtors, GPOC holds all of the oil and gas interests and conducts all of the business and operations that are allegedly shared between the Griffon Entities.[63] Meanwhile, the other Guarantors are purely holding companies with no business operations and no meaningful assets, save for the Greenfire Shares held by Spicelo.[64] Essentially, aside from GPOC, the other Debtors have no business to be managed and the amount sought by the Debtors for the Administration Charge is excessive.

102. Furthermore, unlike cases cited by the Debtors such as *Mustang GP Ltd*, *Re*,[65] the Debtors do not have limited means to obtain professional assistance.[66] It is clear from GPOC's financial disclosure that it has positive cashflow and is capable of paying the fees of any administrative professionals itself.[67] The Debtors are not seeking any interim or DIP funding, and in fact, appear to have enough available funds to pay up to $1 million of unsecured pre-filing claims from trade suppliers. There is therefore no need to grant the Administration Charge and unnecessarily prime the Lenders' security.

103. The size of the administration charge being sought is another example of how the Lender's priority position is being primed by these proceedings. The cash flow forecast filed by the Trustee 10 days following the filing of the NOI has forecast over $1.2 million in professional fees accruing to GPOC over the next 13 weeks.[68]

(ii) *D&O Charge*

104. The Debtors also seek a directors and officers charge of $250,000 to secure any obligations and liabilities the Debtors' directors and officers may incur (the "**D&O Charge**"). None of the Debtor companies have any employees and, by their own admission, the Debtors have "actively managed all abandonment and reclamation obligations" and therefore have "minimal regulatory obligations."[69] As a result, it is unclear what potential obligations and liabilities the Debtors' directors and officers may incur. The Debtors have led no evidence of any potential obligations or liabilities

[63] Stepanic Affidavit, *supra* note 47 at para 13.
[64] *Ibid* at paras 19-20.
[65] 2015 ONSC 6562 **[Debtors' Brief, Tab 21]**.
[66] *Ibid* at para 33.
[67] Gallagher Affidavit, *supra* note 2 at Exhibit "E".
[68] *Ibid*.
[69] Debtors' Brief, *supra* note 46 at para 34.

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which may necessitate the D&O Charge. Furthermore, unlike cases cited by the Debtors, such as *Colossus Minerals Inc, Re*,[70] there is no evidence that the directors and officers have indicated any unwillingness to continue their involvement with the Debtors without the granting of the D&O Charge.[71]

(iii) *Pre-Filing Payments to Unsecured Trade Creditors*

105. Allowing for payments of up to $1 million to be made to GPOC's unsecured creditors, is inappropriate. There is no distinct statutory provision in the BIA to support such a payment, although an analogy could be made to section 11.4 of the CCAA which creates a charge for "critical suppliers". In order to be deemed a "critical supplier," certain prerequisites must be met – not every party supplying goods and services to a debtor will constitute a critical supplier. In determining whether a supplier is "critical," courts will consider, *inter alia*, the following:

(a) Whether the goods and services were integral to the business of the debtor;[72]

(b) The level of dependency by the debtor on the uninterrupted supply of the goods or services;[73] and

(c) Whether there is an ability to pivot away to a different goods or service provider.[74]

106. The Debtors have not led any evidence suggesting that any of their suppliers meet the prerequisites to be considered "critical." There is no evidence before this Court that the ongoing success of GPOC's business operations would be threatened if any of the suppliers cease doing business with it or that GPOC would be unable to secure different suppliers to supply the same goods and services. In fact, there is no indication in any of the evidence before this Court that any of the suppliers are even threatening to cease supplying goods and services to GPOC.

107. In certain circumstances, the Court has allowed payment to pre-filing unsecured trade creditors in situations where said creditors are facing hardship, or when there are compelling reasons to show that such payment would maximize the value of the debtor's business. There is no evidence of hardship or value maximization here, other than broad statements about the nature of the business, which could apply to any operating business.[75]

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[70] 2014 ONSC 514 **[Debtors' Brief, Tab 9]**.
[71] *Ibid* at para 19.
[72] *Northstar Aerospace Inc, Re*, 2012 ONSC 4546 at para 11 **[Tab 12]**.
[73] *Ibid*.
[74] *Soccer Express Trading Corp, Re*, 2020 BCSC 749 at para 67 **[Tab 13]**.
[75] See e.g., *EarthFirst Canada Inc, Re*, 2009 ABQB 78 **[TAB 14]**; *Eddie Bauer of Canada Inc, Re* (2009), 55 CBR (5th) 33 (Ont Sup Ct J) at para 22 **[Tab 15]**; *Air Canada, Re* (2003), 47 CBR (4th) 163 (Ont Sup Ct J) **[Tab 16]**.

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108. Ultimately what the Debtors are proposing is that unsecured creditors be given up to $1,000,000 in priority to the claims of the secured creditors. Based on the List of Creditors from GPOC's Notice to Creditors, this represents approximately half of the total amounts owed to unsecured creditors being paid out in priority to the secured creditors.[76] Granting this priority to GPOC's unsecured creditors would upend the priority regime that is central to Canadian insolvency law.

E. Consolidation of the Estates

109. The Debtors argue that their proposal proceedings should be procedurally consolidated into one proceeding. Though procedural consolidation can be an efficient way of dealing with proceedings that are closely related, an obvious baseline requirement is that the proceedings sought to be joined must have been properly commenced. For entities such as Spicelo that are not insolvent and should therefore never have filed an NOI, it is not appropriate to consolidate their proceedings.

110. Furthermore, though procedural consolidation may make sense for GPOC and many of the Guarantors, the same cannot be said for Spicelo. Spicelo shares no corporate connection with GPOC or the other Guarantors, as demonstrated by the GPOC Organizational Chart.[77] The Debtors have argued that "(t)he [Debtors] are interrelated and do not have distinct business purposes,"[78] however, they have led no evidence suggesting that the business purpose of Spicelo shares any commonality with GPOC or the other Guarantors. Spicelo's only apparent business purpose is to hold the Greenfire Shares. The Greenfire Shares are in no way tied to the business operations of GPOC or the other Guarantors. Additionally, the assertion that the "root of the [Debtors'] Proposal Proceedings is identical" is misleading; Spicelo's debt obligation arises from the Spicelo Guarantee which establishes that the obligation is separate and distinct from those of GPOC and the other Guarantors.[79]

111. Lastly, though denying that they are seeking substantive consolidation, the Debtors' request for procedural or administrative consolidation extends far beyond housekeeping matters. Their request includes the provision that all the Debtors be allowed to file a joint proposal. There is no distinct statutory provision in the BIA to allow for submission of a consolidated proposal. Courts have sometimes allowed a Consolidated Plan of Arrangement under the CCAA, but only under strict circumstances – the Debtors should show that the affairs of the companies were intertwined and their businesses were in effect operated as one.[80] Courts have considered numerous factors,

[76] Gallagher Affidavit, *supra* note 2 at Exhibit "D".
[77] Stepanic Affidavit, *supra* note 47 at Exhibit "B".
[78] Debtors' Brief, *supra* note 46 at para 84.
[79] Gallagher Affidavit, *supra* note 2 at Exhibit "A", s 5.
[80] See e.g., *PSINet Ltd, Re* (2002), 33 CBR (4th) 284 (Ont Sup Ct J) at paras 2, 11 **[Tab 17]**; *Atlantic Yarns Inc, Re*, 2008 NBQB 144 at paras 31-33 [*Atlantic Yarns*] **[Tab 18]**.

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including difficulty in segregating assets, presence of consolidated financial statements, profitability of consolidation at a single location, commingling of assets and business functions, unity of interests in ownership, existence of intercorporate loan guarantees, and transfer of assets without observance of corporate formalities.[81]

112. The Debtors clearly do not meet the high bar required for such a consolidation. Based on all of the foregoing, the proposed consolidation of the Spicelo estate with those of GPOC and the other Guarantors is not appropriate.

F. The Proposal Trustee's Application re: Confidential Appendix Should be Partially Denied

113. The Proposal Trustee has filed an application to, *inter alia,* seal a confidential appendix to the Trustee Report on the Court file, such that it will not form part of the public record (the "**Restricted Court Access Application**").

114. The Lenders oppose part of the relief sought in the Restricted Court Access Application, namely valuation details as they relate to the Greenfire Shares. As of September 21, 2023, the Greenfire Shares are publicly traded securities on the New York Stock Exchange and there is nothing confidential about their value.

115. *Sierra Club of Canada v Canada (Minister of Finance)*[82] sets out the general test for granting a confidentiality order. A confidentiality order may be granted when (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[83]

116. The first section of the test subsumes three distinct elements:

(a) the risk in question must be real and substantial, in that the risk is well grounded in evidence, and poses a serious threat to the commercial interest in question;

[81] See e.g., *Atlantic Yarns*, *supra* note 19 at para 34, citing *Northland Properties Ltd, Re* (1998), 29 BCLR (2d) 257 (SC) at paras 49-57.
[82] [2002] SCR 522 **[Tab 19]**.
[83] *Ibid* at para 53.

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(b) in order to be an "important commercial interest", the interest must be one that can be expressed in terms of public interest in maintain confidentiality and not merely the interest of the specific party requesting the order; and

(c) the Court must (i) consider whether there are alternatives to a confidentiality order and (ii) ensure that a sealing order is restricted as much as reasonably possible while still preserving the commercial interest in question.[84]

117. In the insolvency context, the principles set out in Sierra Club have led the Court to adopt a standard practice of sealing portions of reports from a court-appointed officer which discloses the valuations of the assets that may be subject to a sales process, the details of bids received by the court-appointed officer or the purchase price contained in the sale agreement for which the approval is being sought.[85]

118. In the present case, the Lenders are the only secured creditors that hold a security interest in the Greenfire Shares. There will not be a marketing process for the Greenfire Shares that requires the details of which to be kept confidential. Further, the details of the valuation of the New Greenfire Shares is publicly available. The Proposal Trustee's Restricted Access Application should be denied as it relates to Spicelo.

V. CONCLUSION

119. For the reasons set forth herein, the Lenders respectfully requests that the Court:

(a) Deny the Stay Extension;

(b) In the alternative, deny the Stay Extension of Spicelo only; and

(c) Grant the Receivership Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF SEPTEMBER, 2023

STIKEMAN ELLIOTT LLP

By: _____

Karen Fellowes, K.C.
Lawyer for the Applicants, Trafigura Canada Limited and Signal Alpha C4 Limited

[84] *Ibid* at paras 54-57.
[85] *GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc*, 2014 ONSC 1173 at para 32 **[Tab 20]**.

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TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
2.	*H&H Fisheries Ltd, Re*, 2005 NSSC 346.
3.	*Entegrity Wind Systems Inc, Re*, 2009 PESC 33.
4.	*Baldwin Valley Investors Inc, Re* (1994), 23 CBR (3d) 219 (Ont Ct J (Gen Div)).
5.	*Cumberland Trading Inc, Re* (1994), 23 CBR (3d) 225.
6.	*Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53.
7.	*BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127.
8.	*Judicature Act*, RSA 2000, c J-2.
9.	*Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430.
10.	*Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866.
11.	*Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43.
12.	*Northstar Aerospace Inc, Re*, 2012 ONSC 4546.
13.	*Soccer Express Trading Corp, Re*, 2020 BCSC 749.
14.	*EarthFirst Canada Inc, Re*, 2009 ABQB 78.
15.	*Eddie Bauer of Canada Inc, Re* (2009), 55 CBR (5th) 33 (Ont Sup Ct J).
16.	*Air Canada, Re* (2003), 47 CBR (4th) 163 (Ont Sup Ct J).
17.	*PSINet Ltd, Re* (2002), 33 CBR (4th) 284 (Ont Sup Ct J).
18.	*Atlantic Yarns Inc, Re*, 2008 NBQB 144.
19.	*Sierra Club of Canada v Canada (Minister of Finance)*, [2002] SCR 522.
20.	*GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc*, 2014 ONSC 1173.

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CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to September 13, 2023

Last amended on April 27, 2023

À jour au 13 septembre 2023

Dernière modification le 27 avril 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

50.4 (1) 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).

Certain things to be filed

(2) 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

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable

cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

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

Exception

(4) 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.

Trustee protected

(5) 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.

Trustee to notify creditors

(6) 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).

Trustee to monitor and report

(7) 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 —

relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(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.

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Where assignment deemed to have been made

(8) 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.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

(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

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

(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.

Court may not extend time

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

Court may terminate period for making proposal

(11) 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.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

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

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

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

s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

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

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

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

Restriction on appointment of receiver

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

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

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

Definition of *receiver*

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

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

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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

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

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

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

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

Restriction relative à la nomination d'un séquestre

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

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

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

Définition de *séquestre*

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

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

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie,

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: *H &H Fisheries Limited, Re,* 2005 NSSC 346

Date: 20051219
Docket: SH B259148
Registry: Halifax

IN THE MATTER OF: H & H Fisheries Limited

DECISION

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: December 14, 2005 in Halifax, Nova Scotia

Counsel: Victor J. Goldberg and Martha L. Mann for
H & H Fisheries Limited
Stephen J. Kingston and Bob Mann, articled clerk, for
the Bank of Nova Scotia

By the Court:

BACKGOUND:

[1] H & H Fisheries Limited (HHFL) owns and operates a fish processing plant at Eastern Passage, Halifax, Nova Scotia, which is a somewhat seasonal operation and it presently employs seventy-five people which diminishes to approximately twelve people off-season.

[2] Reginald P. Hartlen is the president, a founding shareholder and director of HHFL and the company became a customer of the Bank of Nova Scotia (BNS) in May of 2003.

[3] HHFL and BNS secured a commitment letter December 2, 2004 with the stated purpose of BNS "to finance trade receivables and inventory". It provided that BNS would have a first charge over accounts receivable and inventory and set out the terms and conditions of their agreement including "for ongoing credit risk management purposes, all operating accounts of the borrower shall be maintained with the Bank as long as the borrower has any operating line facilities with the Bank". There were several additional terms and conditions dealing with reporting ratios of current assets to current liabilities, ratio of debt to tangible net worth, etc. The letter of commitment contained a clear outline of the general borrower reporting conditions. The letter of commitment made reference to two specific receivables outstanding; Emporio and Simone, upon which I will comment further.

[4] In November 2004 HHFL applied to increase its limit on its operating credit line from $400,000 to $1,100,000 and this increase was approved subject to confirmation as to the collection of the Emporio and Simone accounts.

[5] In December 2004 the Simone account was paid in full but Emporio remained outstanding. Because the lobster season was approaching, HHFL requested BNS to waive the condition relating to the Emporio account. BNS did not waive the requirement in relation to that account but did allow access to the full operating line of $1,100,000 to January 31, 2005 when the limit was reduced to $750,000.

[6] In February 2005, HHFL again requested access to the $1,100,000 credit limit to February 28, 2005 when again it would be reduced to $750,000 and this

was agreed upon by the parties. HHFL provided BNS with an update on the status of the Emporio account which continued to remain outstanding. BNS became increasingly concerned with respect to the impact of the potential write-off of the Emporio account and as a result in March 2005 conversations took place between BNS and Reginald Hartlen, who undertook April 7, 2005 to inject equity of $200,000 into HHFL by April 22, 2005. Mr. Hartlen did come up with $100,000 and endeavoured to obtain additional funds in relation to mortgaging his residence but unfortunately there was a lien/judgment against his property and his financing has not been possible.

[7] In June 2005 HHFL advised that as part of its 2005 fiscal year ending June 30, 2005, the company would write off the Emporio account which would give it an operating loss of $300,000 which would be partially set off by an SR&ED refund of $200,000, leaving a net loss of $100,000 for the fiscal year 2005.

[8] In September 2005 BNS received a copy of HHFL's unaudited financial statement for the year ending June 30, 2005 which showed a net loss of $596,043. This compared with a net loss of $21,003 for the year ending June 30, 2004.

[9] HHFL had problems with cash flow and operating and contrary to the letter of commitment started to deposit funds to its accounts with CIBC and this was acknowledged by the director of finance of the company in September 2005. There followed innumerable meetings, correspondence between the parties and Mark S. Rosen, a licensed trustee in bankruptcy, who has consented to act as trustee for any proposal in this matter.

LEGISLATION:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

ss. 50.4(9):

Extension of Time for Filing Proposal

In order to obtain an extension, the debtor must establish the following three items

(a) that it is acting in good faith and with due diligence;

(b) that it would likely be able to make a viable proposal if an extension were granted; and

(c) that no creditor would be materially prejudiced.

s. 54(2.2)(3):

Related creditor - A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

62(1.2)(2):

On whom approval binding - A proposal accepted by the creditors and approved by the court is binding on creditors in respect of

(a) All unsecured claims, and

(b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, personally or by proxy, at the meeting and voting on the resolution to accept the proposal.

but does not release the insolvent person from the debts and liabilities referred to in section 178, unless the creditor assents thereto. (S.C. 1992, c. 27, s. 26).

Interpretation Act, R.C.C. 1985, c. I-21

Law Always Speaking

Law always speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

Enactments Remedial

Enactments deemed remedial

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

APPLICATION:

[10] HHFL filed a Notice of Intention dated November 3, 2005 under ss. 50.4(1) to make a Proposal of H & H Fisheries Limited. An order was granted extending the time to file a proposal November 29, 2005 to December 8, 2005. Unfortunately, the Chambers' docket was so heavy that the Justice presiding on December 8, 2005 was unable to address the matter and I was asked to deal with it and it was put over by consent to December 14, 2005. The application is comprised of several affidavits and both parties declined cross-examination of the other sides' supporting affidavits. On December 14th I heard almost four hours of argument and reserved my decision in order to thoroughly review the extensive material filed by both parties and arrive at a determination.

ONUS:

[11] The court, as directed by s. 50.4(9) above, must be 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.

[12] The onus is upon the applicant, in this case HHFL), to satisfy the court on a balance of probabilities that all three prerequisites of s. 50.4(9) have been established on the application.

[13] This is so because of the use of the "semi-colon" and the use of the word "and" in (b), rendering the requirements conjunctive. This requires the court to consider each of the subsections as to whether the applicant has established the prerequisite contained in the subsection on a balance of probabilities. For the application to be successful the court must be satisfied that all three prerequisites

of the application have been established on a balance of probabilities before extending the time for filing a proposal. It is, in essence, a three part test and if the applicant fails on any part the court would not then be satisfied, requiring the application to be dismissed.

[14] **Has HHFL satisfied the court that it has acted in good faith and exercised due diligence?**

[15] There is some merit to the arguments advanced by BNS and the court is particularly concerned about a party HHFL signing a commitment letter with the clear undertaking noted above that all its operating accounts were to be maintained with BNS. This is for the obvious purpose of providing BNS with an opportunity to monitor and protects its interests as a creditor and clearly HHFL in moving all its trading, operating business to its CIBC accounts has committed a breach of contract, a breach of the commitment it made in the original committal letter executed by both parties December 2, 2004.

[16] Does a breach of contract automatically constitute bad faith? The answer is, "not necessarily", but it is evidence that must be weighed very carefully and the evidence here does show a deliberate failure to notify BNS of this redirection of operating funds and at one point a signed invoice or record which was somewhat misleading with respect to the possibility of some relatively minor accounts having been directed to the CIBC in error.

[17] The converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable. If, for example, the diversion of operating/trading proceeds had been diverted to the CIBC for the purposes of personal gain for any officer, director or shareholder of HHFL, an example of which would be payment to ones family or a pay-down on a mortgage or judgment on ones home, etc., or to enhance the third level of a secured creditor being Mr. Hartlen's company, R. Hartlen Investments Inc., then clearly such would amount to bad faith and quite possibly fraud. It is clear that the motivation for moving the funds to the CIBC account was, in one word, for the purpose of "survival". Funds were essential in that I accept the view expressed by HHFL that had it continued to direct its operating/trading funds to BNS the probability is almost a certainty that BNS would have utilized such funds to pay-down its advances precluding the company from having any operating funds and the door to the plant would have been shut. This result would not have been, and is not at this time, in the best

interest of either party and coincidentally the seventy-five employees who are at the moment gainfully employed by HHFL. I make it clear that it is not necessary that there be fraud for the conduct to fall short of good faith. HHFL have also fallen behind in many other aspects of the original commitment letter but they have responded and provided documentation, bank records, reconciliation of invoices with cash withdrawals. Its recent conduct probably directed by the trustee entirely mitigates against any suggestion of the diversion being for personal gain other than as I have said, a course of conduct taken for the benefit of both parties some other ninety-six outstanding creditors and the seventy-five employees. In some cases a breach of contract may be such of itself that it precludes acceptance on a balance of probabilities that the overall conduct meets the good faith requirement.

[18] It is argued by HHFL that only its conduct since the filing of the Notice of intention November 3, 2005 should be considered and with respect, I am inclined to disagree. The manner in which a party conducts itself in the past, particularly the immediate past, is often an indicator of likely conduct in the immediate future. In addition, what you have here is a breach of the contract/commitment letter which occurred before November 3, 2005 and continued and overlapped the date of the filing of the Notice of intention.

[19] The court does have the opinion of a respected trustee whose sworn testimony by affidavit has not been challenged and Mark S. Rosen, LLB, FCIRP, has been involved for some time and very active in endeavouring to come to grips with the challenge and has met with and communicated with officials of BNS, BDC and many of the unsecured creditors. After reciting in detail the extent of such activity he deposes in paragraph 14 of his affidavit of December 1, 2005 as follows:

> 14. I have been working with and receiving information from Messrs. Hartlen and Limpert as well as Harley Hiltz, the director of marketing and production for the Company, who at all times have been fully co-operative. From my experience and dealings with the Company, I believe that the Company has acted and is acting in good faith and with due diligence in working towards formulating a viable proposal. I believe that the Company would likely be able to make a viable proposal if the extension is granted.

My finding on this prerequisite is that by a relatively small margin HHFL has satisfied the court on a balance of probabilities that it has been and is likely to act in good faith. In reaching this conclusion I have not taken into account the

representation made in oral argument that Mr. Hartlen has probably advanced $90,000 to $95,000 to HHFL recently because I do not recall seeing anything in the evidence, particularly documentation confirming this infusion and therefore I am unable to give it any weight.

[20] The second wing of subparagraph (a) is in relation to due diligence and while the company has not acted in quite the timely manner it ought to have acted its deficiency in this regard is not severe and the cumulative evidence before me including the summary contained in Mr. Rosen's affidavit of December 1, 2005 and the volume of response which has been made to the BNS's requests and entitlement for documentation, combined with the efforts being made by the trustee in bankruptcy, Mark S. Rosen, to address a resolution constitutes satisfaction on a balance of probabilities of due diligence to this date.

[21] **Would HHFL likely to be able to make a viable proposal if the extension being applied for were granted?**

[22] "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (*Re Baldwin Valley Investors Inc.*, [1994] 23 C.B.R. (3rd) 219). Again, the court must be satisfied on a balance of probabilities that HHFL **would likely**. This at the very least means that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for.

[23] Lack of detail and assurance of this kind was considered in *St. Isidore Meats Inc. v. Paquette Fine Foods Inc.* [1997] O.J. No. 1863. In dismissing an application for an extension of time, Justice Chadwick stated (at para. 16):

> "...[T]he debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is a vague reference in the affidavit material that they have approached at least two prospective purchasers, however there is no evidence that any of these parties are interested in assisting the debtor either now or in the future."

[24] The BNS points to a number of specifics of what it considers a lack of effort that should result in a finding that there is little likelihood of HHFL making a viable proposal. BNS notes the fact that it has stated clearly that it no longer has any interest of being involved in the affairs of HHFL which will necessitate, in all

probability, an alternate financial institution and to date no inquiries have been made by HHFL or the Trustee of any financial institution. The absence of this step will take on weight depending upon the totality of the circumstances that exist at the time of the Notice of intention and that have developed since the Notice of intention was filed.

[25] There has been a considerable degree of activity before and since the Notice of intention was filed November 3, 2005. It seems in the total evidence available to the court through the affidavits filed that it is a reasonable inference to draw that it is highly unlikely that any financial institution would show any interest in filling the shoes of BNS until a determination is made with respect to this application for an extension of time to January 30, 2006. Since the Notice of intention has been filed the evidence is that HHFL has made a profit for November 2005 greater than that was anticipated. It had been anticipated that the profit would have been $7,000 and it appears to be approximately $19,600. There is an indication that the company is operating a new business model as a processing facility and there is evidence of the projected sales. In addition, there is evidence of a company, Pesca Pronta, having entered into a contract which by now would have had two substantial deliveries of lobster and in response to my inquiry during argument it appears that the first delivery has been paid for. HHFL advances the affidavit of Francesco Amoruso of Rome, Italy as to a possible solution and substitution by financial injection from that company, however, at this stage all that affidavit establishes is that an effort is being made by HHFL to address their situation. It further confirms that this is a busy, crucial period for HHFL but it does not at this point provide any comfort to be BNS or the court as to being a probable element of a viable proposal.

[26] Paragraph 5 of Francesco Amoruso's affidavit merely states:

> I have had discussions with Mr. Hartlen with respect to a potential share investment in H & H by Pesca Pronta in the approximate amount of $400,000.00 Cdn. I am very interested in pursuing the investment opportunity but will require 30 days to discuss the situation with my brothers/partners. I am hopeful that the transaction can be finalized. In the meantime, my company will continue to deal with H & H.

[27] To this point the court has not been advised nor has BNS of any further developments, inquiries or progress with respect to Amoruso's affidavit which can only be classified as a statement of interest.

[28] HHFL has made a concerted effort to secure government financing by way of a grant. The company has spent $6,000 for the services of a consultant in the preparation of its grant application and on December 9, 2005 a science officer who is preforming the due diligence for the grant indicated her satisfaction with the scientific basis of the claim and that she would be making a positive recommendation. The only weight that can be given at this stage to the grant application is that it is another example of the efforts being made by HHFL and its proposed trustee but until the grant reaches the stage of being a balance sheet item it can be given no further weight.

[29] BNS raises an objection to a determination that HHFL can satisfy the requirement pointing out that BNS and BDC as one class of secured creditor represent a substantial majority position of the secured claims. R. Hartlen Investments Inc. is bound by s. 54.2.2(3) as noted above.

[30] BNS takes the position that it has a clear veto over any proposal that may be advanced and that it will not be supporting any proposal to secured creditors that might be filed by HHFL.

[31] In *Re Cumberland Trading Inc.*, [1994] O.J. No. 132, wherein Farley J. stated at para. 4:

> Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis, Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly, Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under BIA regime, one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-a-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality of a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

[32] In that case Farley, J. held that Skyview's position was satisfactory proof that the company would not likely be able to make a proposal that would be accepted by the creditors. In that case Skyview had 95% in value of Cumberland's admitted secured creditors and here the math appears to give BNS a virtual veto.

HHFL counters that when you look at the funds in the company's bank accounts at the end of November 2005 of approximately $170,000 that such reduces the debt outstanding of BNS and again reiterates that BNS has since the Notice of intention being filed received approximately $90,000 U.S. on its account. BNS is correct in that the mere presence of money in a debtor's bank account does not reduce indebtedness unless it is applied to the indebtedness. Since the notice of intention was filed HHFL has paid the required interest to BNS for November 2005. In this case, it is clear from the evidence before me and particularly the affidavit of the Trustee that there is a recognition of the proposal providing either alternate financing, such as speculated in Mr. Amoruso's affidavit or approaching alternate financial institutions. It would seem reasonable to assume that the proposal that will be advanced if it has a means of essentially paying out by substitution injection of capital of BNS indebtedness then the proposal presumably would be acceptable. It is inconceivable that if the BNS indebtedness were satisfied that BNS should retain the right to apply a guillotine effect to the extreme prejudice of itself and all other interested parties including the probable closure of the plant. The second largest secured creditor is the Business Development Corporation and they are in agreement to the granting of an extension to HHFL.

[33] In these circumstances, again by the a fairly narrow margin, I conclude that HHFL has met this prerequisite on a balance of probabilities. In doing so, I am not overlooking the considerable debt of HHFL that, while the projections for the next couple of months are favourable, clearly, the proposal will require addressing BNS.

[34] The third step is: **Will any creditor be materially prejudiced if the extension being applied for were granted?** As noted, there has been some improvement in the position of BNS since the Notice of intention was filed in that it has received approximately $95,000 U.S. which the Bank's solicitor points out came direct to it and not through any exercise of direction by HHFL. BNS has also received the November 2005 interest. In this case there are only two significant unrelated secured creditors, BNS and BDC. BDC consents to the extension of time but I am mindful of the fact that its security is a first charge over the fixed assets which are by themselves not likely to significantly decrease in value but on the other hand would probably have some measure of increased value by virtue of an operating going concern and also there is an indication of additional land being acquired from government by HHFL. I do agree with BNS that additional land, even if the obtaining of it is imminent, does not by itself provide any comfort to the

Bank which has as its security a first charge on trade receivables and inventory. What does come through from the totality of the evidence is that this is a busy and likely profitable time for the industry and Mr. Rosen, in his affidavit, deposes at paragraphs 11 and 12:

> 11. I believe that the forty five day extension for filing the proposal is critical to the operations of the Company. It is my opinion that no creditor would be materially prejudiced if the extension is granted. The security of BNS would actually be enhanced during the extension period because of the profitable time of year and increase in inventory and receivables. BDC would have an opportunity to add to their security the land which I understand is to be conveyed to the Company by the government.
>
> 12. In the event the Company were to become bankrupt, it is my opinion that both BDC and R. Hartlen Investments Inc., which has a third charge on the assets would be severely prejudiced. It is also my opinion that the unsecured creditors would lose any opportunity of recovery.

[35] I struggle with what constitutes material prejudice and there is some guidance in *Re Cumberland Trading Inc.* above. In that case the creditor under the BIA applied to have a stay, etc. In paragraph 11 Justice Farley stated:

> 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- ie., it refers to the degree of the prejudice suffered vis-a-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *quo* 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. ...

[36] In the case before the court, the accounts receivables as of November 31, 2005 amounted to $956,532.16, almost double the indebtedness outstanding to BNS. HHFL certainly has as great if not greater motive in pursuing and collecting receivables as does BNS and I do not think there need be any concern as to the attempts in the short run for collection. Arguably, if an accounts receivable is uncollectible now its position cannot be any worse a few weeks from now. Extending the time period obviously creates some risk and some possibility of benefit. Provided a proper monitoring scheme is in effect, what normally should follow an extension is a flowing of proceeds from existing accounts receivables, new sales and new accounts receivables into the operating costs in an operation where in the immediate future a degree of profitability is projected.

[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.

CONDITIONS:

[38] During the course of argument I indicated if an extension was granted that BNS at the very least was entitled to have timely full disclosure of the utilization of funds for the continued operation of the company. This could be achieved by requiring HHFL to return to the commitment of having all operating funds passed through its accounts with BNS but it will also require a direction that other than interest entitlement, if not paid, BNS would not be able in the intervening period to encroach upon the trading funds which are absolutely necessary for the continued operation and survival chances of the business. The direction would probably also require any outstanding documentation, possibly requiring HHFL to produce the invoices in the reconciliation it provided for cash withdrawals for cash purchases from Pacmar Norway, etc. There would be a requirement of timely disclosure. There are a number of other possible conditions that come to mind. However, as both counsel indicated if the extension was granted they requested the opportunity to address possible conditions, I readily accede to their offer of assistance. Counsel, if they agree, may take some time to consult with each other and put their views in writing or alternatively address the matter orally and, in any event, I will, as scheduled be available at 2:00 p.m. this afternoon unless both counsel agree on the appropriate terms and conditions of the order of extension.

J.

SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: In Re Entegrity Wind Systems Inc. 2009 PESC 33 Date: 20091015
Docket: S1 BK-2429
Registry: Charlottetown

In the Matter of the Notice of Intention to make a Proposal of:

Entegrity Wind Systems Inc.

Insolvent Person

Pricewaterhousecoopers Inc.

Trustee

In the matter of a Motion by Entegrity Wind Systems Inc. having a place of business in Charlottetown, Prince Edward Island, to grant a further extension for filing a Proposal pursuant to Section 50.4 of the *Bankruptcy and Insolvency Act*

BEFORE: The Honourable Justice Wayne D. Cheverie

Appearances

Pamela J. Williams	solicitor for the applicant, EWSI
Kevin Kiley & Michael Drake	solicitors for the respondent, Mercantile Finance Services Ltd.
Place and date of hearing	Charlottetown, Prince Edward Island October 9, 2009
Place and date of judgment	Charlottetown, Prince Edward Island October 15, 2009

In the Matter of the Notice of Intention to make a Proposal of:

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Supreme Court of Prince Edward Island
Before: Cheverie J.
Heard: October 9, 2009
Judgment: October 15, 2009
[16 pages]

Bankruptcy and Insolvency — Proposal — time period to file — further extension of time

Insolvent person brought motion for further extension of time before expiration of initial extension period — motion dismissed — insolvent person failed to meet the three part test set out in s-s. 50.4(9) of the Bankruptcy and Insolvency Act — viable plan not likely if extension granted.

Cases Referred to: ***Re Entegrity Wind Systems Inc.*** 2009 PESC 25; **Re Baldwin Valley Investors Inc.** 1994 CarswellOnt. 253; ***Mercantile v Entegrity*** 2009 PESC 23; ***Re Nortec Colour Graphics Inc.*** (2000) 18 C.B.R. (4th) 84; ***Re Cantrail Coach Lines Ltd.***, 2005 BCSC 351

Statutes Referred to: ***Bankruptcy and Insolvency Act*** R.S.C. 1985 Cap. B-3 as amended R.S.C. 1985 Cap. 27 first supplement

Pamela J. Williams, for the applicant, EWSI
Kevin Kiley & Michael Drake, for the respondent, Mercantile Finance Services Ltd.

Cheverie J.:

Introduction

[1] Entegrity Wind Systems Inc. (“Entegrity”) brings this motion for an order pursuant to s-s. 50.4 (9) of the ***Bankruptcy and Insolvency Act*** R.S.C. 1985 Cap. B-3 as amended R.S.C. 1985 Cap. 27 first supplement (“the Act”) for a further extension of 45 days in which to file a proposal to its creditors. Entegrity filed its Notice of Intention to Make a Proposal pursuant to s-s. 50.4(1) of the Act on July 15, 2009. It failed to produce its proposal within the initial 30 days allowed by the Act, and applied for and was granted an initial extension of 45 days by court order dated August 19, 2009. I presided over that hearing and granted that court order, with reasons (see In ***Re Entegrity Wind Systems Inc.*** 2009 PESC 25).

[2] Entegrity is insolvent. As such, it invoked the provisions of s. 50.4 of the Act and engaged Pricewaterhousecoopers Inc. as its trustee and then filed its Notice of Intention to Make a Proposal. With its initial 30-day period coming to an end, and it not having developed its proposal, Entegrity applied for an extension of 45 days. It successfully argued before me that it was acting in good faith and with due diligence; would likely be able to make a viable proposal if the extension were granted; and that no creditor would be materially prejudiced if the extension were granted. A key consideration in granting that extension was my acceptance of the factual underpinning as argued by Entegrity. In short, Entegrity made a case for an extension based on its inability to focus on obtaining additional funding sources because it was preoccupied with the actions taken by its primary creditor, Mercantile Finance Services Ltd. (“Mercantile”).

[3] Entegrity still bears the burden of proof to satisfy the court on the balance of probabilities that it has complied with the law and is thus entitled to ask for a further extension of time in which to file its proposal. As in the previous application, Entegrity’s motion is opposed by Mercantile. What must be determined is whether Entegrity has discharged its burden by satisfying the three-part test articulated by Parliament in s-s. 50.4(9) of the Act. Put more directly, what has Entegrity done since my order of August 19, 2009 to demonstrate that it is deserving of a further 45-day extension?

The Law

[4] In a sense, Parliament has codified the rules governing an extension of time for filing a proposal. Extensions are discretionary and may only be granted if the court is satisfied that the requirements of s-s. 50.4(9) of the Act are met. That subsection states:

> (9) Extension of time for filing proposal - The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof 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 may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the expiration of the thirty day period mentioned 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] The parties agree that this is the law that governs the motion before the Court. They also agree that Entegrity bears the burden of proof to satisfy each of the three parts of the test. If Entegrity fails to satisfy the Court on any of the three branches of the test, then its motion must fail. (See **Re Baldwin Valley Investors Inc.** 1994 CarswellOnt. 253 at para. 7). Entegrity met all three branches of the test in its initial application for an extension of time, but each of those three branches must be now revisited to determine whether Entegrity continues to meet its legal requirements for a further extension as its efforts since August 19, 2009 may demonstrate.

1. Has Entegrity acted in good faith and with due diligence?

[6] In addition to the affidavit evidence presented on the application for the initial extension, Entegrity relies on the affidavit of James Heath who is the President and Chief Executive Officer of Entegrity, and also owns or controls approximately 60% of all issued and outstanding shares in that company. Heath's affidavit was sworn on the 24th day of September, 2009. Entegrity also relies on the additional affidavit of Walter MacKinnon of Pricewaterhousecoopers Inc. as trustee for Entegrity, which affidavit was also sworn on the 24th day of September, 2009.

[7] While continuing to rely on the affidavit evidence filed in opposition to the original application, Mercantile filed two additional affidavits: (1) that of John Gundy, Vice-President Commercial Lending and Portfolio Management for Mercantile, sworn on the 29th day of September, 2009; and (2) that of Robert W. Powell, Vice-President of A.C. Poirier and Associates, Inc., trustee in bankruptcy, sworn on the 29th day of September, 2009. In contrast to the application for the initial extension of time, where there was no cross-examination on the affidavits, all four of these named individuals were cross-examined on the 6th day of October,

2009. The transcripts of those cross-examinations form part of the evidence on this motion. Although the cross-examinations were conducted just a few days before the hearing of the motion, I was provided with transcripts of them and had the opportunity to review that evidence before the hearing.

[8] Counsel for Entegrity urges that I consider this motion for an extension of time in the context of what was going on chronologically since the issuance of my last order, and given the happening of those events that I treat this motion as really an initial application and not an extension. Counsel outlined the chronology commencing with Mercantile's early enforcement of its security on July 9, 2009 through to the end of the initial extension on September 28, 2009 with the additional reference to the cross-examination on the affidavits which took place subsequent to that date. Counsel referred to a number of things which took place prior to the hearing before me on August 14, 2009, much of which I took into account in granting my order of August 19, 2009. She then went on to point out that A.C. Poirier turned over the keys to Entegrity's rented premises on August 18, 2009. This followed a decision of Taylor, J on August 14, 2009 where he dismissed Mercantile's motion to appoint a receiver and manager until the trial of the action by Mercantile against Entegrity (See ***Mercantile v Entegrity*** 2009 PESC 23).

[9] Counsel noted there was a dispute over who was responsible for the rent of Entegrity's Island premises between the time A.C. Poirier was in possession and the subsequent order by Taylor, J. There was also an issue after my earlier decision with respect to Entegrity's request to A.C. Poirier that it notify Entegrity's creditors of Taylor, J's decision. While these disagreements continued, Heath met with representatives of the Prince Edward Island Business Development Inc. ("BDI") on September 7, 2009, requesting additional funding in the amount of $350,000. On September 10, 2009, Entegrity paid the rental arrears, thus bringing interim closure to that issue. Finally, on September 24, 2009, BDI denied Entegrity's application for further funding.

[10] Entegrity refers to these events in support of its position that it has been busy trying to attend to development of its proposal since August 19, 2009, but in much the same fashion as occurred in its initial 30-day period, it found itself in time-consuming disagreements with Mercantile. It argues this had the effect of detracting from the time granted in the last order to develop its proposal and therefore in effect put it back in the position it found itself during the initial 30-day period. Hence Entegrity argues it is really looking for its initial extension all over again and not a further extension to file its proposal.

[11] While this argument is thoughtful, it is not persuasive. First of all many of the activities which Entegrity argues distracted it during the period August 19, 2009 to the date of this hearing, do not advance its position. For example, the dispute over the rent was not something which required the attention given it in light of

Entegrity's primary goal of developing a proposal. More telling is the issue with respect to Entegrity's application to BDI. While it may be that making such an application was a demonstration of Entegrity's good faith in pulling together its proposal, the fact that Heath did not meet with representatives of BDI until September 7, 2009 shows a lack of due diligence. In saying this I am well aware that the evidence discloses Heath was in verbal contact with BDI prior to September 7, but he did not actually meet with them until that date. His reason for not meeting with BDI for several weeks after I granted the 45-day extension is that he was too busy. The following appears at p. 9 of the transcript of October 6, 2009:

> Q. Mr. Heath, why is it that Entegrity filed its Notice of Intention to Make a Proposal on July 15th but you didn't bother to meet with PEI Development Inc. seeking funding until the week of September 7th?
>
> A. My schedule didn't allow it.
>
> Q. You're busy?
>
> A. Yes.
>
> Q. Too busy?
>
> A. Too busy.

[12] Whether Heath has other business ventures that preoccupied him or not, I do not know, but having applied for, and obtained, an initial extension to file its proposal, the actions of its Chief Executive Officer, or perhaps his inactions, do not support a finding of due diligence. To the contrary, one might have thought Heath would be on BDI's doorstep immediately after the order for extension of time on August 19, 2009, rather than waiting as he did until September 7, only to find out his application was denied on September 24, 2009. In my view, this delay is more indicative of a lack of importance in getting on with development of a proposal, which would include additional financing, than it does with meeting the test of due diligence.

[13] What was Heath doing during the initial extension period? His evidence is that he was working 12 to 16 hours a day on this file. If that is so, he certainly did not reap the benefits of those long hours. As will be seen under the second branch of this test, he has been in discussion with two marketing companies, but no additional investors have been identified.

[14] Entegrity's trustee, Walter MacKinnon, offers his professional opinion that Entegrity has acted in good faith and with due diligence with respect to restructuring in order to complete preparation of its proposal. He offers his reason for that statement in para. 3 of his affidavit citing as support the fact Entegrity

made application to BDI for interim financing; that Heath took care of the rental arrears for both PEI locations; that Heath committed $75,000 of his own money to the company; that Entegrity reduced its overhead costs; and that during the initial extension period Entegrity secured some new orders, completed warranty work and offered immediate plans to commence production to fill the orders. However the basis for MacKinnon's opinion is information provided to him by Heath. That being so, if Heath's evidence is undermined in any significant way, then MacKinnon's opinion on due diligence is of little value. There is nothing in the evidence to suggest that MacKinnon checked out or verified what Heath was telling him.

[15] It appears during the extension period Heath was able to obtain four new orders, but his work force has been reduced to approximately ten individuals — two in Prince Edward Island and eight in the United States. One might expect if Entegrity was acting in good faith and with due diligence, that there would be some signposts pointing in the direction of additional investors in the company. A name which surfaced in the initial application and comes up again is that of Valmont Industries. At para.37 of his affidavit, Heath states that Valmont continues to be a potential equity investor and remains interested "but is reluctant to provide a commitment in writing". Heath confirmed in his cross-examination that Valmont was aware if the present extension is not granted then Entegrity would be bankrupt, but still it would not provide any commitment in writing. What Entegrity has from Valmont is nothing.

[16] At paras. 35 and 36 of his affidavit, Heath speaks about two companies. The first is Pure Energy Professionals Ltd. which is not an investor but some sort of marketing company. Attached to Heath's affidavit as Exhibit M is a copy of a letter dated September 23, 2009 from Pure Energy to Heath in which appears in the first paragraph the following:

> Subject to the successful continuation of Entegrity Wind Systems Inc. (EWSI) beyond its extension hearing on September 28, 2009, Pure Energy Professionals Ltd. (PEP) has a sincere interest in continuing its discussions toward the development of a joint venture between our companies, as outlined in our proposal of May, 2009 (attached).

The best Pure Energy can offer is "a sincere interest in continuing its discussions" with Entegrity. Likewise, attached as Exhibit N to Heath's affidavit is a copy of letter from Western Community Energy to Entegrity dated September 22, 2009. That letter reads in part:

> Subject to the successful continuation of Entegrity Wind Systems Inc. (EWSI) beyond its BIA extension hearing on September 28, 2009, Western Community Energy (WCE) has a strong interest in continuing its

> discussions with EWSI...; however, we are both awaiting clarification of the legal status of EWSI before proceeding further.

Western Community Energy is not an investor. The best it can offer is “a strong interest in continuing its discussions with EWSI”.

[17] Entegrity argues that the contact with Pure Energy and Western Community Energy are indicative of the progress it is making. It says it needs these marketing tools in order to set Entegrity up as a viable company worthy of investment. In the long run, that may be correct, but presently, Entegrity needs money. None of these three companies mentioned are willing to invest a nickle in Entegrity. They are willing to continue discussions but with no foreseeable goal in sight.

[18] In my view, Entegrity has attempted to recast its argument on good faith and due diligence that carried it through the day in its original application. At that time, Entegrity argued successfully that it was being impeded by the actions of Mercantile from the time it filed its Notice of Intention to Make a Proposal, and in addition, it floated the name of Valmont Industries as one target which it felt would invest in the company but more time was needed to bring that to fruition. At the August 14 hearing, Mercantile argued that there was no substance to those discussions between Heath and Valmont; the nature and extent of any involvement proposed by Valmont were missing; whether Valmont’s interest included a provision for paying out Mercantile or indeed any terms and conditions of Valmont’s interest. Mercantile argued at that time, unsuccessfully, that the reference to Valmont was nothing more than a bare assertion.

[19] It is now October, 2009, and we have nothing more from Valmont, not even an indication in writing that they are interested in Entegrity. Add to that the reference to Pure Energy and to Western Community Energy, and in my view all you have is pure fluff. There is no substance here. Entegrity has failed to meet the first part of the test. In my view it has not acted in good faith and with due diligence. On that basis alone, its motion for an extension of time ought to be dismissed. However, for completeness I shall now proceed to deal with the second and third parts of the test to determine whether Entegrity might be successful on either or both of those branches.

2. Would Entegrity likely be able to make a viable proposal if the extension being applied for were granted?

[20] In the ***Baldwin Valley*** case at para. 4, Farley J. discussed a viable proposal as contemplated by the second branch of the test as follows:

> 4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10 - 11 in Re Cumberland Trading Inc. released January 24, 1994. "Likely" as defined in the Concise Oxford Dictionary of Current English, 7th ed. (1987; Oxford, The Claredon Press) means:
>
> *likely* 1. such as *might well happen*, or turn out to be the thing specified, *probable* 2. to be *reasonably expected* [emphasis added]
>
> I do not see the conjecture of the debtor companies' rough submission as being *"likely"*.

Unlike the case before Farley J., I do not have a draft proposal to consider. There are no new investors prepared to commit any infusion of capital to Entegrity at this point in time, so how can Entegrity hope to advance a viable proposal?

[21] Entegrity argues that its cash flow statement will do the trick. At para. 21 of his affidavit, Heath states:

> The Cash Flow Statement for all intents and purposes will be substantially what is used to formulate the Proposal.

That cash flow statement, it is argued, demonstrates that Entegrity is well on its way to developing a viable proposal. I disagree for two reasons:

> (1) The cash flow statement which is attached to Heath's affidavit as Exhibit L includes cash from the bank in the amount of $300,000. It is clear from Heath's affidavit and subsequent cross-examination, that this $300,000 refers to the $350,000 he sought to borrow from BDI and was denied.

> (2) The cash flow statement includes under the heading "Miscellaneous In-flows" the sum of $10,000,000. This is the equity investment Heath intends to raise. He has not done so. There is no $10,000,000.

Although Entegrity argued that even backing these two items out of its cash flow statement it is still showing growth based on completion of eleven backlog orders (See Heath's affidavit, Exhibit P) and four new orders, I am not convinced that is the case. Rather, it appears Entegrity has included two significant items in its cash flow statement which are essential on a go-forward basis. In fact, Entegrity has neither of these cash infusions in place.

[22] As was the case on the issue of due diligence, MacKinnon's affidavit supports the cash flow statement as an indicator that a viable proposal is likely. However, there is no evidence that he verified the calculations in that cash flow statement and certainly in para. 4 of his affidavit he makes no reference to the fact that the $10,000,000 is not in place. Therefore, MacKinnon's affidavit is of little support to Entegrity.

[23] In contrast, Robert Powell deposes at para. 32 of his affidavit as follows:

> 32. Upon my review of Mr. Heath's Affidavit and Mr. MacKinnon's Affidavit, and based upon my knowledge of the company's operations, cash flow, and financing, I have significant concern regarding EWSI's ability to put forward a viable proposal because of the following, which is not intended to be exhaustive:
>
> a. Aside from Mr. Heath's assertion that funds will be available to finance the company's operations through the further extension period, there is no evidence of sufficient receipts or capital to do so.
>
> b. EWSI has drastically reduced its workforce and appears to have only one employee in each of the Charlottetown and Albany locations (though such employees have not been identified). Based upon my understanding of the operations of the company, it is impossible for EWSI to meet its cash flow projections with one employee in each of its production facilities in PEI;
>
> c. EWSI has not put forward any evidence that its key suppliers and creditors, such as Wilson Manufacturing, are prepared to support EWSI's efforts to restructure and whether they will continue to supply EWSI during the further extension period;
>
> d. Mr. Heath has deposed that EWSI obtained four new orders for wind turbines, but there is no evidence that these sales are being made on a profitable basis. Without evidence to the contrary and given EWSI's recent material losses and the fact

that manufacturing employees have not been retained, it is extremely unlikely that these sales could be made on a profitable basis.

e. The evidence put forward does not support the conclusion that EWSI's employees (who have not been paid since mid May 2009) will be paid their back wages and would continue to work for the company during the extension period or otherwise;

f. It appears that EWSI's operations and employees are now primarily located in the United States.

Paragraph 32 provided some detail in support of Powell's statements at para. 5 where he offered the following:

> 5. I have read the Affidavits of James Heath and J. Walter MacKinnon, C.A., both dated September 24, 2009, in support of EWSI's motion for a further extension of time in which to file a proposal. It is my professional opinion after reviewing those Affidavits, and in particular the Cash Flows and other supporting documentation attached to the Affidavit of Mr. Heath, that EWSI has not established that it will be able to make a viable proposal if the further extension sought by EWSI is granted, or at all. I address specific concerns and deficiencies in EWSI's Cash Flow Statement and supporting materials below.

[24] Powell was cross-examined on his professional opinion that Entegrity has not established that it will be able to make a viable proposal. This cross-examination appears at p. 57 of the transcript commencing at line 11, and continuing on p. 58 as follows:

Q. You come to the conclusion that it's your professional opinion that Entegrity ". . . has not established that it will be able to make a viable proposal. . ."

A. Yes.

Q. For purposes of that statement, "make a viable proposal", are you addressing this as, from the perspective of Mercantile?

A. No.

Q. No? Explain to me, then, this statement that you're making.

A. Well, the company has not proven that it has any ability to obtain equity capital to finance a proposal. It's got no demonstrated access to working capital to even operate the business, and has laid off all of its employees, or substantially all of its employees with no apparent prospect of them coming back, based on the cash flows and materials filed by Mr. Heath.

Q. Unless Mr. Heath obtains this equity investor.

A. But, there's no evidence to that, and so I can only go with what evidence he's put forward —

q. Right, but when you're —

A. — in making my conclusion.

Q. Okay. So a viable proposal, you're saying, is broad spectrum and not related to your role with Mercantile?

A. No, it's with respect to all creditors.

[25] The evidence before me supports the conclusion that Powell reviewed and analysed all the financial information relied on by Entegrity, including its centrepiece, the cash flow statement. I prefer Powell's evidence here over that of MacKinnon because Powell critically analysed the data provided by Entegrity, while MacKinnon merely relied on Heath and did no analysis of his own.

[26] Not only does Entegrity lack any new investors for its venture, it has suffered substantial losses which have culminated in its insolvency. For the twelve-month period ending December 31, 2008, Entegrity incurred a loss of $6,463,850. For the five-month period ending May 31, 2009, Entegrity incurred a further loss of $1,884,000. Since the commencement of its operations in the fall of 2004, Entegrity has accumulated net losses of $12,873,689. Given this history, the lack of any new investor in sight, and the apparent substantial deficiencies in the cash flow statement, which is at the centre of its proposal, it does not appear to me that Entegrity has shown that it is likely to be able to make a viable proposal. Therefore, Entegrity fails on the second branch of the test.

3. Will any creditor be materially prejudiced if the extension being applied for were granted?

[27] In its argument, Entegrity underlined the fact that it is "material" prejudice which is at issue here, not just any prejudice to a creditor. I agree. Mercantile is the only creditor opposing the extension and Entegrity points out that Mercantile holds extensive security over the assets of Entegrity. It relies on the case of ***Re Nortec Colour Graphics Inc.*** (2000) 18 C.B.R. (4th) 84 for the proposition that a creditor like Mercantile who opposes a request for an extension on the basis of material prejudice is required to quantify its losses and give particulars of prospective purchasers for its equipment.

[28] Counsel for Entegrity notes that in her cross-examination of John Gundy, he asserts he has had an expression of interest in the company, but refuses to provide details. She also points to another area of his cross-examination where he indicates he is not aware of the present status of Entegrity and he has not made any inquiries of the company with respect to same. In summary, Entegrity argues Mercantile cannot maintain it will suffer material prejudice if the extension of time to file a proposal is granted when a senior officer in Mercantile is not aware of Entegrity's present status and has made no inquiries about its security.

[29] At p. 41 of the transcript of his cross-examination, Gundy is asked:

> Q. Do you consider Mercantile to be in its worst case scenario now?
>
> A. I'd consider, at the moment, it is. If it goes any further, it's simply digging deeper into a hole.

That answer appears to suggest that Mercantile's position cannot get any worse. However, at p. 45 the following question and answer appear:

> Q. You have already indicated, though, as far as you're concerned, Mercantile has kind of bottomed out, it's worst case position right?
>
> A. I think the position continue, can continue to get worse for Mercantile and for the company.

On the one hand, Gundy says it can't get any worse and then a little later on in his testimony he indicates Mercantile's position can deteriorate further.

[30] Entegrity relies on the case of ***Re Cantrail Coach Lines Ltd.***, 2005 BCSC 351 at para. 22 where Master Groves for the British Columbia Supreme Court concludes:

> ...There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. . . .

[31] Mercantile responds to this reference in a variety of ways. In particular, Mercantile refers to Exhibit A to the most recent affidavit of Gundy where appears a copy of a letter dated September 15, 2009 to James Heath from Owens Community College, alleging a breach in the delivery, installation, technical support, commissioning and five-year operating and maintenance agreement for

the purchase of one of Entegrity's wind turbine systems. The letter suggests that Owens Community College has been in contact with Heath as early as May, 2009; that Heath did not deny the breach of contract; but as of September 15, 2009, the breaches complained of have not been remedied. In its submissions, Entegrity did not take issue with this letter and although I am cognizant of the fact that these are allegations only, it does point to a situation where a customer of Entegrity is not satisfied with the system or its maintenance and this in turn might have some bearing on Mercantile's overall security. The letter is certainly not an indicator that things are going in a positive direction for Entegrity.

[32] Mercantile submits material prejudice will befall it if the extension is granted based on its belief that the only hope for Entegrity is that it be sold as a going concern. As time passes, this option becomes more remote simply because the majority of the work force is gone and it is not known whether they will return. In fact seven judgments have already been entered against Entegrity by the Inspector of Labour Standards for the Province of Prince Edward Island for wages owed to employees.

[33] Further, Mercantile argues that some of its security is going out the door without it having any recourse because it is powerless to intervene while Entegrity develops its proposal. It argues that if Entegrity is bankrupt, then the trustee takes control of the assets of the company and attempts to put it in a viable position. Mercantile offers Powell's evidence at para. 35 of his affidavit as proof of material prejudice. It is worthy of reproduction here:

> 35. I believe that the granting of a further extension as requested by EWSI will further prejudice MFSL. In my view, the highest value for MFSL collateral is by sale as a going-concern and that value is rapidly eroding as time passes for the following reasons:
>
> a. EWSI had approximately 55 employees in May, 2009, when EWSI ceased paying them. EWSI has just started paying only 8 of those employees starting in September 2009. As more time passes, the likelihood that skilled manufacturing and service employees find other jobs increases thereby increasing the risks and costs associated with re-starting production.
>
> b. EWSI appears to have done fairly little in terms of servicing customers since well prior to the filing of the Notice of Intention to Make a Proposal. All that appears to have been done is warranty work on 23 machines and the completion of the installation of 4 machines. However, there does not appear to be any revenue from this work reflected in the actual receipts and disbursements to date nor in the projection. Also, it is noted that EWSI has failed to complete a contract with

Owens Community College, who made a payment to EWSI of U.S. $73,000 on July 9, 2009, just prior to the filing. Owens has now noted EWSI in breach of the contract. It appears that EWSI's reduced workforce and lack of working capital is jeopardizing customer contacts and relationships and thereby damaging the going-concern value of EWSI's assets.

c. In addition, I am concerned that the weak state of EWSI and the lengthy period of time that they are taking to formulate a proposal will cause customers to abandon EWSI in search of alternative suppliers. Again, this will damage the going-concern value of EWSI's assets.

d. EWSI, prior to filing, had contracted with a supplier in Quebec to manufacture new molds for the production of the wind turbine blades. These would appear to be critical to the future manufacturing capability of EWSI as I understand that the existing molds are near the end of their useful life. I understand that the supplier has manufactured the molds and is seeking payment of approximately $60,000 for the release of the molds. Mr. Heath has not addressed this situation and it appears that the payment of the $60,000 is not incorporated into the cash flow projection. The loss of these molds could have a negative impact on the ability to obtain going-concern value for EWSI's assets.

I find Powell's assertion here to be credible and reliable and based, in large part, on information provided by Entegrity.

[34] At para. 22 of his factum, counsel for Mercantile sets out the factors upon which he bases his conclusion that Entegrity will be materially prejudiced if the extension sought is granted. The following appears at para. 22:

> 22. MFS submits that it, as well as other creditors (including EWSI's employees), will be materially prejudiced if the extension sought is granted. MFS's position is premised on the following factors:
>
> a. EWSI has been in default of its obligations to MFS since May of 2009, and the total secured indebtedness to MFS as at July 9, 2009 was in excess of $3 million, with a per diem since that time of over $1,880;
>
> b. each day that passes erodes MFS's security, and the total indebtedness continues to rise;

c. no employees of EWSI have been paid since mid-May of 2009, and the passage of time renders the possibility of salvaging EWSI's operations more remote.

d. MFS has lost all confidence in the ability of James Heath to manage EWSI's affairs and business operations;

e. if EWSI is deemed to have made an assignment in bankruptcy, all of the assets of EWSI will vest in its Trustee in Bankruptcy, thereby preserving those assets, and the Trustee has the power to operate the company, under the oversight of the Court;

f. EWSI has offered no evidence in the Affidavits submitted on its application for a second extension of time as to how it would mitigate or avoid any material prejudice to creditors. The issue of material prejudice is simply not addressed in any substantive way in the Affidavit evidence put forward by EWSI on this application;

g. EWSI had approximately 55 employees in May 2009, when EWSI ceased paying them. EWSI now, according to the evidence of Mr. Heath, has two or perhaps three employees in Prince Edward Island who may be receiving current pay. However, as more time passes, the likelihood that skilled manufacturing and service employees will find other jobs increases, thereby increasing the difficulties and costs associated with restarting production;

h. as noted by Robert Powell in his Affidavit at paragraph 35, there does not appear to be any revenue received by EWSI for warranty work, or in the installation of four machines. Further, EWSI has failed to complete a contract with Owens Community College, who made a payment to EWSI of U.S. $73,000 on July 9, 2009. Mr. Powell concludes that EWSI's "reduced workforce and lack of working capital is jeopardizing customer contracts and relationships and thereby damaging the going concern value of EWSI's assets";

i. also in paragraph 35 of his Affidavit, Mr. Powell deposes that "I am concerned that the weak state of EWSI and the lengthy period of time that they are taking to formulate a proposal will cause customers to abandon EWSI in search of alternative suppliers. Again, this will damage the going concern value of EWSI's assets";

j. as stated by Mr. Gundy in his Affidavit at paragraph 24,

> EWSI is an insolvent company that has lost substantially all of its workforce; is faced with substantial warranty claims; lacks the necessary operating funds to

> carry on any meaningful business; is in breach of its obligations to past customers; and lacks the credibility required to attract new customers. It becomes more and more unlikely as every day goes by that EWSI can be turned around and sold on anything approaching a going concern basis to provide for any meaningful recovery by creditors. I believe we are very quickly reaching the point where there will be no hope for any such recovery. As a result, I believe MFS and all other creditors will suffer very significant material prejudice if a further extension is granted. [Emphasis added]

The evidence before me supports the statements contained in clauses (a), (b) and (c) of paragraph 22. As for clause (d), loss of confidence in James Heath is not conclusive of the matter. Clause (e) is correct, and I agree with the statement contained in clause (f). As for clause (g), the number of employees referenced there is substantially correct according to the evidence of Mr. Heath and with that I agree. The suggestion that the skilled manufacturing and service employees will not likely return to their jobs unless something is done very soon, is to a certain extent, conjecture, but may be a logical conclusion to be drawn from the present state of affairs. Clauses (h) and (i) reference facts which are a cause for concern that may result in material prejudice to Mercantile. Finally, clause (j) refers to the evidence of Gundy which is factually correct except for the underlined portion which represents his opinion.

[35] The question I must ask myself is whether it is more likely than not that Mercantile will suffer material prejudice if the requested extension is granted? After considering the arguments advanced by both parties, I am of the view Mercantile would suffer material prejudice and therefore Entegrity has failed to satisfy this third branch of the test. This material prejudice exhibits itself not simply in the amount which is currently owed by Entegrity to Mercantile and the per diem that continues to pile up since Entegrity's default, but it is the accumulation of all those other factors referred to by Mercantile which would further erode its position if the extension were granted. I am thinking of such things as the reduced workforce and the uncertainty as to their return; Entegrity's completion of warranty work without any profit associated therewith; complaints from customers who are unsatisfied with the product or service associated with the product, which if allowed to continue will further undermine the customer base and make it more difficult for the company to be turned around so that Mercantile's exposure can be eliminated or reduced. These are but examples. There are others.

[36] For all of the foregoing reasons I conclude Entegrity has failed to discharge the onus on it as set out in s-s. 50.4(9) of the Act. It has failed to satisfy me on each of the three branches of the test set out in that subsection, and therefore I am unable to exercise my discretion to grant the extension requested. Mercantile shall have its costs in the cause against Entegrity which I expect will offset the costs awarded to Entegrity in my decision of August 19,2009.

October 15, 2009 _____

Cheverie, J.

1994 CarswellOnt 253
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 253, [1994] O.J. No. 271, 23 C.B.R. (3d) 219

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

Farley J.

Judgment: February 3, 1994 *
Docket: Doc. 32-65038

Counsel: *Frank Bennett* , for debtor companies.
Larry Crozier , for secured creditor, Royal Bank of Canada.

Headnote
Bankruptcy --- Proposal — General
Proposals — Notice of intention — Extension of time — Debtor companies applying for extension of time to file proposal and failing to file within extended time — Companies again applying for extension — Registrar dismissing application upon finding that companies would not be able to make viable proposal — Companies' appeal from registrar's decision dismissed.
Two related debtor companies defaulted on their obligations to their bank. The bank demanded payment from the companies and served notice of intention to enforce its security. The companies filed a notice of intention to file proposals, and each subsequently received an extension to file a proposal. When they failed to file a proposal by the extended time, the companies again applied for an extension of time to file.
The Registrar in Bankruptcy dismissed the applications, upon a finding that the bank, which held about 92 per cent of one company's debt and almost 100 per cent of the other, had lost all confidence in the companies and wanted only to enforce its security. As a result, a viable proposal was not possible. The companies were, therefore, unable to satisfy the statutory burden imposed upon them by s. 50.4(9) of the *Bankruptcy and Insolvency Act* .
The companies appealed.
Held:
The appeal was dismissed.
The registrar did not err in finding that the companies had not satisfied the onus imposed on them by s. 50.4(9).

***Farley J.*:**

1 Baldwin Valley Investors Inc. ("Baldwin") and Varion Incorporated ("Varion"), the debtor companies appealed the dismissal of their extension of time to file proposals requests heard January 27, 1994 by Registrar Ferron. The Registrar indicated that he had refused extensions that day with reasons to follow shortly [reported at 23 C.B.R. (3d) 219 at 223]. The matter came before me on January 28th and on consent was adjourned to be heard today when it was expected that reasons would be available, as they in fact were. The Registrar was of the view that the debtor companies had failed to meet all three tests under s. 50.4(9) of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 as amended ("BIA"). That section provides that:

> (9) The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof 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 may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the expiration of the thirty day period mentioned 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.

This should be contrasted with the termination provisions of s. 50.4(11) which provide that:

(11) 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 expired.

2 The facts are as set out in the Registrar's reasons released today. Counsel were agreed that the standard of review was that I had to be satisfied that the Registrar either erred in law or in principle.

3 Let me deal with the middle test of s. 50.4(9)(*b*) that the debtor companies must show that they "would likely be able to make a viable proposal if the extension being applied for were granted". The Registrar appeared to focus on the fact that the Bank, as the 92% creditor of Baldwin and almost 100% creditor of Varion, had lost all confidence in the debtor companies and would not vote for any proposal put forth. However, in my view this is not the test of s. 50.4(9)(*b*). This becomes clear when one examines s. 50.4(11)(*b*) and (*c*); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(*b*) and (11)(*b*)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(*c*) but with no corresponding clause in s. 50.4(9)).

4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10-11 in *Re Cumberland Trading Inc.* released January 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. "Likely" as defined in *The Concise Oxford Dictionary of Current English* , 7th ed. (1987; Oxford, The Claredon Press) means:

> *likely* 1. such as *might well happen* , or turn out to be the thing specified; *probable* . 2. to be *reasonably expected* . [emphasis added]

I do not see the conjecture of the debtor companies' rough submission as being "*likely* ".

5 While one may well fault the Bank for its approach to this situation, one has to recognize that the onus is on the debtor companies to show that they have acted in good faith and with due diligence. I am satisfied that the Registrar correctly assessed the situation in that regard that the debtor companies could have and should have proceeded with laying the foundation for their proposal and in fact building on that foundation rather than relying on anything that may be forthcoming from the Bank. In

particular, see Cohn, *Good Faith and the Single Asset Debtor* (1988) 62 Am. Bankr. L.J. 131 on which it appears the Registrar relied. However, it is noted that there was no examination of the jurisprudential principles therein.

6 I discussed the question of material prejudice in *Cumberland, supra* , at pp. 11-13 [pp. 231-232]. The debtor companies have provided no information in that regard for the 45 day extension period from February 28, 1994. The only information close to this is the cash-flow statement of the previous extension granted December 16, 1993. However, for this extension there was no information. It appears therefore, that the debtor companies did not even attempt to meet this condition.

7 I am therefore, of the view that on all three tests (one failure of a test being sufficient to disqualify a debtor company from being able to ask for an extension) the debtor companies have failed to overcome the onus on them. The Registrar was correct in the result on all counts, although I feel that he inadvertently used the wrong test in s. 50.4(9)(*b*), a quite understandable situation given the terminology used in the legislation.

8 I would also point out that it was clear that if the debtor companies had won a victory in this appeal, it would have been a Pyhrric victory. The Bank would have been able to come right back in with a motion based on s. 50.4(11)(*c*).

9 The appeal is dismissed. Costs were agreed at $2,500 and are payable by the debtor companies jointly and severally to the Bank forthwith.

Appeal dismissed.

Footnotes

* This judgment is an appeal from the decision reported at 23 C.B.R. (3d) 219 at 223 .

Ontario Supreme Court
Cumberland Trading Inc., Re
Date: 1994-01-24

Re proposal of Cumberland Trading Inc.

Ontario Court of Justice (General Division [Commercial List]) [In Bankruptcy] Farley J.

Judgment – January 24, 1994.

Kevin J. Zych, for secured creditor, Skyview International Finance Corporation.

Jeff Carhart, for debtor, Cumberland Trading Inc.

(Doc. 31-282225)

[1] January 24, 1994. FARLEY J.: – Skyview International Finance Corporation ("Skyview") brought this motion for a declaration that the stay provisions (ss. 69 and 69.1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 as amended ("BIA") no longer operate in respect of Skyview taking steps to enforce its security (including accounts receivable and inventory) given by Cumberland Trading Inc. ("Cumberland") which it has been financing for the last 9 years. In addition Skyview moved for a declaration that the 30 day period to file a proposal mentioned in s. 50.4(8) BIA was terminated. Thirdly, Skyview was asking for an order removing Doane Raymond Limited ("Doane") which was Cumberland's choice as trustee and substituting A. Farber Associates ("Farber") as trustee under the Notice of Intention to File a Proposal of Cumberland. In the alternative to the relief awarded in the last two aspects, Skyview wished to have an order appointing Farber as interim receiver.

[2] On January 5, 1994 Skyview demanded payment in full of its operating financing loan to Cumberland and gave a s. 244 BIA notice of its intention to enforce its security in ten days. The affidavit filed on behalf of Skyview indicated that Cumberland was not cooperating with it in providing appropriate financial information for the last half year. This was disputed in the affidavit filed by Cumberland. Suffice it to say that there has been a falling out between the two. Skyview asserted that it was owed $966,478 and that there was an exposure to it under a guarantee given on Cumberland's behalf to a potential of approximately $200,000 U.S. Skyview's deadline for repayment was January 16th. On January 14th Cumberland filed with

the Official Receiver a Notice of Intention to make a Proposal (s. 50.4(1) BIA) and pursuant to s. 69 BIA there would be a stay of proceedings upon this filing.

[3] Skyview's president swore that:

> 21. In light of the unpleasant and frustrating experience Skyview has had to endure over the preceding 3 to 4 months with Cumberland, including specifically the persistent refusal by Cumberland to account for its sales from the Retail Business, the misrepresentation of Cumberland's pre-sold orders referred to above and particularly its secretive purported "termination" of its direction to accord to pay sums to Skyview in reduction of Cumberland's indebtedness, Skyview's faith and confidence in the management of Cumberland has been irreparably damaged such that Skyview would not be prepared to vote in terms of any proposal which Cumberland may make.

and further that

> 24. The continued operation of a stay of proceedings preventing Skyview from enforcing its security will be materially prejudicial to the rights of Skyview. The assets of Skyview consist primarily of inventory and receivables (both from the Distribution Business and the Retail Business). With each day that passes Cumberland is converting its inventory (financed by Skyview) into cash (primarily in the Retail Business) and receivables (primarily in the Distribution Business) and it is Skyview's fear that those sums will be used by Cumberland to pay its other creditors and to fund the professional costs which it inevitably must incur in formulating and implementing a proposal. This fear is especially heightened insofar as the receivables generated from the Retail Business are concerned as they are under the direct and immediate control of Cumberland and are not collected by Accord.

[4] Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under the BIA regime one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-à-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

[5] Cumberland's essential position is that it must have some time under BIA to see about reorganizing itself. While I am mindful that both BIA and the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA") should be classified as debtor friendly

legislation since they both provide for the possibility of reorganization (as contrasted with the absence of creditor friendly legislation which would allow, say, creditors to move for an increase in interest rates if inflation became rampant), these acts do not allow debtors absolute immunity and impunity from their creditors. I would also observe that all too frequently debtors wait until virtually the last moment, the last moment or, in some cases, beyond the last moment before even beginning to think about reorganization (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spadework. It is true that under BIA an insolvent person can get an automatic stay by merely filing a Notice of Intention to File a Proposal – as opposed to the necessity under CCAA of convincing the court of the appropriateness of granting a stay (and the nature of the stay). However BIA does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case Skyview is utilizing s. 50.4(11) to do so.

[6] Cumberland relies upon *Re N.T.W. Management Group Ltd.* (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.), a decision of Chadwick J. Skyview asserts that *N.T.W.* is distinguishable or incorrectly decided and secondly that the philosophy of my decision in *Re Triangle Drugs Inc.* (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.) should prevail. In *Triangle Drugs* I allowed the veto holding group of unsecured creditors to in effect vote at an advance poll in a situation where there appeared to be a gap in the legislation. The key section of BIA is s. 50.4(11) which provides:

> 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.

It does not seem to me that there is any gap in this sector of the legislation.

[7] As the headnote in *N.T.W.* stated, Chadwick J. viewed a situation similar to this one as requiring that the debtor must have an opportunity to put forth its proposal when he stated at p. 163:

> The bank had stated that it would not accept any proposal. However, since the companies had not yet had the opportunity to put forth their proposal, it was impossible to make a final determination under s. 50.4(11)(*c*). The companies should have the opportunity to formulate and make their proposal.

However I note that in this instance Cumberland has filed its Notice of Intention to File a Proposal the day before Skyview's s. 244 notice would have allowed it to take control of the security. Cumberland's president swore that:

> 2. The efforts which Cumberland is currently undertaking represent a bona fide effort, made in good faith, to restructure its finances in order to preserve the business of the company for the benefit of all of the creditors of the company, including Skyview. It is my belief that the proposal process will represent a significantly better treatment of all such creditors then would be available through either an enforcement by Skyview of its security against the assets of Cumberland, a bankruptcy of Cumberland or other processes available in the circumstances.

and further that:

> I intend to submit a proposal, pursuant to the provisions of the Bankruptcy and Insolvency Act, which represents the most advantageous treatment available, in my view, to all of the creditors of Cumberland and which allows for the continued viability of the business of Cumberland. This proposal is being prepared, and will be presented, in complete good faith. In the course of reviewing and preparing this proposal material with Mr. Godbold, I have determined that the legitimate claim of Skyview does not, in fact, represent in excess of 66-2/3 of all of the claims against Cumberland. At this time, Doane Raymond Limited is already in the position of Trustee under the proposal, in accordance with the provisions of the
>
> Bankruptcy and Insolvency Act. In addition, as noted above, I am prepared to consent to the appointment of Doane Raymond Limited as interim receiver of Cumberland. In the circumstances, I respectfully submit that the stay in favour of Cumberland pursuant to the Bankruptcy and Insolvency Act should not be lifted.

No explanation was given as to the lower share indicated for Skyview but in any event there was no assertion that Skyview lost its veto.

[8] However we do not have any indication of what this proposal proposes to be – notwithstanding that 10 days have now passed since Cumberland filed its Notice of Intention to File a Proposal and five days since Skyview served Cumberland with this motion. In a practical sense one would expect, given Skyview's veto power and its announced position, that Cumberland would have to present "something" to get Skyview to change its mind – e.g. an injection of fresh equity or a take out of Skyview's loan position. However there was not even a germ of a plan revealed – but merely a bald assertion that the proposal being worked on would be a better result for everyone including Skyview. This is akin to trying to box with a ghost. While I agree with the logic of Chadwick J. when he said at p. 168 of N.T.W. that:

> C.I.B.C. the major secured creditor has indicated they will not accept any proposal put forth, other than complete discharge of the C.I.B.C. indebtedness. Other substantial creditors have taken the same position. There is no doubt that the insolvent companies have a substantial obstacle to overcome. *As the insolvent companies have not had the opportunity to put forth this proposal, it is impossible to make the final determination.* In *Triangle Drugs Inc.* Farley J. had the proposal. Well over one-half of the secured [sic; in reality unsecured] creditors indicated they would not vote for the proposal. As such, he then terminated the proposal. We have not reached that stage in this case. The insolvent companies should have the opportunity of putting forth the proposal.

[emphasis added]

[9] However this analysis does not seem to address the test involved. With respect I do not see this logical aspect as coming into play in s. 50.4(11)(*c*) which reads:

> The court may, on application by… a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8)… if the court is satisfied that
>
> …
>
> (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
>
> …
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It seems to me that clause (*c*) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is

strengthened when one considers that the court need only be satisfied that "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…" (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

[10] Skyview of course also has the option of proceeding under s. 69.4 BIA which 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.

[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 Chamberland'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 a 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.

[12] I note that Cumberland does not oppose Skyview's request for an interim receiver. But for my conclusion that Skyview succeeds in its second relief request (to have the 30 day period in which to file a proposal terminated) and the ancillary third relief request of substitution of Farber for Doane as trustee, I would have granted the fourth relief request of appointing Farber as interim receiver. I would also award Skyview costs of $600 payable out of the estate of Cumberland from the proceeds first realized.

Order accordingly.

Attorney General for Saskatchewan
Appellant

v.

Lemare Lake Logging Ltd. *Respondent*

and

Attorney General of Ontario and Attorney General of British Columbia
Interveners

Indexed as: Saskatchewan (Attorney General) *v.* Lemare Lake Logging Ltd.

2015 SCC 53

File No.: 35923.

2015: May 21; 2015: November 13.

Present: Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Cooperative federalism — Division of powers — Bankruptcy and insolvency — Property and Civil Rights — Receiver — Federal paramountcy — Federal legislation authorizes court, upon application of secured creditor, to appoint receiver with power to act nationally — Provincial legislation imposes other procedural and substantive requirements before commencing an action with respect to farm land — Whether provincial legislation constitutionally inoperative when application made to appoint national receiver under federal legislation, by reason of doctrine of federal paramountcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243 — The Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1, ss. 9 to 22.

A secured creditor brought an application pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* for the appointment of a receiver over substantially all of the assets of its debtor, a "farmer" within the meaning of *The Saskatchewan Farm Security Act*. The debtor contested the appointment and argued that the creditor had to comply with Part II of *The Saskatchewan Farm Security Act*, which requires that before commencing an action with

Procureur général de la Saskatchewan
Appelant

c.

Lemare Lake Logging Ltd. *Intimée*

et

Procureur général de l'Ontario et procureur général de la Colombie-Britannique *Intervenants*

Répertorié : Saskatchewan (Procureur général) *c.* Lemare Lake Logging Ltd.

2015 CSC 53

N° du greffe : 35923.

2015 : 21 mai; 2015 : 13 novembre.

Présents : Les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon et Côté.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit constitutionnel — Fédéralisme coopératif — Partage des compétences — Faillite et insolvabilité — Propriété et droits civils — Séquestre — Prépondérance fédérale — Loi fédérale autorisant le tribunal à nommer, à la demande d'un créancier garanti, un séquestre capable d'agir partout au Canada — Loi provinciale imposant d'autres exigences de fond et de procédure avant qu'une action à l'égard d'une terre agricole soit intentée — Lorsque la nomination d'un séquestre national est demandée en vertu de la loi fédérale, la loi provinciale est-elle constitutionnellement inopérante en raison de la doctrine de la prépondérance fédérale? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 243 — The Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1, art. 9 à 22.

Un créancier garanti a demandé au tribunal, en application du par. 243(1) de la *Loi sur la faillite et l'insolvabilité*, de nommer un séquestre à l'égard de la quasi-totalité de l'actif de son débiteur, un « agriculteur » au sens de la *Saskatchewan Farm Security Act*. Le débiteur a contesté cette demande, soutenant que le créancier devait se conformer à la partie II de la *Saskatchewan Farm Security Act*, qui exige d'une personne, avant d'intenter une action

regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.

[46] Section 243(1.1) states that, in the case of an insolvent person in respect of whose property a notice is to be sent under s. 244(1), the court may not appoint a receiver under s. 243(1) before the expiry of 10 days after the day on which the secured creditor sends the notice, unless the insolvent person consents or the court considers it appropriate to appoint a receiver sooner. The effect of the provision is to set a minimum waiting period. This does not preclude *longer* waiting periods under provincial law. There is nothing in the words of the provision suggesting that this waiting period should be treated as a ceiling, rather than a floor, nor is there any authority that supports treating the waiting period as a maximum.

[47] In fact, the discretionary nature of the s. 243 remedy — as evidenced by the fact that the provision provides that a court "may" appoint a receiver if it is "just or convenient" to do so — lends further support to a narrower reading of the provision's purpose. A secured creditor is not entitled to appointment of a receiver. Rather, s. 243 is permissive, allowing a court to appoint a receiver where it is just or convenient. Provincial interference with a discretion granted under federal law is not, by itself, sufficient to establish frustration of federal purpose: *COPA*, at para. 66; see also *114957 Canada Ltée*.

[48] This case is thus easily distinguishable from *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, where the Court held that a security interest created pursuant to federal law could not, constitutionally, be subjected to the procedures for enforcement of

quant à la large portée de l'objet de l'art. 243 porte un coup fatal à la thèse de l'*amicus curiae*. Ce qui ressort de la preuve, c'est plutôt un objet simple et restreint : la création d'un régime permettant la nomination d'un séquestre national, éliminant de ce fait la nécessité de demander la nomination d'un séquestre aux tribunaux de plusieurs ressorts.

[46] Selon le par. 243(1.1), dans le cas d'une personne insolvable dont les biens sont visés par le préavis que doit donner le créancier garanti aux termes du par. 244(1), le tribunal ne peut faire la nomination d'un séquestre aux termes du par. 243(1) avant l'expiration d'un délai de 10 jours après l'envoi de ce préavis, à moins que la personne insolvable ne consente à la nomination d'un séquestre à une date plus rapprochée, ou que le tribunal estime indiqué de nommer un séquestre à une date plus rapprochée. Cette disposition a pour effet de fixer une période minimale d'attente, ce qui n'exclut pas des périodes d'attentes *plus longues* prévues par la loi provinciale. Rien dans le libellé de cette disposition ne laisse croire que cette période d'attente devrait être considérée comme une période maximale plutôt que minimale, et aucune source n'indique qu'il s'agirait d'une période maximale.

[47] En fait, le caractère discrétionnaire du recours prévu à l'art. 243 — comme en témoigne le fait que, aux termes de la disposition, le tribunal « peut » nommer un séquestre si cela est « juste ou opportun » — vient appuyer une interprétation plus étroite de l'objet de cette disposition. Le créancier garanti n'a pas droit à la nomination d'un séquestre. L'article 243 constitue plutôt une disposition permissive en permettant au tribunal de nommer un séquestre si cela est juste ou opportun. L'atteinte d'une province à un pouvoir discrétionnaire conféré par une loi fédérale ne suffit pas en soi pour établir l'existence d'une entrave à la réalisation d'un objectif fédéral : *COPA*, par. 66; voir également *114957 Canada Ltée*.

[48] La présente affaire se distingue donc nettement de l'affaire *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121, où la Cour a statué qu'une sûreté établie en vertu d'une loi fédérale ne pouvait pas, au point de vue constitutionnel, être assujettie

In the Court of Appeal of Alberta

Citation: BG International Limited v. Canadian Superior Energy Inc., 2009 ABCA 127

Date: 20090407
Docket: 0901-0048-AC
Registry: Calgary

Between:

BG International Limited

Respondent
(Plaintiff)

- and -

Canadian Superior Energy Inc.

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Whole of the Interim Orders by
The Honourable Madam Justice B.E.C. Romaine
Dated the 11th day of February, 2009
Filed on the 11th day of February, 2009
(Docket: 0901-02012)

Memorandum of Judgment

The Court:

[1] This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

[2] The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

[3] There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

[4] When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

[5] The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

Standard of Review

[6] Granting a receivership order under the *Judicature Act*, R.S.A. 2000, c. J-2, involves the exercise of a discretion. The granting of the order will not be interfered with on appeal unless it is based on an error of law, or the granting of the remedy is wholly unreasonable in the circumstances: ***Wewaykum Indian Band v. Canada***, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 107; ***Medical Laboratory Consultants Inc. v. Calgary Health Region,*** 2005 ABCA 97, 43 Alta. L.R. (4th) 5 at para. 3.

Appointment of the Receiver

[7] The chambers judge was motivated to appoint the interim receiver without any delay because she perceived a real risk that Maersk would remove the rig, thereby causing irreparable harm to all concerned. The respondent was prepared to advance $47 million through the receiver to complete the work on the well. The appellant argues, first, that there was no real prospect of Maersk removing the rig, and that Maersk was merely taking steps to preserve its legal rights. It is argued the chambers judge committed a palpable and overriding error in finding a real risk the rig would be removed.

[8] The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia. He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

[9] Next the appellant argues that it was denied its basic rights because it was not granted an adjournment, it was not allowed to cross examine on the respondent's affidavit, and it was not given time to file its own affidavit. Despite the presence of the appellant, the application proceeded almost as if it was an *ex parte* application. While there is substance to this complaint, it is not uncommon for interim receivers to be appointed on an *ex parte* basis, and there were remedies available to review or withdraw the order granted. Given the urgency found by the chambers judge, the method of proceeding was not, in this case, fatal. We do not find that Article 18.2 (C)(9) of the arbitration provisions, which enables electronic hearings, effectively prohibits *ex parte* procedures.

[10] The appellant was asked to suggest terms on which an adjournment might be granted, but persisted in its request for an adjournment that did not address the respondent's legitimate concerns. The chambers judge was entitled to conclude that the requested adjournment could itself have led

to irreparable damage to all parties.

[11] We note that in the weeks that have followed since the granting of the order, the appellant has still not cross examined on the respondent's affidavit, nor has it filed an affidavit in reply. Any such evidence could have been used in an application to set aside or vary what was similar to an *ex parte* order, it could have been used on the stay application, and it would likely have been admitted on this appeal. We conclude that the appellant's objections are to some extent tactical. Even though the record may be incomplete, many of the key facts are not in dispute, and the key documents are included. A fair picture of the situation can be obtained from this record, supplemented as it has been by counsels' submissions.

[12] The appellant notes that under Article 18.3 (A) of the joint operating agreement, when one party gives notice of default it is required by the contract to pay the amounts owed by the defaulting party. The appellant points out that this is a contractual obligation, and that the respondent was required to pay all outstanding amounts without seeking any more security or protection than that provided by the operating agreement. By advancing the $47 million by way of receiver's certificates, the respondent has in effect managed to enhance its position under the contract. The respondent replies that it had already paid its share of the Maersk invoice, and the clause cannot mean that it has to pay twice the amount misapplied by the appellant. It also argues that the security provided by Article 18.4 (E) of the joint operating agreement may not cover all of the money the respondent proposes to advance.

[13] The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

[14] The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and

indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

[15] The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in ***Royal Bank of Canada v. W. Got & Associates Electric Ltd.,*** [1999] 3 S.C.R. 408 without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

[16] We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

[17] In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in ***Swiss Bank Corp. (Canada) v. Odyssey Industries Inc***. (1995), 30 C.B.R. (3d) 49 (Ont. C.J. G.D.) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

[18] The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that

the rig stay on the well, and that the well be flow tested. The appellant is in default. The respondent has not disputed its obligation to pay the appellant's share of operating expenses, and is quite willing to pay the $47 million required to do that. In all the circumstances it was not an unreasonable exercise of her discretion for the chambers judge to extend to the respondent the protection of receiver's certificates. The practical effect of accelerating the removal of the appellant as the operator was apparent to her. If the appellant does not have the necessary funds to cure its defaults, then its removal as operator merely accelerated the inevitable.

[19] The chambers judge had to make a difficult decision in a very short period of time based on limited materials. Deference is owed to her discretionary decision to appoint a receiver. While an order short of a receivership might have been crafted, we have not been satisfied that her eventual balancing of the various rights and interests involved was unreasonable. She was primarily motivated by preserving the value of the well for the benefit of all concerned. We cannot see any error that warrants appellate interference, and the appeal is dismissed.

[20] The dismissal of the appeal is not intended to limit the powers of the chambers judge or the CCAA case management judge. The receivership was to be "interim" only, and it has an internal mechanism for review. The Queen's Bench retains the ability to revoke or amend the order as circumstances dictate.

Appeal heard on March 10, 2009

Memorandum filed at Calgary, Alberta
this 7th of April, 2009

Berger J.A.

Slatter J.A.

Rowbotham J.A.

Appearances:

V.P. Lalonde and M.A. Thackray, Q.C.
for the Appellant

C.L. Nicholson and M.E. Killoran
for the Respondent

T.S. Ellam
for interested/affected party Challenger Energy Corp.

H.A. Gorman
for the interested/affected party Canadian Western Bank

L.B. Robinson, Q.C.
for the receiver Deloitte & Touche Inc.

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of April 1, 2023

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General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

(2) If a defendant claims to be entitled

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430

Date: 20020429
Action No. 0101 05444

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS &TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

INTRODUCTION

[1] On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company (“MTAC”) and 586335 British Columbia Ltd. (“586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

[2] The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

[3] On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

[4] The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation (“Georgia Pacific”), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon’s counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

[5] The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

[6] Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c.B-3, as amended

[7] MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

[8] Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

[9] It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

[10] The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

[11] On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the *ex parte* receivership order have been granted?

[12] Rule 387 of the ***Alberta Rules of Court*** provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: ***Metropolitan Life Insurance Company v. Hover***, 1999, 237 A.R. 30 at paragraph 23, referring to ***Royal Bank v. W. Got & Associates*** (1994), 150 AR. 93 at 102-3 (Alta. Q.B.); (1997) AR. 241 (Alta. C.A.); leave to appeal granted [1997] S.C.C.A. No. 342.

[13] The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

[14] There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

[15] There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

[16] Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

[17] There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

[18] There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

[19] The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex*

parte order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

[20] In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": ***Canadian Urban Equities Ltd. v. Direct Action for Life et al***, [1990] A.J. No. 253 (Q.B.) at pages 7 and 8.

[21] The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the *ex parte* order been precluded from acting in this case due to conflict?

[22] This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

[23] Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety

for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

[24] The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

[25] I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the *ex parte* order now be set aside?

[26] The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: ***Edmonton Northlands v. Edmonton Oilers Hockey Corp***., 1993, 15 Alta. L.R. (3rd) 179 (paragraphs 30 and 31).

[27] The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

[28] In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry : ***Bank of Nova Scotia v. Freure Village on Clair Creek***, [1996] O.J. No. 5088, paragraph 12.

[29] It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a

court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

[30] The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

[31] The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in ***Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*** [1995] O.J. No. 144 at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

[32] I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

[33] To be granted a stay of an order pending appeal, an applicant must establish:

a) that there is a serious issue to be tried on appeal;

b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and

c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

R.J.R. McDonald Inc. v. Canada (A.G.), [1994] S.C.J. No. 17 (S.C.C.); ***Schacter v. National Park Services***, [1999] A.J. No. 599 (Q.B.).

[34] On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to

indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

[35] With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

[36] The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

[37] Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

[38] I therefore decline to grant a stay, or to vary the order as granted.

[39] If the parties are unable to agree on the matter of costs, they may be spoken to.

DATED at Calgary, Alberta this 29th day of April, 2002.

_____

J.C.Q.B.A.

CITATION: Elleway Acquisitions Limited v. The Cruise Professionals Limited, 2013 ONSC 6866
COURT FILE NO.: CV-13-10320-00CL
DATE: 20131127

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED

RE: **ELLEWAY ACQUISITIONS LIMITED, Applicant**

AND:

THE CRUISE PROFESSIONALS LIMITED, 4358376 CANADA INC. (OPERATING AS ITRAVEL2000.COM) AND 7500106 CANADA INC., Respondents

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Natalie Renner, for the Applicant**

John N. Birch, for the Respondents

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver

HEARD & ENDORSED: **NOVEMBER 4, 2013**

REASONS: **NOVEMBER 27, 2013**

ENDORSEMENT

[1] At the conclusion of argument, the requested relief was granted with reasons to follow. These are the reasons.

[2] Elleway Acquisitions Limited ("Elleway" or the "Applicant") seeks an order (the "Receivership Order") appointing Grant Thornton Limited ("GTL") as receiver (the "Receiver"),

without security, of all of the property, assets and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., ("Travelcash"), and The Cruise Professionals ("Cruise") and together with itravel and Travelcash, "itravel Canada"), pursuant to section 243 of the *Bankruptcy and Insolvency Act (Canada)* (the "BIA") and section 101 of the *Courts of Justice Act (Ontario)* (the "CJA").

[3] The application was not opposed.

[4] The itravel Group (as defined below) is indebted to Elleway in the aggregate principal amount of £17,171,690 pursuant to a secured credit facility that was purchased by Elleway and a working capital facility that was established by Elleway. The indebtedness is guaranteed by each of itravel, Cruise and Travelcash, among others. The itravel Group is in default of the credit facility and the working capital facility, and Elleway has demanded repayment of the amounts owing thereunder. Elleway has also served each of itravel, Cruise and Travelcash with a notice of intention to enforce its security under section 244(1) of the BIA. Each of itravel, Cruise and Travelcash has acknowledged its inability to pay the indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

[5] Counsel to the Applicant submits that the itravel Group is insolvent and suffering from a liquidity crisis that is jeopardizing the itravel Group's continued operations. Counsel to the Applicant submits that the appointment of a receiver is necessary to protect itravel Canada's business and the interests of itravel Canada's employees, customers and suppliers.

[6] Counsel further submits that itravel Canada's core business is the sale of travel services, including vacation, flight, hotel, car rentals, and insurance packages offered by third parties, to its customers. itravel Canada's business is largely seasonal and the majority of its revenues are generated in the months of October to March. itravel Canada would have to borrow approximately £3.1 million to fund its operations during this period and it is highly unlikely that another lender would be prepared to advance any funds to itravel Canada at this time given its financial circumstances.

[7] Further, counsel contends that the Canadian travel agent business is an intensely competitive industry with a high profile among consumers, making it very easy for consumers to comparison shop to determine which travel agent can provide services at the lowest possible cost. Given its visibility in the consumer market and the travel industry, counsel submits that it is imperative that itravel Canada maintain existing goodwill and the confidence of its customers. If itravel Canada's business is to survive, potential customers must be assured that the business will continue uninterrupted and their advance payments for vacations will be protected notwithstanding itravel Canada's financial circumstances.

[8] Therefore, counsel submits that, if a receiver is not appointed at this critical juncture, there is a substantial risk that itravel Canada will not be able to book trips and cruises during its most profitable period. This will result in a disruption to or, even worse, a complete cessation of itravel Canada's business. Employees will resign, consumer confidence will be lost and existing goodwill will be irreparably harmed.

[9] It is contemplated that if GTL is appointed as the Receiver, GTL intends to seek the Court's approval of the sale of substantially all of itravel Canada's assets to certain affiliates of Elleway, who will operate the business of itravel Canada as a going concern following the consummation of the purchase transactions. Counsel submits that, it is in the best interests of all stakeholders that the Receivership Order be made because it will facilitate a going concern sale of itravel Canada's business, preserving consumer confidence, existing goodwill and the jobs of over 250 employees.

[10] Elleway is a corporation incorporated under the laws of the British Virgin Islands. Elleway is an indirect wholly owned subsidiary of The Aldenham Grange Trust, a discretionary trust governed under Jersey law.

[11] itravel, Cruise and Travelcash are indirect wholly owned subsidiaries of Travelzest plc ("Travelzest"), a publicly traded United Kingdom ("UK") company that operates a group of companies that includes itravel Canada (the "itravel Group"). The itravel Group's UK operations were closed in March 2013. Since the cessation of the itravel Group's UK operations, all of the itravel Group's remaining operations are based in Canada. itravel Canada currently employs approximately 255 employees. itravel Canada's employees are not represented by a union and it does not sponsor a pension plan for any of its employees.

[12] The itravel Group's primary credit facilities (the "Credit Facilities") were extended by Barclays Bank PLC ("Barclays") pursuant to a credit agreement (the "Credit Agreement") and corresponding fee letter (the "Fee Letter" and together with the Credit Agreement, the "Credit Facility Documents") under which Travelzest is the borrower.

[13] Pursuant to a series of guarantees and security documents (the "Security Documents"), each of Travelzest, Travelzest Canco, Travelzest Holdings, Itravel, Cruise and Travelcash guaranteed the obligations under the Credit Facility Documents and granted a security interest over all of its property to secure such obligations (the "Credit Facility Security"). Travelzest Canco and Travelzest Holdings are direct wholly owned UK subsidiaries of Travelzest. In addition, itravel and Cruise granted a confirmation of security interest in certain intellectual property (the "IP Security Confirmation and together with the Credit Facility Security, the "Security").

[14] The Security Documents provide the following remedies, among others, to the secured party, upon the occurrence of an event of default under the Credit Facility Documents: (a) the appointment by instrument in writing of a receiver; and (b) the institution of proceedings in any court of competent jurisdiction for the appointment of a receiver. The Security Documents do not require Barclays to look to the property of Travelzest before enforcing its security against the property of itravel Canada upon the occurrence of an event of default.

[15] Commencing on or about April 2012, the itravel Group began to default on its obligations under the Credit Agreement.

[16] Pursuant to a series of letter agreements, Barclays agreed to, among other things, defer the applicable payment instalments due under the Credit Agreement until July 12, 2013 (the

"Repayment Date"). Travelzest failed to pay any amounts to Barclays on the Repayment Date. Travelzest's failure to comply with financial covenants and its default on scheduled payments under the Repayment Plans constitute events of default under the Credit Facility Documents.

[17] Since 2010, Itravel Canada has attempted to refinance its debt through various methods, including the implementation of a global restructuring plan and the search for a potential purchaser through formal and informal sales processes. Two formal sales processes yielded some interest from prospective purchasers. Ultimately, however, neither sales process generated a viable offer for Itravel Canada's assets or the shares of Travelzest.

[18] Counsel submits that GTL has been working to familiarize itself with the business operations of Itravel Canada since August 2013 and that GTL is prepared to act as the Receiver of all of the property, assets and undertaking of itravel Canada.

[19] Counsel further submits that, if appointed as the Receiver, GTL intends to bring a motion (the "Sales Approval Motion") seeking Court approval of certain purchase transactions wherein Elleway, through certain of its affiliates, 8635919 Canada Inc. (the "itravel Purchaser"), 8635854 Canada Inc. (the "Cruise Purchaser") and 1775305 Alberta Ltd. (the "Travelcash Purchaser" and together with the itravel Purchaser and the Cruise Purchaser, the "Purchasers"), will acquire substantially all of the assets of itravel Canada (the "Purchase Transactions").

[20] If the Purchase Transactions are approved, Elleway has agreed to fund the ongoing operations of itravel Canada during the receivership. It is the intention of the parties that the Purchase Transactions will close shortly after approval by the Court and it is not expected that the Receiver will require significant funding.

[21] The purchase price for the Purchase Transactions will be comprised of cash, assumed liabilities and a cancellation of a portion of the Indebtedness. Elleway will supply the cash portion of the purchase price under each Purchase Transaction, which will be sufficient to pay any prior ranking secured claim or priority claim that is not being assumed.

[22] The Purchasers intend to offer substantially all of the employees of itravel and Cruise the opportunity to continue their employment with the Purchasers.

[23] This motion raises the issue as to whether the Court should make an order pursuant to section 243 of the BIA and section 101 of the CJA appointing GTL as the Receiver.

1. The Court Should Make the Receivership Order

a. The Test for Appointing a Receiver under the BIA and the CJA

[24] Section 243(1) of the BIA authorizes a court to appoint a receiver where such appointment is "just or convenient".

[25] Similarly, section 101(1) of the CJA provides for the appointment of a receiver by interlocutory order where the appointment is "just or convenient".

[26] In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. 5088 at para. 10 (Gen. Div.)

[27] Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd*., 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village, supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]. I accept this submission.

[28] Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

(a) the potential costs of the receiver;

(a) the relationship between the debtor and the creditors;

(b) the likelihood of preserving and maximizing the return on the subject property; and

(c) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.).

[29] Counsel to the Applicant submits that it is just and convenient to appoint GTL as the Receiver in the circumstances of this case. As described above, the itravel Group has defaulted on its obligations under the Credit Agreement and the Fee Letter. Such defaults are continuing and have not been remedied as of the date of this Application. This has given rise to Elleway's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

[30] It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint GTL as the Receiver for five main reasons:

(a) the potential costs of the receivership will be borne by Elleway;

(a) the relationships between itravel Canada and its creditors, including Elleway, militate in favour of appointing GTL as the Receiver;

(b) appointing GTL as the Receiver is the best way to preserve itravel Canada's business and maximize value for all stakeholders;

(c) appointing GTL as the Receiver is the best way to facilitate the work and duties of the Receiver; and

(d) all other attempts to refinance itravel Canada's debt or sell its assets have failed.

[31] It is noted that Elleway has also served a notice of intention to enforce security under section 244(1) of the BIA. itravel Canada has acknowledged its inability to pay the Indebtedness and consented to early enforcement pursuant to section 244(2) of the BIA.

[32] Further, if GTL is appointed as the Receiver and the Purchase Transactions are approved, the Purchasers will assume some of itravel Canada's liabilities and cancel a portion of the Indebtedness. Therefore, counsel submits that the appointment of GTL as the Receiver is beneficial to both itravel Canada and Elleway.

[33] Counsel also points out that if GTL is appointed as the Receiver and the Purchase Transactions are approved by the Court, the business of itravel Canada will continue as a going concern and the jobs of substantially all of itravel Canada's employees will be saved.

[34] Having considered the foregoing, I am of the view that the Applicant has demonstrated that it is both just and convenient to appoint GTL as Receiver of itravel Canada under both section 243 of the BIA and section 101 of the CJA. The Application is granted and the order has been signed in the form presented.

Morawetz J.

Date: November 27, 2013

Court of Queen's Bench of Alberta

Citation: Alberta Treasury Branches v COGI Limited Partnership, 2016 ABQB 43

Date: 20160121
Docket: 1501 12220
Registry: Calgary

Between:

Alberta Treasury Branches

Applicant

- and -

COGI Limited Partnership, Canadian Oil & Gas International Inc., and Conserve Oil Group Inc.

Respondents

Oral Reasons for Judgment
of the
Honourable Madam Justice K.M. Eidsvik

Background

[1] On January 14 and 15, 2016 I heard the applications of the receiver dated November 6, 2015 and January 4, 2016.

[2] The November 6 application was to clarify and expand the receiver's powers under the Receivership Order that was granted on October 26, 2015 with respect to several subsidiaries of Conserve Oil Group Inc. (Conserve) including Conserve Oil 1st Corporation (Conserve 1st) and Proven Oil Asia Ltd (POA).

[3] On November 10, 2015 Justice Jeffrey allowed expanded powers with respect to several subsidiaries and adjourned the claims with respect to Conserve 1st and POA to November 27, 2015 and ordered further information to be disclosed.

[4] Mr. Crombie, the President and sole director of POA, subsequently filed an Affidavit on November 23, 2015 and was cross-examined on it on November 24, 2015. A supplemental, correcting Affidavit was filed on November 26, 2015.

[5] The receiver filed a second report on November 27, 2015 outlining its concerns about the information that had been obtained including:

1) 100,000 shares had been issued and transferred to Arrow Point Oil and Gas Ltd. (Arrow Point) and then to Capital Asia Group Pte Ltd (CAGOM) thereby diluting Conserve's 1000 shares and sole ownership position in POA;

2) Some oil and gas wells had transferred from COGI (a subsidiary of Conserve) to POA but COGI still holds the assets' title and there were potential substantial abandonment liabilities in POA.

[6] Therefore, the receiver sought an adjournment of the application set for November 27, 2015 to investigate further. The adjournment application was allowed to January 14, 2016 by Justice Hawco, with deadlines about further material to be filed, and a standstill Order was granted wherein certain powers with respect to the assets, shares, and management of POA were detailed.

[7] The second application filed January 4, 2016 seeks a receivership order of POA, and alternatively an order seeking certain rights and powers over POA and an order that net proceeds from the operation of assets of POA be paid into court.

[8] The receiver seeks to be appointed pursuant to the oppression remedy under s.242 of the ***ABCA*** or s. 13(2) of the ***Judicature Act***.

[9] A third Affidavit was filed by Mr. Crombie, along with a supplemental brief of POA and a brief by CAGOM on January 7, 2016 opposing the relief sought by the receiver.

[10] Meantime, on January 6th, 2016, Justice Horner determined that the Conserve subsidiary Conserve 1st was bound by a guarantee of January 27, 2012, Debenture, Demand and Pledge Agreement and GSA in favour of ATB, and as such allowed the receiver to be appointed over Conserve 1st's assets etc. pursuant to s.243(1) of the ***Bankruptcy and Insolvency Act***.

The law

[11] The parties did not disagree on the law with respect to appointing a receiver in these circumstances but did disagree about its application on the facts as they have slowly and confusingly emerged over the last couple of months.

[12] As noted above, the receiver is bringing the application on the grounds of s 242 of the ***ABCA*** and s 13 (2) of the ***Judicature Act.*** The ***ABCA*** section reads as follows:

242 (1) A complainant may apply to the Court for an order under this section,

(2) If, on application under subsection (1) the Court is satisfied that in respect of a

corporation or any of its affiliates

(a) Any act or omission of the corporation or any of its affiliates effects a result,

(b) The business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) The powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

[13] This Order may, according to 242 (3) (b), include an order for a receiver manager.

[14] The ***Judicature Act*** s 13 (2) allows the Court wide discretion to appoint a receiver when it is "just and convenient".

[15] Oppressive conduct has been interpreted by the Supreme Court in ***BCE Inc v 1976 Debentureholders*** 2008 SCC 69. This case emphasises that the oppression remedy is an equitable discretionary remedy that must look to the fairness of the situation to all parties involved in the business in question. A two part test is outlined where the Court must determine the reasonable expectation of the parties and whether the conduct complained of amounts to a violation of those expectations.

[16] A myriad of factors are set out in ***Bennett on Receiverships*** to aid in the decision about whether a receiver should be appointed. They are often repeated in decisions so I won't do so now. I have applied the relevant factors which I will detail shortly.

[17] In addition, it is said that applications brought by a person other than a security holder, is an extraordinary remedy which should only be used sparingly. It is compared to injunctive relief and the tripartite test that is used in those cases is recommended to be used here (see ***Murphy v Cahill*** 2013 ABQB 335 at para 7).

Analysis.

Serious issue to be tried

[18] Is there a serious issue to be tried? Or more specifically, is there evidence that the actions taken by POA in the last 10 months violate the reasonable expectations of Conserve and COGI that amount to oppressive conduct?

[19] As noted above, the Receiver has two main concerns **1**. That shares in POA were issued without due notice, at the hands of directors who were in a conflict of interest and without evidence of fair value, and **2**. An asset purchase of wells from COGI by POA has left some potential liability to the AER in COGI's hands.

1. Share transaction

[20] In my view, the transaction in questions does not violate what Conserve's reasonable expectations of corporate and financial behaviour of POA should have been at the time, for the following reasons.

[21] Conserve is a shareholder of POA wherein it paid $1000 for 1000 shares. It was the sole shareholder since its inception in 2012. There is no evidence that Conserve put any other funds into POA.

[22] POA's business involves the acquisition and operation of wells. In order to fund such acquisitions, POA uses funds raised and advanced by CAGOM. CAGOM has security in the nature of guarantees and GSAs on POA's assets. The funds are used to acquire properties, having those properties operated by third parties, including but not exclusively COGI, and receiving revenues from those properties which are then repaid to investors, who reside in Asia.

[23] Conserve and COGI did some administration duties for POA, including managing most of its wells. The terms of the administration and operating duties, and remuneration for such responsibilities, were not before me.

[24] POA has regularly scheduled payments to its secured creditor CAGOM for distribution to its Asian investors.

[25] Mr. David Crombie is the sole director of Conserve and POA and a shareholder of Conserve. He does not hold any personal shares in POA. Although Mr. Crombie suggested that he was a director and officer of Arrow Point in questioning, his lawyer advised at the hearing that this was in error and that he had no relationship to Arrow Point.

[26] The applicant ATB has security over Conserve and COGI's assets. The debt outstanding, as of October 20, 2015, was $300,000 and $34 M respectively.

[27] However, ATB confirmed at the hearing that, contrary to the receiver's belief, it did not have any security over any of POA's assets.

[28] In March 2015 POA entered into a secured demand loan agreement with Arrow Point wherein Arrow Point lent POA $7 M in return for 100,000 shares. Initially these shares were common shares but ultimately POA issued and transferred preferred shares to Arrow which could be redeemed into common shares. The cost of the shares in the agreement was initially suggested to be $1 per share but this was corrected by Mr. Crombie subsequently to be $1 for all of the shares.

[29] The loan was obtained since POA was required to make a substantial payment to investors in April 2015. Funds were advanced on the loan by way of a payment on March 12 2015 in the amount of $4,823,000 and March 27,2015 of $4,000,000.

[30] The receiver complains that there was not consideration for the shares, the issuance of the shares diluted Conserve's shareholding to 1 %, and certain corporate requirements were not conducted.

[31] The Affidavit filed by Mr. Crombie of January 7, 2016 answers many of the concerns. It is unfortunate that this detail was not forthcoming initially. POA's lawyer suggested that this was because oppression was not claimed by the receiver until the January 4 application so it did not know it needed this information. This excuse is somewhat hollow in my view considering that

there is mention of this transaction in the initial Nov 23 affidavit and Mr. Crombie was questioned on this but gave incorrect and confusing answers, not out of malice, but likely confusion on his own part.

[32] The corporate structure in this case, which I've only outlined a small part which is relevant to these applications, is rather vast and convoluted, involves many of the same human players, and seems to be constantly changing. Accordingly, it is no surprise that the receiver has had difficulties figuring it out, and as an officer of the court he has raised many reasonable questions of concern.

[33] In my view, the evidence discloses that POA has its own separate financing structure in place which was in peril in early 2015. It is reasonable to understand that it would try to get further financing. The deal made with Arrow Point appears to have allowed POA to continue on with its operations. To the extent that this meant diluting the share value and diluting Conserve's position, this was likely a necessary evil.

[34] The receiver complains that these shares have since been converted into common shares and transferred to COGAM from Arrow Point. The deal between these parties was not in evidence. In any event this transfer was not done by POA. It is hardly surprising to me that COGAM, POA's major creditor, would want to solidify its position further by controlling POA via its shareholding position. In this regard, the receiver has now had a chance to review the five guarantees granted by POA to COGAM between November 1, 2013 and March 1, 2015 which total approximately $70 M. Other credit documents have not yet been reviewed but CAGOM suggested at the hearing that it was open to cooperate in this regard.

[35] Mr. Crombie advised that the value of POA at the time the shares were issued to Arrow Point was either $35 or $30 M (another example of rather careless testimony). In any event, on this evidence, the value of POA according to this testimony, and therefore of Conserve's shares, would have been nil.

[36] There has been far from forensic accounting dealing with the value of these shares, as pointed out by the solicitor of ATB, however, for this application's purposes the evidence sets out what could be considered to be a reasonable transaction in terms of the issuance of these shares even though there was dilution of Conserve's shareholding

[37] The receiver complains that Conserve was not given due notice of the transaction. However, Mr. Crombie, wearing dual hats for Conserve and POA was well aware of the transaction so notice was not necessary as the transaction was well known to Conserve through its director.

[38] POA admits that it did not comply with all of its statutory obligations required under the ***ABCA*** i.e.holding the requisite shareholder meetings etc. However, in the whole of the circumstances, I do not find this to be oppressive conduct at the time. Note that this transaction occurred well before the receiver was appointed in October.

[39] Finally, I asked the receiver if he had another suggestion about how Conserve's share position could have been better protected. The receiver suggested in its brief that Conserve was prevented from taking "preventative steps". No concrete solution was forthcoming from the receiver about what these steps could have been. He suggested that there was no need for Arrow Point to have a shareholder position at the time. However, it appears that this was the deal.

Certainly if POA's credit had been called at that time, it appears that Conserve's shareholding may have been worthless in any event.

[40] In sum, I agree that there are many details with respect to this share transaction which are missing and the veracity of the evidence given by Mr. Crombie has not been thoroughly tested. The receiver and ATB want the power to examine this transaction with the powers of a receivership. There is a serious issue with respect to the dilution of the shares but there is also a very reasonable defence to this potentially oppressive conduct which, if found true, would answer the situation for the reasons I have outlined.

[41] The other serious issue is the asset sale which I will now turn to.

2. Asset sale

[42] POA purchased various well assets from COGI in 2015. A letter from COGI to ATB dated June 26, 2015 was put into evidence via Mr. Crombie's January 7, 2016 Affidavit. In it COGI advised ATB that POA was purchasing various interests for the purchase price of $3M, $5.7M and $11.9M approximately and that the funds received from POA would go to reduce COGI's credit facility with ATB. The closing dates were July 15, August 5, and October14, 2015 respectively for the various sales.

[43] The sale agreements were not put into evidence in this proceeding (although they were in evidence in the CCAA proceeding against COGI in late August 2015). In any event, I am to understand that the beneficial title to these wells were transferred to POA and that the wells continued to be operated by, and remain on legal title to, COGI. COGI collects the oil sale production proceeds and pays them to POA.

[44] The receiver was concerned that pursuant to the agreement, since COGI maintains legal title to the wells, it may face AER abandonment and reclamation liability if that were to occur to those wells. According to the operating manager the receiver has put into place since the receivership of COGI in October, Niven Fischer Energy Services Inc., the net potential liability is almost $15 M.

[45] The receiver argues that since COGI needs to pay the proceeds of these wells to POA and that these funds will be sent off to investors in Asia, COGI has a large liability from POA with no corresponding benefit. Accordingly, the receiver has been withholding payments to POA over the last few months. The gross revenue in September 2015 was $285,000 and in October it was $183,000. Operational expenses can be deducted from these amounts however, as noted above, it was not in evidence what these amounts are. The receiver wants an order that the net funds be paid into Court as an alternative to a receivership order.

[46] POA replies that the sale transactions represented full market value, they were approved by ATB, and that the revenue represents trust funds that the receiver is improperly withholding. This withholding is to the prejudice of POA which has obligations to its own creditors and investors.

[47] With respect to the potential AER liability, POA is attempting to deal with the problem. Indeed, contrary to Niven Fisher's opinion that this situation is unlikely to change in the near future, AER's counsel indicated at the hearing that they are working on solutions with Arrow Point and another purchaser of these wells.

[48] It is difficult, without the appropriate documents, to comment extensively on this issue at this time. However, for the purposes of the potential oppression claims as a basis to appoint a receiver, in my view, again, the transaction on the surface appears to have been made for a valid business purchase and for full market value. To the extent that the potential AER liability was not considered, ATB was notified of this transaction and could have stopped this transaction at the time. Instead it accepted payments (of gross $20.6 M approximately – the net amount was not disclosed) and consented to the deal by way of No Interest notices. It is hardly fair then to say that they have been oppressed or that POA acted in an oppressive manner towards Conserve in these circumstances.

[49] The suggestion that it is fair to hold the oil proceeds in this situation is problematic. It is not clear that a set off is appropriate in these circumstances considering that the production revenue may be trust funds and that this contingent AER liability is very far from being crystallised.

[50] In other words, there may be an issue to be tried about these sale transactions, however, on the limited evidence before me on this issue, it appears that POA may have a good defence that there is any oppression here.

Irreparable harm

[51] The receiver suggests that it will suffer irreparable harm if it is not appointed a receiver for POA so that it can control its management and avoid further dissipation of the shares and any of its assets. It further argues that if the proceeds from the wells are not paid into Court it will be paid to foreign investors and the money will not be easily recoverable.

[52] POA argues that loss of management control could have devastating effects on its business. Further, that the lack of payments from its wells jeopardises its ability to maintain its obligations to COGAM and its investors which may cause irreparable harm to POA. There is no irreparable harm to the receiver here as the wells are still located in Alberta and should POA face liability to COGI, these assets can be called upon. Further, it has no present plans to divest of further assets in any event.

[53] COGAM, the secured creditor of POA, points out that the standstill Order in place by Justice Hawco answers any concerns of divestiture.

[54] The Court's concern in this case is the complicated corporate structure in place and the difficulty the receiver has had to untangle the web of transactions between non- arms length corporations without the powers of a receiver over POA. However, considering the more recent informational disclosure by POA , and proposed cooperation by COGAM, and the standstill Order presently in place, at the present time, the receiver may well be able to get to the bottom of the issues without the powers of a receiver and therefore will not be irreparably harmed.

[55] With respect to the oil proceeds, I agree with POA that the wells are some security presently for the potential AER liability. In any event, on the evidence before me and the representations of the AER, the potential liability is legally uncertain and remote at this time so that the receiver has not met the onus to show that it will be irreparably harmed.

Balance of convenience

[56] As mentioned, appointing a receiver is an extraordinary relief and should be granted cautiously and sparingly – especially in circumstances such as these where there is no outstanding debt from POA to ATB, no security arrangements between them, and that POA has its own secured creditors who oppose the appointment of this receiver.

[57] I can understand the receiver's concerns that have arisen since it started investigating into the corporate structure and its belief that a receiver order over POA is just and convenient and will enable it to carry out its duties more efficiently.

[58] However, as I have analysed above, in my view, on the evidence as it stands, I am not presently "satisfied" as required under s 242 of the ***ABCA*** that the conduct in question can be considered to be oppressive. It did not breach the reasonable expectations of Conserve that some sort of further financing was necessary to keep POA from reneging on its creditor's obligations, and the wells sale agreements between COGI and POA appear to be reasonable business transactions.

[59] The receiver may still consider starting an oppression action against POA if it wants to pursue this further. Alternatively, if it turns out that the assumptions that I have had to make on the limited evidence before me are not accurate, a further application could be made at a later time.

[60] With respect to the wells, I note that they are presently already being managed under the control of the receiver. I would also ask that it reconsider the position it has been taking over the proceeds from the wells by reviewing the agreements that were put into place and are attached to an affidavit in the CCAA proceedings to which it has access. If these are indeed trust relationships that are being breached by the withholding of those funds, I recommend that this position be reconsidered by the receiver, failing which POA may bring a further application about this issue. Having not looked at these agreements, I am not in a position to say further on this topic. But, to be clear, I will not order that the proceeds be paid into Court at this time.

[61] In balancing the interests of POA and its secured creditor, vs those of ATB and Conserve, the latter as a shareholder in POA, an unsecured position, it seems that the fairer answer to this application by the receiver is to dismiss it at this time. I would allow Justice Hawco's standstill Order to continue for the time being, but would reconsider its continuance once further answers to outstanding questions about the interrelationship between these companies is answered.

[62] Conserve continues to have its shareholdings in POA and so continues to enjoy those rights, even if it now is as a minority shareholder, which will have to be respected.

[63] It is expected that POA and COGAM will continue to cooperate with the receiver to determine certain rights and obligations, hopefully without formal litigation. I would also recommend in that regard that sensitive business documents can be kept confidential and if there are any issues in that regard you can seek further Court directions.

Conclusion

[64] There may be serious issues to be tried but the defences to an oppression action are also quite strong on the evidence before me. I am not satisfied that an oppression action would have success on the limited evidence presently before the Court. The receiver has also not convinced

me that any harm would be irreparable if he was not appointed receiver over POA at this time. There are other Orders and measures in place that will protect the companies in question under receivership. Further, on the balance of convenience, fairness in my view dictates that POA's rights to self-determination and the secured creditor's interests to POA prevail over those of the unsecured shareholder and ATB.

[65] For these reasons, the applications of the receiver are dismissed.

Heard on the 14th and 15th days of January, 2016.
Dated at the City of Calgary, Alberta this 20th day of January, 2016.

K.M. Eidsvik
J.C.Q.B.A.

Appearances:

G.B. Davison, Q.C. for the Receiver
R. Algar
R. Zahara for ATB
for the Applicant

D. S. Nishimura for POA
C. E. Hanert for COGAM
A. C. Maerov
for the Respondents

CITATION: Northstar Aerospace, Inc. (Re), 2012 ONSC 4546
COURT FILE NO.: CV-12-9761-00CL
DATE: 20120807

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTHSTAR AEROSPACE, INC., NORTHSTAR AEROSPACE (CANADA) INC., 2007775 ONTARIO INC. AND 3024308 NOVA SCOTIA COMPANY, Applicants

BEFORE: D. M. Brown J.

COUNSEL: M. Konyukhova, for the Applicants

Craig J. Hill, for Ernst & Young Inc., Court-Appointed Monitor

S. Weisz, for Fifth Third Bank as Pre-filing Agent and DIP Lender

C. Prophet, for Boeing Capital Loan Corporation

HEARD: August 7, 2012

REASONS FOR DECISION

I. Motion under the *CCAA* to authorize payment to critical supplier of pre-filing costs

[1] Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc. ("Northstar Canada"), 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "CCAA Entities") applied for and were granted protection under the *Companies' Creditors Arrangement Act* (the "CCAA") pursuant to an Initial Order of this court dated June 14, 2012 (the "Initial Order"). Ernst & Young Inc. was appointed as Monitor (the "Monitor") of the CCAA Entities and FTI Consulting Canada Inc. ("FTI Consulting") was appointed Chief Restructuring Officer ("CRO") of the CCAA Entities.

[2] Certain of Northstar Canada's direct and indirect U.S. subsidiaries (the "Chapter 11 Entities") commenced insolvency proceedings (the "Chapter 11 Proceedings") pursuant to Chapter 11 of the United States Bankruptcy Code on June 14, 2012 in the United States Bankruptcy Court for the District of Delaware (the "U.S. Court"). The CCAA Entities and the Chapter 11 Entities are sometimes collectively referred to herein as "Northstar".

[3] Northstar supplies components and assemblies for the commercial and military aerospace markets, and provides related services. Northstar provides goods and services to customers all over the world, including military defence suppliers, as well as the U.S. army. Northstar's products are used in the Boeing CH-47 Chinook helicopters, Boeing AH-64 Apache helicopters, Sikorsky UH-60 Blackhawk helicopters, AgustaWestland Links/Wildcat helicopters, the Boeing F-22 Raptor Fighter aircraft and various other helicopters and aircraft.

[4] The history of this proceeding is set out in previous endorsements of Morawetz J., most recently his Reasons dated July 30, 2012 (2012 ONSC 4423) approving the Heligear Transaction, vesting all of the Canadian Purchased Assets in the Canadian Purchaser free and clear of all restrictions, and authorizing and directing the Monitor, on the closing of the Heligear Transaction, to make distributions to the DIP Agent for the DIP Lenders and to the Lenders in accordance with their legal priorities.

[5] The Heligear Transaction has not yet closed.

[6] Changsha Zhongchuan Transmission Machinery Co., Ltd., a manufacturer of gears located in Hunan, The People's Republic of China, is the exclusive supplier to Northstar Canada of the gears that make up the components in gearboxes sold by Northstar to General Electric Company on an on-going basis. According to Nigel Meakin, a senior managing director of the CRO, the gears provided by Changsha are essential to Northstar's continued supply of gearboxes to GE on a timely basis in accordance with the Revenue Sharing Agreement between Northstar Canada and GE.

[7] Changsha rendered two invoices to Northstar Canada totaling US$ 135,226.06 prior to the Initial Order. Those invoices remain unpaid. Notwithstanding that paragraph 17 of the Initial Order requires Changsha to continue supplying goods to Northstar Canada, Changsha has informed the CCAA Entities that until the two invoices are paid, it will not supply further materials to Northstar Canada. The evidence discloses that re-sourcing the gears would take approximately 12 months, and the inability of Northstar to deliver gearboxes "may imminently impact GE production lines".

[8] Under the Heligear Transaction the amounts owing under the Changsha invoices might be treated as Cure Costs, making them payable by the CCAA Entities on closing. The CRO deposed, however, that given the urgency of obtaining supply from Changsha, it is necessary for payment of the invoices to be made whether or not the amounts are Cure Costs and, in any event, payment is required earlier than the closing date.

[9] The CCAA Entities therefore move for an order authorizing them to make a payment of US$ 135,223.06 to Changsha in respect of those amounts owing for supplies delivered prior to the commencement of these *CCAA* proceedings.

II. Positions of the parties

[10] The Monitor supports the relief requested. Fifth Third Bank does not oppose the relief sought; Boeing Capital supports the motion. All wish to see the Heligear Transaction close

quickly. No interested person appeared to oppose the motion or communicated its opposition to the CCAA Entities or the Monitor.

III. Analysis

[11] In *Cinram International Inc. (Re)*[1] Morawetz J. accepted, as an accurate summary of the applicable law on this issue, the following portions of the applicant's factum in that case:

> ***Entitlement to Make Pre-Filing Payments***
>
> 67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Re Canwest Global*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.
>
> *Canwest Global supra*, at paras. 41 and 43; Book of Authorities, Tab 1.
>
> 68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:
>
> a. whether the goods and services were integral to the business of the applicants;
>
> b. the applicants' dependency on the uninterrupted supply of the goods or services;
>
> c. the fact that no payments would be made without the consent of the Monitor;
>
> d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
>
> e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

[1] 2012 ONSC 3767

> f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.
>
> *Canwest Global supra*, at para. 43; Book of Authorities, Tab 1.
>
> *Re Brainhunter Inc.*, [2009] O.J. No. 5207 (Sup. Ct. J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.
>
> *Re Priszm Income Fund* (2012), 75 C.B.R. (5th) 213 (Ont. Sup. Ct. J.) at paras. 29-34; Book of Authorities, Tab 14.

[12] In the present case the evidence disclosed that the materials supplied by Changsha are integral to the business of the CCAA Entities, they depend on the uninterrupted supply of those goods, and they lack a sufficient inventory of the goods on hand to meet their needs, with the potential of imminently affecting the production lines of GE, one of their customers.

[13] The Monitor supports the order sought; no party opposes the motion.

[14] Although Changsha is subject to the critical supplier provisions of the Initial Order, the simple reality of the situation is that Changsha is located outside the jurisdiction of this court and the courts in the parallel U.S. Chapter 11 proceedings. Enforcement of the Initial Order against Changsha could not occur in a timely fashion. In my view, this practical reality weighs heavily in favour of granting the order sought, although granting the order, in a sense, rewards improper conduct by a critical supplier who has ignored an order of this court and has the effect of countenancing a form of hard-ball queue-jumping.

[15] That said, in light of the support by interested parties for the order sought, business realities must prevail in order to ensure the continued operation of Northstar Canada pending closing of the Heligear Transaction. Accordingly, I grant the order requested by the CCAA Entities and authorize them to pay Changsha the amount of US$ 135,223.06 in satisfaction of the two invoices.

D. M. Brown J.

Date: August 7, 2012

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Soccer Express Trading Corp. (Re),*
2020 BCSC 749

Date: 20200512
Docket: S204288
Registry: Vancouver

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

- AND -

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

- AND -

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED

- AND -

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SOCCER EXPRESS TRADING CORP. AND KAHUNAVERSE SPORTS GROUP INC.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

Counsel for Petitioners, Soccer Express Trading Corp. and Kahunaverse Sports Group Inc.:	C.J. Ramsay K.G. Mak N. Carlson (A/S)
Counsel for Monitor, PricewaterhouseCoopers Inc.:	V. Tickle L. Williams
Counsel for Greyrock Capital Incorporated:	K. Robertson D. Jackson

(2) Should the Court declare adidas to be a "critical supplier" and order continued supply?

[64] Section 11.4 of the *CCAA* is intended to allow the Court to intervene and order continued supply where actions that might otherwise be taken by a supplier might jeopardize the restructuring efforts that are underway. Such relief is not unlike other *CCAA* provisions that allow relief which adversely affects other stakeholders in aid of these objectives and measures. The stay of proceedings and the priming of existing security are other examples.

[65] In *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 at para. 43, Justice Pepall (as she then was) described an order under the provision as "facilitative and practical in nature".

[66] As always, a balancing of interests is required in determining what is appropriate and fair in the circumstances. In that respect, the comments of the Court in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 bear repeating:

> [70] . . . Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[67] I readily conclude that this Court should exercise its discretion to declare adidas as a "critical supplier" under s. 11.4(1) of the *CCAA* given the following circumstances:

a) The relationship between the Petitioners and adidas is significant, a point conceded by adidas' counsel in argument;

b) Adidas supplies unique branded goods to the Petitioners, as their customers wish to purchase and arising from the active promotion of

adidas products by the Petitioners to their customers over the course of their long relationship;

c) The relationship at this point is beyond repair and continues to be acrimonious. Adidas has indicated that it is not prepared to continue to supply without a court ordering it to do so;

d) The Petitioners do not have the capability to pivot away from the supply of adidas products in the near term to other or similar products;

e) Any disruption in the continued supply of adidas products at this time would have serious and negative repercussions to the Petitioners' business operations into the near term and would likely cause irreparable harm to their businesses;

f) If any disruption to the adidas supply occurs, with expected negative consequences, there is serious jeopardy to Greyrock's support of these proceedings; and

g) Without Greyrock's support of these proceedings, there is significant risk that the restructuring proceedings will fail entirely, with disastrous consequences to most stakeholders in the event of a liquidation of assets. Those stakeholders include the significant supplier group, which includes adidas.

[68] In my view, declaring adidas to be a critical supplier is consistent with the statutory objectives of the *CCAA* and well supported by the circumstances here. It is so ordered. Adidas is ordered to continue to supply its products and provide services to the Petitioners under the arrangements in place prior to the NOI filings, until further court order. Those services will include providing access to the MiTeam and B2B platforms, as before.

Court of Queen's Bench of Alberta

Citation: EarthFirst Canada Inc. (Re) 2009 ABQB 78

Date:20090203
Docket: 0801 13559
Registry: Calgary

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

And in the Matter of a Plan of Compromise or Arrangement of
EarthFirst Canada Inc.

Corrected judgment: A corrigendum was issued on July 8, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Madam Justice B.E.C. Romaine

Introduction

[1] EarthFirst Canada Inc., a corporation under the protection of an initial order granted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended, sought to establish a "hardship fund" that would be used to allow it to pay pre-filing obligations owing to certain suppliers and contractors operating in the community near which EarthFirst is developing a wind farm project. I authorized the establishment of this fund, and these are the reasons for my decision.

Background

[2] EarthFirst is a publicly-traded developer of renewable wind energy in Canada. It has several projects under development and the most advanced is a wind farm under construction at Dokie Ridge in northeast British Columbia. This project is to be developed in two phases, with the first involving the construction of eight turbines and the second involving a further 40 turbines.

[3] EarthFirst's financial difficulties arose primarily from cost overruns on the Dokie Project, combined with difficulties in completing re-financing and/or restructuring initiatives, exacerbated by the general tightening of credit markets.

[4] The Dokie Project is located in a remote area of British Columbia close to three first nations' communities. The development has involved local contractors and suppliers whose viability is significantly dependant on this project. Some of these local contractors and suppliers have significant account receivable balances owing from EarthFirst, and some have not received payment from EarthFirst for several months. Certain creditors face immediate financial difficulty, including the inability to fund payroll and purchase critical supplies to continue operations. If some relief is not available, these local operations face bankruptcy.

[5] EarthFirst, with the aid and support of the Monitor, proposed the establishment of a fund of $1.5 million to be disbursed in payment of some pre-filing claims of certain local suppliers who are in significant financial difficulty. Payments from the hardship fund are to be at the discretion of EarthFirst's Chief Restructuring Officer and subject to the approval of the Monitor. Such payments are to be considered an interim distribution under a future plan of arrangement and will be reflected in any final distribution to creditors.

[6] The amount of the hardship fund was arrived at following discussions among EarthFirst, the Monitor, the local suppliers and contractors. The proposal recognizes the potential domino effect of a failure to fund small, local businesses that are dependant on the continued development of the Dokie Project and are essential to future construction activities and the preservation of the project's value, and the dire and harsh consequences in the surrounding communities of the inability of such businesses to meet payroll obligations. The company and the Monitor submit that payments from the fund would contribute to necessary goodwill in the area and that cooperation and support of the local community is required to ensure that the value of the project is maximized. EarthFirst also notes that, while a CCAA stay of proceedings affects many creditors, the proposed recipients of the hardship fund in this isolated community are particularly vulnerable and at risk.

[7] While the nature of payments from the hardship fund is different from the issue that was before Farley, J. in Re Air Canada, 2003 CarswellOnt. 5296 (at para. 4), and while EarthFirst is not suggesting that recipients of the fund are "critical suppliers" in the usual sense of the term, it appears to be the case that, as in Air Canada, the potential future benefit to the company of these relatively modest payments of pre-filing debt is considerable and of value to the estate as a whole. The decision to allow the hardship fund thus outweighs the prejudice to other creditors, justifying a departure from the usual rule.

[8] Counsel for the Monitor noted that the payments are likely necessary in order to preserve the opportunity to complete the Dokie Project, if that option appears to be the best way to maximize recovery for creditors. It was likely the recognition of this factor that led to little opposition to the application, including from the primary secured creditor. The opposition that

was expressed related to a lack of certainty over which unsecured creditors would benefit. While the Monitor would not commit to full public disclosure of the recipients of the hardship fund, which might provoke the precise financial embarrassment and consequential business failure that payments from the fund are intended to prevent, the company and the Monitor were clear that payments would be limited to bare-bone payments "essential to keeping the lights of the recipient company on": *Re Smoky River Coal Ltd.*, 2000 CarswellAlta 830 at para. 40.

[9] I am satisfied that the payment of these case-specific pre-filing debts in a limited amount in order to preserve the value of this CCAA-debtor's primary asset and the option of continuing its development for the benefit of all creditors is fair and reasonable in the circumstances and in accordance with the purpose and objectives of the *Companies' Creditors Arrangement Act*.

Heard on the 28th day of January, 2009.
Dated at the City of Calgary, Alberta this 3rd day of February, 2009.

B.E.C. Romaine
J.C.Q.B.A.

Appearances:

Howard A. Gorman and Randal Van de Mosselaer
Macleod Dixon LLP
for EarthFirst Canada Inc.

A. Robert Anderson, Q.C.
Osler Hoskin & Harcourt LLP
for the Monitor Ernst & Young Inc.

Brian P. O'Leary, Q.C., Doug S. Nishimura and Trevor A. Batty
Burnet, Duckworth & Palmer LLP
for WestLB AG

Jeffrey Thom, Q.C.
Miller Thompson LLP
for the IDL Projects Ltd.

Susan Robinson-Burns
Miles Davison LLP
for Synergy Engineering Ltd.

Benjamin La Borie
Heenan Blaikie LLP
for Gisborne Industrial Construction Ltd.

V. Philippe (Phil) Lalonde
Brownlee LLP
for Interoute Construction Ltd.

Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice B.E.C. Romaine

The citation Re Earthfirst Canada Inc. (*Companies' Creditors Arrangement Act*) 2009 ABQB 78 was corrected to read "Earthfirst Canada Inc. (Re) 2009 ABQB 78"

COURT FILE NO.: 09-8240-CL
DATE: 20090624

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC.

Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **L. J. Latham, F. L. Myers and C. G. Armstrong, for the Applicants**

A. Kauffman, for the Rainier Holdings LLP

A. Cobb, for the Bank of America

M. P. Gottlieb, for RSM Richter Inc.

HEARD: **June 17, 2009**

E N D O R S E M E N T

[1] On June 17, 2009, I granted an Initial Order under the *Companies' Creditors Arrangement Act* ("CCAA") which provided CCAA protection to Eddie Bauer of Canada, Inc. ("EB Canada") and Eddie Bauer Customer Services Inc. ("EBCS" and, with EB Canada, the "Applicants"), with brief reasons to follow. These are the reasons.

[2] The application was not opposed.

[3] Having reviewed the Affidavit of Marvin Toland, the Chief Financial Officer of Eddie Bauer Holdings Inc. ("EB Holdings") and a Vice President of EB Canada and EBCS (the "Toland Affidavit") as well as the Report of RSM Richter Inc. ("RSM"), the proposed Monitor of the Applicants (the "RSM Report"), I am satisfied that the Applicants qualify as proper applicants under the CCAA.

[4] EB Holdings and Eddie Bauer Inc. ("EB Inc.") (collectively, the "US Debtors") have filed voluntary petitions (the "Chapter 11 Proceedings") for relief under Chapter 11 in the United States Bankruptcy Court for the District of Delaware.

[5] The U.S. Debtors and the Applicants are collectively referred to as the "Eddie Bauer Group".

[6] EB Canada is a Canadian corporation and EBCS is an Ontario corporation.

[7] EB Canada is a wholly-owned subsidiary of EB Inc. which, in turn, is a wholly-owned subsidiary of EB Holdings.

[8] EB Canada is located in Vaughan, Ontario and is the main operating company in Canada, focussing on operating the business of Eddie Bauer's 36 retail stores and its one warehouse store in Canada.

[9] EBCS is located in Saint John, New Brunswick. EBCS is also a wholly-owned subsidiary of EB Inc., and is therefore an affiliate of EB Canada. EBCS operates a call centre.

[10] The Applicants have liabilities in excess of $5 million and have declared themselves to be insolvent.

[11] I am satisfied that, based on a reading of the Toland Affidavit and the RSM Report, that the Applicants cannot carry one business independently from the US Debtors.

[12] The Toland Affidavit establishes that the Applicants are fully integrated into the US and except for some Canadian-specific functions, all of the "head office" functions are based out of Eddie Bauer's head office in Bellvue, Washington.

[13] The principal indebtedness of each Applicant is the inter-company loan that arises between each Applicant and the US Debtors.

[14] The Toland Affidavit also establishes that the Applicants depend on financing from EB Inc. to carry on business.

[15] The Toland Affidavit also establishes that the primary purpose of the CCAA Proceedings and the Chapter 11 Proceedings (collectively, the "Restructuring Proceedings") is to allow the Eddie Bauer Group the opportunity to maximize the value of its business and assts in a unified, court-supervised sales process.

[16] The US Debtors have, subject to necessary Chapter 11 approvals, obtained DIP Financing.

[17] RSM understands that the Applicants do not have any secured creditors (with the possible exception of equipment lessors, if any), nor are the Applicants a borrower or guarantor under the US Debtors' Senior Secured Revolving Credit Facility.

[18] The Applicants are funded by the US Debtors on an unsecured basis and the obligation is tracked in the inter-company account.

[19] The proposed DIP Facility contemplates the US Debtors to advance up to US $7.5 million to the Applicants and US Debtors be granted a charge over the assets of the Applicants limited to the actual amount of inter-company advances.

[20] The DIP Facility is predicated on the US Debtors carrying out a Sale Process, which will include the marketing of the businesses and assets of the US Debtors and the Applicants. The Sales Process will be subject to approval by this Court and the US Court. I am satisfied that the proposed DIP Facility is appropriate in the circumstances as is the creation of the Inter-company Charge as described in the Toland Affidavit and the RSM Report.

[21] The proposed form of order is based on the Model Order. It provides for other charges as described in the Toland Affidavit and the RSM Report. These charges are the Administrative Charge and the Directors' Charge. I am satisfied that these charges are reasonable in the circumstances.

[22] The proposed order also provides that the Applicants shall be entitled but not required to pay amounts owing for goods and services actually supplied to the Applicants prior to the date of the Order. The RSM Report comments on this point. The Eddie Bauer Group is of the view that operations could be disrupted and its vendor relationships adversely impacted if it does not have the ability to pay pre-filing obligations to certain vendors and it further believes that the value of its business will be maximized if it can pay its pre-filing creditors. RSM has reviewed this issue and is supportive of this provision as the Eddie Bauer Group believes it is a necessary provision and the DIP Lenders are supportive of the Restructuring Proceedings. The relief requested in these proceedings is consistent with the relief sought in the Chapter 11 Proceedings. This provision is unusual but, in the circumstances of this case, appears to be reasonable.

[23] As previously noted, I am satisfied that the Applicants qualify as debtor corporations within the meaning of the CCAA. They have obligations in excess of the qualifying limit and have acknowledged they are insolvent. The jurisdiction of the court to receive the CCAA application has been established.

[24] The Applicants seek an Initial Order under Section 11 of the CCAA. The Statement of Projected Cash Flow and other financial documents required under Section 11(2) have been filed. RSM Richter has consented to act as Monitor. The application was not opposed by any party appearing.

[25] I am satisfied that it is appropriate that the Applicants be granted protection under the CCAA and an order shall issue to that effect.

[26] The Applicants are fully integrated into the operations of the US Debtors. The Applicants have not filed under Chapter 11. The Applicants do, however, recognized that it is important to coordinate the activities of the Eddie Bauer Group in the two proceedings and, to this end, the Applicants have proposed the adoption of a Cross-Border Insolvency Protocol (the

"Protocol") which incorporates by reference the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (the "Guidelines").

[27] Mr. Toland stated that he believes the Protocol is needed to ensure that: (i) both the CCAA and Chapter 11 Proceedings are coordinated to avoid inconsistent, conflicting or duplicative rulings by the Courts; (ii) all parties of interest are provided with sufficient notice of key issues in both proceedings; (iii) the substantive rights of all parties in interest are protected; and (iv) the jurisdictional integrity of the Court is preserved.

[28] I accept the views of Mr. Toland. It seems to me that all parties would be best served if the Protocol is implemented. Accordingly, I approve the Protocol, in substantially the form included in the Application Record. It is recognized, however, that the implementation of the Protocol cannot take effect until such time as the Protocol has also been approved by the US Bankruptcy Court.

[29] An order shall issue to give effect to the foregoing.

[30] I appreciate the efforts of the parties involved in this process. The detail contained in the Toland Affidavit and the RSM Report was of great assistance to the Court.

MORAWETZ J.

DATE: June 24, 2009

Ontario Superior Court of Justice
Air Canada (Re)
Date: 2003-12-17
Docket: 03-CL-4932

David R. Byers, Timothy Banks, Karen Park for Applicants, Air Canada

James P. Dube, Susan M. Grundy for Lufthansa

Aubrey Kauffman for Ad Hoc Committee of Financial Creditors

Gregory Azeff for GECAS

A. Cobb for Trinity Time Investments Limited

Joseph Bellissimo for Ad Hoc Aircraft Lessor/Lender Group

Erik Penz for Unsecured Creditors Committee

Jeremy Dacks for GE Capital

Peter J. Osborne, Monique Jilesen for Monitor

Farley J.:

[1] On December 17, 2003 at the end of the hearing, I wrote a very short Endorsement approving the Canada-Germany Co-operation Agreement ("Agreement") between Air Canada ("AC") and Deutsche Lufthansa Aktiengesellschaft ("LH") promising that I would provide reasons in due course. These are those reasons.

[2] The Agreement was supported by all those appearing except for certain bondholders represented by Mr. Kauffman. His submissions were that AC and LH were attempting to have LH "gain an advantage over other creditors to which it is not otherwise entitled," indicating that this was being done in "precisely the same manner disapproved by Justice Blair" in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re,* [1999] O.J. No. 3657 (Ont. S.C.J. [Commercial List]) at paragraph 10. The Court must always be concerned that there not be ill-founded arm-twisting of a CCAA applicant, such that the Applicant and its creditors and other stakeholders are put to a significant disadvantage. These concerns were generally addressed in the Report of the Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals Joint Task Force on Business Insolvency Law Reform of March 15, 2002 by recommendations 15-17. I attach a copy of those recommendations and the commentary as an appendix (Appendix "A") to these reasons. Perhaps it would be salutary if the critical vendor issue were addressed in a somewhat strengthened way if it were made clear that not more than, say one-half or one-third of a pre-filing debt could be "pressured out" of an

applicant so that there might be some sharing of the pain by the critical vendor of what the other unsecured vendors were experiencing. Any such “pressured out” payment would leave to be accounted for in the plan of re-organization with respect to the balance of the debt which would be compromised. In any event, it would appear to me that in exercising its discretion, the Court ought to take into account the extent and nature of support of interested parties as to the payment to a critical vendor.

[3] In the subject case, I find that the relationship with LH has been extremely beneficial to AC and it is reasonably expected that the benefit will continue to increase during the currency of the Agreement to 2009 and that the arrangements contemplated therein would likely not be possible to duplicate with any other airline (given LH’s dominant position in Europe and its facility to be able to seamlessly be able to give AC’s passengers to Eastern Europe and other promising areas of the world). Indeed, it would be extremely disruptive if the relationship were not continued. (LH indicated that it would terminate its relationship at the earliest opportunity if the Agreement were not approved). I note, in this regard that there was no direct evidence; however, there was no request for an adjournment or even cross-examination on the Brewer AC affidavit in this regard (which may suggest that Mr. Kauffman’s concern here was more technical than practical - but he has a legitimate concern about this practice, which in my view is to be avoided in future absent justifiable and unusual circumstances). However, I do note that the Monitor in its 16th Report did not indicate that it had any concerns (after its extensive investigation of the situation) as to the legitimacy of the concern about the danger to AC or the *bona fides* of LH’s caution.

[4] The future net benefit to AC of the future arrangements and cooperation is expected to be substantial and considerably in excess of the pre-filing debt to LH which is to be paid over time pursuant to the terms of the Agreement.

[5] The cost to AC to attempt to obtain even part of the benefit through alliances through other airlines, if possible, would be extremely expensive.

[6] Taking these various factors into consideration, it is understandable that there was considerable support from the others taking part in this hearing. The Monitor has helpfully ruled out a potential double recovery issue vis-à-vis LH payments and the Kreditanstalt fur Wiederaufbau (“KfW”) loan transaction. These are documented by the LH and KfW letters at Tab C of the Monitor’s 16th Report.

[7] In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), I observed at page 173 that, in dealing with creditors under the CCAA, equitable treatment is not necessarily equal treatment and that the objective should be fair, reasonable and equitable treatment.

[8] With respect to *Red Cross, supra,* I note that the concern there of Blair, J. was that there was to be a lump sum payment out of the existing assets in what would be the CCAA Estate, which payment would diminish that estate out of which the other creditors would be paid. In contrast, the Agreement provides for payments to LH in the future and which are reasonably expected to be paid out of the future net profits guaranteed by AC and if the relationship with LH now consolidated and confirmed by the Agreement. See Blair, J.'s views in this regard at paragraphs 12-14:

> ¶ 12…[R] egardless of the merits of the settlement as between its immediate parties or the apparent worthiness of its beneficiaries, I am not persuaded that a strong unsecured creditor and the debtor can effectively isolate a particular claim and carve it out of the CCAA proceedings by simple expedient of entering into an agreement purporting to settle their future relations.
>
> ¶ 13 The foregoing is premised, of course, on the lump sum payment which is made as part of the Settlement being paid out of a fund which is not a segregated trust fund and, therefor [sic], something outside of the CCAA proceedings….
>
> ¶ 14… In my view, it must be determined, however, before approval can be given to the pay equity settlement. If the Homemakers' Fund from which the $10.2 million payment is to be made is, indeed, a segregated trust fund whose participants are agreeable to its being used for the purposes indicated, I would have no difficulty in approving the Settlement. Clearly it would be in the interests of the Red Cross, the Union and the employees in question, and all of the Red Cross Claimants to have the pay equity claim dealt with <u>in the fashion proposed</u>, if that were the case. In the absence of such a determination, however, I am not prepared to grant such approval, for the reasons articulated above (emphasis added).

[9] In the result, I am of the view that the truly extraordinary and indeed it seems to me unique relationship of LH and AC which is so beneficial to AC and reasonably expected to be even more so in the future is to the overall benefit of the creditors and stakeholders of AC generally. If it were not approved and implemented, then AC and its creditors and stakeholders would probably be dealt a severe body blow which could well have a devastating effect upon the question of AC successfully emerging from this CCAA process. The Agreement is therefore approved.

[10] Appendix attached.

Order accordingly.

APPENDIX "A"

15. Provide (in both CCAA and BIA proposal cases) that no payments are to be made or security granted with respect to pre-filing unsecured claims without prior court approval (obtained after the initial order), except that with the prior written consent of the monitor/trustee (unless otherwise ordered by the court) the following pre-filing claims can be paid:

(a) source deductions;

(b) wages (including accrued vacation pay), benefits and sales tax remittances not yet due or not more than seven (7) days overdue at the date of filing; and

(c) reasonable professional fees (subject to subsequent assessment) incurred with respect to the filing.

16. Provide (in both CCAA and BIA proposal cases) that no payments are to be made or additional security granted with respect to pre-filing secured claims (including security leases) that are subject to the stay without the prior approval of the court.

17. Provide that during a reorganization proceeding if there is no readily available alternative source of reasonably equivalent supply, then in order to prevent hostage payments the court has jurisdiction, on notice to the affected persons, to order any existing critical suppliers of goods and services (even though not under pre-filing contractual obligation to provide goods or services) to supply the debtor during the reorganization proceeding on normal pricing terms so long as effective arrangements are made to assure payment for post-filing supplies.

These three proposals complement one another and balance a prohibition on payment of pre-filing claims with important carve outs to recognize particular needs and interests. Proposal #15 prohibits payments being made or security granted to pre-filing unsecured claims without prior court approval. This prohibits the debtor from giving a preference to unsecured creditors, to the prejudice of more senior creditors or other unsecured creditors. However, the recommendation also recognizes that there are circumstances where it is in the interests of the debtor company as well as the general body of creditors to make payments. These include source deductions such as income tax, employment insurance and pension deductions, wages, accrued vacation pay, benefits and sales tax remittances that are not yet due or not more than 7 days overdue when the debtor files its application. In such cases, the debtor corporation, with the prior written consent of the monitor or trustee, can pay the claims without the cost and delay of having to obtain a court order.

This meets fairness objectives in that employees are being paid specified amounts and will be encouraged to stay through the restructuring. Tax remittances held in trust can also be paid for a limited period. The monitor or trustee acts as a check on behalf of the court and the general body of creditors in approving the payments. The debtor can go to the court if it believes that the monitor or trustee is withholding consent without valid reason.

The debtor would also be permitted to pay reasonable professional fees incurred with respect to the filing, also with the prior written consent of the monitor or trustee and subject

to subsequent assessment by the court. This will facilitate timely filing of CCAA applications and commencement of the restructuring negotiations, and should prevent excessive appearances before the court. The subsequent assessment condition provides creditors with an avenue to object to these payments if they believe that they are excessive or unreasonable.

Proposal #16 is a prohibition on payments to be made or additional security to be granted to pre-filing secured creditors. This is aimed at ensuring both that a preference is not given to one or more secured creditors and that such creditors are not in a position to extract hostage payments from the debtor company during the stay period. Thus it is aimed at protection of the general body of creditors. Payments can be made or additional security granted if the court gives prior approval. Thus the general prohibition is tempered by granting the court discretion in its supervisory capacity to approve payments or security where appropriate.

Proposal #17 then recognizes that there may be instances in which there is no readily available alternate source of supply that is reasonably equivalent to the goods or services of a particular supplier. In order to prevent that creditor from extracting hostage payments during the restructuring proceeding, i.e. from demanding credit on excessive terms because the debtor has no ability to contract with another supplier, the recommendation puts in place a mechanism for the court to supervise the issue of continued supply of goods and services. The court would have the jurisdiction, on notice to the affected persons, to order an existing critical supplier of goods and services, even where it was not under a pre-filing contractual obligation to continue supplying, to supply the debtor company during the reorganization proceeding. The court would have authority to order this on normal pricing terms, as long as effective arrangements were made to ensure payment for post-filing supplies. Thus the creditor would be required to continue to supply for a fixed period on normal pricing terms, but it would not be required to accept normal payment terms and the arrangement for payment by the debtor would have to satisfy the court that it was effective and timely. If the supplier had legitimate reasons for refusing to supply or for requesting increased pricing (for example, in order to recover extraordinary costs), the court would have authority to protect the supplier.

These three proposals together allow the debtor some discretion in respect of allowing payments, under supervision of the court-appointed officer, while ensuring that the general body of creditors is protected from the debtor preferring pre-existing creditors or being held hostage by a critical supplier. The fairness objectives are that it allows the debtor to

continue to receive needed supplies and services, while balancing the interests and prejudice to other creditors. In terms of efficiency objectives, there is likely to be need for fewer court appearances if all stakeholders, including court-appointed officers and creditors, are given clear guidelines on the scope and ability to make payments or grant additional security during the stay period.

Ontario Supreme Court
PSINet Ltd., Re
Date: 2002-03-14

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

In the Matter of a Plan of Compromise or Arrangement of PSINet Limited, PSINet Realty Canada Limited, PSINetworks Canada Limited and Toronto Hosting Centre Limited, Applicants

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: March 14, 2002

Judgment: March 14, 2002

Docket: 01-CL-4155

Lyndon A J. Barnes, Monica Creery, for Applicants

Geoffrey B. Morawetz, for the Monitor, PricewaterhouseCoopers Inc.

Peter H. Griffin, for PSINet Inc.

Edmond F.B. Lamek, for 360Networks Services Ltd.

***Farley J.*:**

[1] This motion was for the sanctioning of the consolidated plan of arrangement or compromise of the four Canadian applicants under the *Companies' Creditors Arrangement Act* ("CCAA"). The consolidated plan was approved by the creditors of the applicants at meetings held February 28, 2002. Since that time and as permitted by the consolidated plan there have been ongoing negotiations concerning various aspects of the plan. It is a tribute to the expertise and experience of the parties involved and their counsel that they have been able to negotiate resolutions of the various points in issue with the result that this sanction motion is unopposed. I also think it commendable that the Monitor so amply demonstrated the objectivity and neutrality which is the hallmark of a court-appointed officer.

[2] I am advised that while the applicants initially considered an unconsolidated plan which had the support of PSINet Inc. (“Inc.”), their parent and major creditor, it was considered that the consolidated route was the way to go. The consolidated plan avoids the complex and likely litigious issues surrounding the allocation of the proceeds from the sale of substantially all of the assets of the applicants to Telus Corporation. The consolidated plan also reflected the intertwined nature of the applicants and their business operations, which businesses in essence operated as a single business and with only one of the applicants having employees. I have previously alluded to the incomplete and deficient record keeping of the applicants. While shooting oneself in the foot should not be endorsed, this is another factor favouring consolidation and the elimination of expensive allocation (amongst the four Canadian applicants) litigation.

[3] I note that the consolidated plan also provides that Inc. valued its charge against the assets of PSINet Limited (“Ltd.”) one of the applicants to $55 million. The Monitor, PricewaterhouseCoopers Inc. found this to be a reasonable amount and within the range of values which might reasonably be anticipated. Again however I would repeat my observation about incomplete and deficient record keeping.

[4] At the February 28th meeting of creditors, a single class of creditors, namely the unsecured creditors, voted on the consolidated plan as it then existed. Secured creditors were not affected by the plan, but were of course characterized as unsecured creditors to the extent that their claim exceeded the expected deficiency in the deemed realization of their security. 92.7% of the creditors voting, representing 98.8% in value of the claims, voted in favour of the plan. Had the votes of Inc. and other creditors affiliated with the applicants been ignored, then 92.5% of the class, representing 87.2% in value voted in favour of the plan.

[5] Since the vote, 360Network Services Ltd. (and other affiliates) (“360Networks”) have reached agreement with the applicants and Inc. to resolve a motion brought by 360Networks in respect of its concerns regarding the consolidation of the estates of the applicants in the plan of arrangement.

[6] Similarly Inc. has made certain concessions as to the plan with an eye to making good on the condition imposed on it to make a material (albeit modest) adjustment so as to compensate the other creditors for the “frustration cost” associated with Inc.’s late blooming discovery of its security vis-à-vis Ltd. and its motion to reperfect this security.

[7] The three part test for sanctioning a plan is laid out in *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Sammi Atlas Inc., Re,* 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]):

> (a) There must be strict compliance with all statutory requirements and adherence to the previous orders of the court;
>
> (b) All material filed and procedures carried out are to be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA or other orders of the court; and
>
> (c) The plan must be fair and reasonable.

[8] It appears to me that parts (a) and (b) have been accomplished, now that Inc. has made the further concessions. The creditors have had sufficient time and information to make a reasoned decision. They have voted in favour of the consolidated plan by a significant margin over the statutory requirement, even where one eliminates the related vote of Inc. and its affiliates. In reviewing the fairness and reasonableness of a plan, the court does not require perfection. As discussed in *Sammi* at p. 173:

> A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment… One must look to the creditors as a whole (i.e. generally) and to the objecting creditors (specifically), and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights …

[9] There is a heavy onus on parties seeking to upset a plan that the required majority have supported: See *Sammi* at p. 174 citing *Central Guaranty Trustco Ltd., Re,* 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List])

[10] The fairness and reasonableness of a plan are shaped by the unique circumstances of each case, within the context of the CCAA. In *Canadian Airlines Corp., Re,* [2000] 10 W.W.R. 269 (Alta. Q.B.), leave to appeal refused [2000] 10 W.W.R. 314 (Alta. C.A. [In Chambers]) Paperny J. at p. 294 considered factors such as the composition of the unsecured vote, what creditors would receive on liquidation or bankruptcy as opposed to the plan, alternatives available (to the plan and bankruptcy) and the public interest. I have already discussed the first element; the third and fourth do not appear germane here. As to the second, it is clear that the creditors generally are receiving more than in a bankruptcy and to the extent that Inc. is impacted, it has consented to such impact.

[11] In the circumstances of this case, the filing of a consolidated plan is appropriate given the intertwining elements discussed above. See *Northland Properties Ltd., Re,* 69 C.B.R. (N.S.) 266 (B.C. S.C.), affirmed (B.C.C.A.), *supra,* at p. 202; *Lehndorff General Partner Ltd., Re,* 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 31. While consolidation by its very nature will benefit some creditors and prejudice others, it is appropriate to look at the overall general effect. Here as well the concessions of Inc. have ameliorated that prejudice. Further I am of the view if consolidation is appropriate (and not proceeded with by any applicant for tactical reasons of minimizing valid objections), then it could be inappropriate to segregate the creditors into classes by corporation which would not naturally flow with the result that one or more is given a veto, absent very unusual circumstances (and not present here). I would also note that *Associated Freezers of Canada Inc., Re,* 36 C.B.R. (3d) 227 (Ont. Bktcy.) and *J.P. Capital Corp., Re,* 31 C.B.R. (3d) 102 (Ont. Bktcy.) which referred to prejudice to one creditor were not CCAA cases, but rather *Bankruptcy and Insolvency Act* cases; secondly *Associated Freezers* merely kept the door open for the objecting party to reconsider its position given the short notice and provided that if on reflection it wished to come back to make its submissions, it was entitled to do so for a period of time.

[12] In the end result (and with no creditors objecting), I approve and sanction the consolidated plan as amended. Order to issue accordingly as per my fiat.

Motion granted.

ATLANTIC YARNS INC. re GE CANADA FINANCE 2008 NBQB 144
S/M/92/07

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

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

-and-

IN THE MATTER OF ATLANTIC YARNS INC., a body corporate and ATLANTIC FINE YARNS INC., a body corporate

RE: GE CANADA FINANCE HOLDING COMPANY MOTION

BEFORE:	**Justice Peter S. Glennie**
HEARING HELD:	**Saint John**
DATE OF HEARING:	**April 1, 2008**
DATE OF DECISION:	**April 1, 2008**
DATE OF REASONS:	**April 11, 2008**

APPEARANCES:

Orestes Pasparakis and M. Robert Jette Q.C. on behalf of GE Canada Finance Holding Company

Joshua J. B. McElman and Rodney E. Larsen on behalf of Atlantic Yarns Inc. and Atlantic Fine Yarns Inc.

James H. Grout and Sara Wilson on behalf of Integrated Private Debt Fund Inc. and First Treasury Financial Inc.

John B. D. Logan on behalf of the Province of New Brunswick

William C. Kean on behalf of Paul Reinhart Inc. and Staple Cotton Co-operative

Robert C. Smith, C. A., Court Appointed Monitor

R E A S O N S

GLENNIE, J. (Orally)

[1] Atlantic Yarns Inc. ("AY") and Atlantic Fine Yarns Inc. ("AFY") obtained relief pursuant to the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c-36, as amended (the "CCAA") by order of this Court dated October 26, 2007 (the "Initial Order").

[2] On December 18, 2007, this Court issued a Claims Procedure Order (the "Claims Procedure Order") and on February 20, 2008 it issued a Creditors Meeting Order (the "Meeting Order").

[3] Subsequent to the issuance of the Meeting Order the parties determined whether there could be a global resolution of all outstanding issues. When no resolution could be realized, one of the secured creditors of AY and AFY (collectively "the Companies"), GE Canada Finance Holding Company ("GE"), brought this motion to address the manner in which voting on the proposed Plan of Arrangement is to be conducted. On April 1, 2008 I denied GE's motion with reasons to follow. These are those reasons.

[4] GE's submission is that the voting procedures set out in the Meeting Order are improper in that they violate the express provisions of both the Initial Order and the Claims Procedure Order; in that the procedures are manifestly unfair and unreasonable; and in that they appear to be designed to silence GE's objections by gerrymandering the voting and diluting GE's voting rights.

[5] In particular, GE asserts that there should be no consolidation of the creditors of the Companies for voting purposes. GE says each of AY and AFY should hold separate meetings with their creditors. As well, GE argues that the

current treatment of the secured creditor class is flawed. It says that either GE ought to be in a separate class or the secured claims ought to be valued and voted in accordance with their value.

[6] The Companies filed a consolidated plan of compromise and arrangement (the "proposed Plan") with this Court on February 19, 2008. The proposed Plan includes two classes of creditors for the purposes of voting on the proposed Plan: a Secured Class (all creditors of each of the Companies holding any security regardless of the value of their security) and an Unsecured Class (all unsecured creditors of each of the Companies).

[7] The Court Appointed Monitor of the Companies, Pricewaterhouse Coopers Inc., delivered a report to the Companies' creditors dated February 21, 2008 which report contains the following:

> "**THE PLAN**
>
> The Applicants have filed a Joint Plan of Arrangement the key Financial Elements of which are:
>
> - Unsecured creditors will received up to 90% of their claim over a relatively short period of time; and
> - Secured Creditors will be afforded payments in respect of their claims based on an amount that in all cases exceeds the liquidation value of the assets held as security.
>
> **ALTERNATIVES TO THE PLAN**
>
> These Companies operate in northern New Brunswick, and the filing of this Plan was in response to a notice from a secured creditor of its intention to appoint a Receiver. It is a virtual certainty that if this plan is not approved, the secured creditor will appoint a receiver and will liquidate the assets subject to its charges by a sale, possibly under Court supervision.
>
> There is a little likelihood that any other party will purchase these assets to operate in situ.

LIQUIDATION ANANLYSIS

The Monitor has considered and reviewed a series of different liquidation analysis, and there is one common theme – the unsecured creditors will receive nothing under any realization plan.

Counsel to the Companies and the Monitor have reviewed the security held by the various secured creditors and concluded that the various security interests are duly registered, filed and recorded, and accordingly create valid and enforceable security against the Applicants.

As can be seen from the Plan terms and conditions, the Secured Creditors holding first charges on the assets of the Companies are being asked to take write downs in their positions. Each of these Secured Creditors has prepared their own analysis which has generally been shared with the Monitor and in the event of a liquidation the Monitor believes that each of such secured creditors will receive a shortfall greater than the alternative provided for in the Plan.

Accordingly, there would be nothing available for distribution to the Unsecured Creditors.

The Secured Creditors will likely wish to consider a sale on a going concern basis. It is the opinion of the Monitor that such a sale is unlikely (except perhaps back to the existing owner) and regardless, the value of the assets that will be realized will be close to the liquidation values.

CONSEQUENCES OF REJECTING THE PLAN

As noted above, if the Plan is rejected by the Creditors or the Court, the assets will be liquidated and:

- Approximately 400 direct jobs will be lost in a largely export oriented business located in a high unemployment area of Canada;
- Approximately 600 indirect jobs will be lost in Canada, with great impact on the remote communities of Atholville and Pokemouche, New Brunswick;

- The Unsecured Creditors will receive nothing on their claims, which in some cases will result in further hardship and business closures.

MONITOR'S RECOMMENDATION

It is the recommendation of the Monitor that ALL affected creditors should approve the Plan.

As a result, creditors are encouraged to send in positive voting ballots and/or proxies as soon as possible."

[8] GE argues that from the start of these CCAA proceedings the Initial Order directed that each of the AY and AFY convene separate creditors' meetings. Paragraph 24 of the Initial Order provides as follows:

> "Each Applicant shall, subject to the direction of this Court, summon and convene meetings between each Applicant and its secured and unsecured creditors under the Plan to consider and approve the Plan (collectively, the "Meetings")."

[9] GE says the Claims Procedure Order directed the valuation of secured claims and required all secured claims to be valued in accordance with the realizable value of the property subject to security. Paragraph 9 of the Claims Procedure Order provides:

> "9. THIS COURT ORDERS that any Person who wishes to assert a Claim against the Applicants, other than an Excluded Claim, must file a properly completed Proof of Claim, together with all supporting documentation, including copies of any security documentation and a valuation of such Creditor's security if a Secured Claim is being asserted, with the Monitor by 5:00 p.m. on January 15, 2008 (defined herein as the Claims Bar Date). The Applicants will be allowed to review the Proofs of Claim and Monitor will provide copies to the Applicants of any Proofs of Claim that they may request from time to time."

[10] The Claims Procedure Order defines 'Secured Claims' as follows:

> "...any Claim or portion thereof, other than the Excluded Claim, which is secured by a validly attached and existing security interest...which was duly and properly registered or perfected in accordance with applicable legislation at the Filing date or in

> accordance with the Initial Order, to the extent of the realizable value of the property of the Applicants subject to such security having regard to, among other things, the priority of such security."

[11] The Proof of Claim form approved in the Claims Procedure Order required creditors to submit an estimate of the value of their security with their claim, and the approved Notice of Disallowance/Revision indicates that secured claims are to be recognized:

> "to the extent of the value of the assets encumbered by such security and subject to any prior encumbrances or security interests."

[12] On January 22, 2008, the Monitor accepted GE's claim and valuation regarding AFY but delivered a Notice of Disallowance in respect of part of GE's claim against AY. The Notice of Disallowance reserved the Monitor's right to value GE's security in respect of this claim if an agreement could not be reached.

[13] On January 31, 2008, for the first time, GE challenged the Companies' CCAA process and sought an alternative course to the Companies' restructuring efforts. GE sought a parallel sales process for the Companies, either on a turn key or piecemeal basis. GE was also critical of the Companies and their failures to meet certain deadlines previously promised by them under the CCAA process. As a consequence, GE withdrew its support of the Companies' CCAA process.

[14] As mentioned, on February 19, 2008 AY and AFY filed a consolidated plan of compromise and arrangement with this Court. The proposed Plan is on a joint and consolidated basis for the purpose of voting on the proposed Plan and receiving distributions under the proposed Plan. The proposed Plan consolidated the Creditors of AY and AFY and allowed all secured claims to be recognized in accordance with their face amount, not their actual value.

[15] GE asserts that the Companies' attempt to fundamentally change the Court's mandated process "came on the heels of GE's opposition the Companies' plans."

[16] Subsequent to the issuance of the Initial Order and the Claims Procedure Order, the Meeting Order was issued by this Court on February 20, 2008 and provides that only two classes of creditors for voting on the proposed Plan: a secured class of all creditors of both Companies and an unsecured class of all unsecured creditors of both Companies; that secured creditors be permitted to vote the face amount of their claim, regardless of the value of their claims; and that GE be classified with all of the other secured creditors.

[17] GE asserts that the effect of the Meeting Order is to consolidate all of the Creditors and permit them to vote the face amount of their claims which GE asserts "serves to swamp GE's vote."

[18] GE has a first charge over the equipment of each of AY and AFY. It obtained an expert valuation report early on in the CCAA process and has provided that valuation to the Companies and the Monitor. Based on the valuation GE says it would recover the full amount of its claims plus accrued interest and costs in an orderly liquidation of the equipment.

[19] GE says its position is very different form the other creditors being compromised under the proposed Plan. GE has security over the Companies' equipment which ought to cover its claims. GE asserts that no other creditor has the same relationship with the Companies or their assets.

[20] Thus, the CCAA process in this case essentially involves two differing interests. On the one hand there are stakeholders, including the Province of New Brunswick, which collectively appear to have lost tens of millions of dollars,

as well as the hundreds of employees who currently have no employment. These stakeholders have already suffered a loss. On the other hand, there is GE, which had sufficient security at the time of filing to cover its claims.

[21] In spite of its unique interest, GE asserts that the Companies have placed GE in a class of creditors where there is no commonality of interest. GE argues that the Companies have gerrymandered the process to try to prevent GE from properly exercising its voting rights.

[22] It is obvious that GE wants to be able to vote down, or veto, the Companies' proposed consolidated Plan of Arrangement on its own. It wants the right to jettison the proposed Plan. No other stakeholder supports GE's position.

[23] The Court appointed Monitor says the proposed Plan of Arrangement and the process which is now in place for the creditors' meeting and the voting process are fair and equitable. In this regard, the Monitor has confirmed that even if this Court were to order two separate creditors meetings with an unconsolidated vote, GE would not be able to veto the proposed consolidated Plan of Arrangement on its own. It should also be noted that GE does not object to the actual proposed Plan of AY and AFY being made on a consolidated basis. It is the voting process that it has a problem with. GE asserts that by consolidating the votes of the Companies' creditors, an "enormous" prejudice to GE is created. However, the Court appointed Monitor has confirmed that there is no prejudice resulting in this regard because GE could not vote down the proposed Plan on its own even if there were two separate meetings and creditors' votes were not consolidated.

[24] It is clear that GE no longer supports the Companies and wants to immediately enforce its security and get paid out now rather than waiting until later.

[25] As mentioned, the Monitor has confirmed that the voting process as it is now structured for the April 2nd meeting of creditors is equitable. The Monitor is of the opinion that the proposed Plan is fair to all parties.

[26] According to its Fourth Report dated March 27, 2008, the Monitor says it is not aware of any creditor, other than GE, which would be voting against the proposed Plan.

[27] GE's position is dealt with in the proposed Plan of Arrangement in paragraph 4.3(b) as follows:

> "b) GE Canada Finance Holding Company
>
> GE shall receive 100% of the amount of its Proven Distribution Claim excluding any Claim for costs, penalties, accelerated payments or increased interest rates resulting from any default of either of the Atlantic Yarn Companies occurring prior to the Plan Implementation Date as follows:
>
> (i) All accrued interest not paid as of the Plan Implementation Date shall be paid within 30 days of the Sanction order;
> (ii) Interest shall accrue at the non-default rate and be paid monthly in arrears;
> (iii) Principle repayment shall be deferred until and commence on January 31, 2009 and continue in 48 equal monthly installments until paid in full; and
> (iv) The Proven Distribution Claims of GE shall be secured by the existing Charges held by GE subject to the February DIP Order."

[28] The Monitor says that the Province of New Brunswick revisions which have been made to the proposed Plan improve the position of GE by virtue of increasing cash flow and deferring cash expenditures until after GE is repaid.

Consolidation of Creditors

[29] GE wants separate creditors meetings for each of the Companies and that there not be a consolidation of the Companies' creditors for the purpose of voting on the proposed Plan.

[30] AY and AFY are affiliated debtor companies within the meaning of section 3 of the CCAA.

[31] Although the Companies are distinct legal entities, they are intertwined in that they are both wholly owned subsidiaries of Sunflag Canada Inc.; there is a commingling of business functions between the Companies in that the marketing divisions, upper employee management, finance management and most suppliers for the Companies are the same, and the employees of both Companies are represented by the same union. As well, AY has guaranteed certain indebtedness of AFY.

[32] In addition, for the purposes of its security, GE treated the Companies as intertwined or linked by virtue of cross default provisions contained in the security held by GE from each of the Companies.

[33] In ***Rescue! The Companies' Creditors Arrangement Act***, by Dr. Janis Sarra, Carswell 2007, the author writes at page 242:

> "The court will allow a consolidated plan of arrangement or compromise to be filed for two or more related companies in appropriate circumstances. For example, in *PSINet Ltd.* the Court allowed consolidation of proceedings for four companies that were intertwined and essentially operated as one business. The Court found the filing of a consolidated plan avoided complex issues regarding the allocation of the proceeds realized from the sale of the assets, and that although consolidation by its nature would benefit some creditors and prejudice others, the prejudice had been ameliorated by concessions made by the parent corporation,

> which was also the major creditor. Other cases of consolidated proceedings such as *Philip Services Canadian Airlines, Air Canada and Stelco*, all proceeded without issues in respect of consolidation.
>
> Generally, the courts will determine whether to consolidate proceedings by assessing whether the benefits will outweigh the prejudice to particular creditors if the proceedings are consolidated. In particular, the court will examine whether the assets and liabilities are so intertwined that it is difficult to separate them for purposes of dealing with different entities. The court will also consider whether consolidation is fair and reasonable in the circumstances of the case."

[34] In ***Northland Properties Ltd. (Re)*** [1988] B.C.J. No. 1210 Justice Trainor writes:

> In *Baker and Getty Financial Services Inc.,* U.S. Bankruptcy Court, N.D. Ohio (1987) 78 B.R. 139, the court said:
>
> > The propriety of ordering substantive consolidation is determined by a balancing of interests. The relevant enquiry asks whether "the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition.
>
> The Court then went on to list seven factors which had been developed to assist in the balancing of interests. Those factors are:
>
> 1. difficulty in segregating assets;
> 2. presence of consolidated financial statements;
> 3. profitability of consolidation at a single location;
> 4. commingling of assets and business functions;
> 5. unity of interests in ownership;
> 6. existence of intercorporate loan guarantees; and
> 7. transfer of assets without observance of corporate formalities.

[35] In ***PSINet Ltd., Re,*** 33 C.B.R.(4th) 284 Justice Farley noted that consolidation of creditors may be appropriate in certain cases where, for example, the nature of the businesses was intertwined, the businesses were operated as a single business or where the allocation of value and claims

between the businesses would be burdensome. He discusses consolidation at paragraph 11 as follows:

> In the circumstances of this case, the filing of a consolidated plan is appropriate given the intertwining elements discussed above. See *Northland Properties Ltd., Re*, 69 C.B.R. (N.S.) 266 (B.C. S.C.), affirmed (B.C.C.A.), *supra*, at p. 202; *Lehndorff General Partner Ltd., Re*, 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p.31. While consolidation by its very nature will benefit some creditors and prejudice others, it is appropriate to look at the overall general effect. Here as well the concessions of Inc. have ameliorated that prejudice. Further I am of the view if consolidation is appropriate (and not proceeded with by any applicant for tactical reasons of minimizing valid objections), then it could be inappropriate to segregate the creditors into classes by corporation which would not naturally flow with the result that one or more is given a veto absent very unusual circumstances (and not present here).

[36] In my opinion the nature of the businesses of AY and AFY were intertwined and, looking at the overall general effect, consolidation is fair and reasonable in the circumstances of this case.

Voting Value of Assets Secured versus Voting Value of Claim

[37] GE wants the claims of secured creditors to be allowed only to the extent of the realizable value of the property of the Companies subject to the security underlying the claim and that any portion of a claim in excess of the underlying security should be listed as an unsecured claim.

[38] Section 12 of the CCAA provides as follows:

> 12.(1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.
>
> (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the *Windings-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or *Bankruptcy and Insolvency Act*, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

(3) Notwithstanding subsection (2), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

[39] In my view, the amount of a secured claim is the amount admitted by the company governed by the CCAA after receiving a proof of the claim. This was the legislative intent. Nowhere in section 12, or anywhere else in the CCAA, is the limit of the value of a secured creditor's claim to be the realizable value of

the assets secured. Where a company governed by the CCAA has developed a plan for its reorganization, the value of a claim should be determined in accordance with paragraph 12(2)(b). The CCAA does not establish a requirement or a procedure for valuing claims. The CCAA is broad and flexible so that Courts can apply the legislation with the overall purpose of restructuring in the context of the facts for any given company.

[40] The value of a secured creditor's claim is the amount outstanding. In my opinion, to require a valuation based on realizable value for voting ignores the value of the security in reorganization and the legislative intent of the CCAA.

[41] I am of the view that the relief sought by GE in this regard is an attempt to maneuver for a better voting position amoung the Companies' secured creditors. It is attempting to fortify its bargaining position in order to negotiate with the Companies for a better deal pursuant to the proposed Plan.

[42] If GE's request in this regard is granted and the claims of the Companies' secured creditors are limited to the realizable value of their security, GE would be able to trump the interests of other stakeholders who would benefit from a plan of arrangement or continuation of the Companies' business. The Quebec Superior Court in ***Re Boutiques San Francisco Inc.*** (2004), 5 C.B.R. (5th) 174, notes as follows:

> Surely, maintaining the status quo involves balancing the interests of all affected parties and avoiding advantages to some of the others. Under the CCAA, the restructuring process and general interest of all creditors should always be preferred over the particular interests of individual ones.

[43] In ***Re Lehndorff General Partner Ltd., Re***, 17 C.B.R. (3d) 24, the Court notes:

> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its

> creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. **It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning amoung the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed.** The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. **The court's primary concerns under the CCAA must be for the debtor and all of the creditors:** *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at pp 315-318. [Emphasis Added]

[44] In my opinion, GE is clearly an aggressive creditor maneuvering for positioning in order to get itself into a position to veto the proposed Plan.

[45] I am satisfied that the purpose of the proposed Plan is to provide a fair recovery to the creditors of AY and AFY and to successfully restructure the Companies as a going concern. The Monitor has confirmed that the Companies have acted in good faith.

[46] The Monitor says it was never its intention that the Proof of Claim forms were being completed by creditors of the Companies for voting purposes. Counsel for GE says what the Monitor had "in its minds eye" is irrelevant.

[47] Counsel for GE goes on to say that he does not understand how there could be any misunderstanding with respect to the purpose of the Order being to determine the value of creditors claim for the purpose of voting. At the hearing

of this Motion counsel for GE asked: "*If a creditor was under a misunderstanding whose lookout was it? Is it somebody who reads the reasonable words and relies on them, GE, or is it somebody whose interpretation seems to be contrary to the words of this document?"*

[48] Counsel for Integrated Private Debt Fund Inc. and First Treasury Financial Inc. counters by saying that GE's interpretation is inconsistent with the wording of the Order and inconsistent with CCAA practice.

[49] In my opinion, given the overall purpose and intent of the CCAA, the relief sought by GE with this Motion is not fair and reasonable. It is an attempt by GE to obtain a better voting position and to trump the rights of other secured creditors, none of which support GE's Motion. No other secured creditor supports the voting scheme sought by GE. The purpose of the proposed Plan is to provide a fair recovery to the creditors of AY and AFY and to successfully restructure the Companies as a going concern.

[50] In the result, GE's request that the claims of the Companies' secured creditors be allowed only to the extent of the realizable value of the property of the Companies subject to the security underlying the claim, and that any portion of a claim in excess of the value of the underlying security be listed as and unsecured claim, is denied.

Classification of Creditors

[51] GE also wants to be put in a separate class of creditors by itself for the purposes of voting on the proposed Plan.

[52] Madam Justice Paperny of the Alberta Court of Queen's Bench set out the starting point for determining the classification of creditors under the CCAA in

Canadian Airlines Corp. (Re), [2000] A.J. No. 1693 at paragraph 14 where she writes:

> The starting point in determining classification is the statue under which the parties operating and from which the court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims. See for example, *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta Q.B.).

[53] Classification of creditors must be based on a commonality of interest and is a fact driven determination that is unique to the particular circumstances of every case. In ***Canadian Airlines****, supra*, Justice Paperny writes at paragraphs 16-18:

> 16 A frequently cited description of the method of classification of creditors for the purposes or voting on a plan, under the C.C.A.A., is *Sovereign Life Assurance Co. v. Dodd* (1891) [1892] 2 Q.B. 573, (Eng. C.A.).
>
> 17 At page 583 (Q.B.), Bowen L.J. writes:
>
> > The word 'class' is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling, the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section, being so worked as to result in confiscation and injustice, and that it must be confined to those persons, whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.
>
> This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply to classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.
>
> 18 Generally, the cases hold that classification is a fact-driven determination unique to the circumstances of every case upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible, and remedial

jurisdiction involved: see, for example, *Re Fairview Industries Ltd.* (1991) 11 C.B.R. (3d) 71 (N.S.T.D.)

[54] Justice Blair writing for the Ontario Court of Appeal in ***Re Stelco Inc.*** (2005), 15 C.B.R. (5th) 307 (Ont.C.A.) discussed the principles to be considered by the courts with respect to the question of commonality of interest as follows:

> 22 These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of the "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process – a flexibility which is its genius – there can be no fixed rules that must apply in all cases.
>
> 23 In *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:
>
> > In summary, the cases establish the following principles applicable to assessing commonality of interest:
> >
> > 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
> >
> > 2. The interests to be considered are the legal interest that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as liquidation.
> >
> > 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if possible.
> >
> > 4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.

5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

[55] In my opinion, the proposed classification of creditors as set forth in the proposed Plan should not be amended. GE should not be placed in its own class of creditors. I am of the view that the Companies' secured creditors, including GE, should remain together in the proposed secured creditor class. All of the Companies' secured creditors have commonality of interests when viewed in light of both the non-fragmentation approach and the object of the CCAA, which is to facilitate reorganizations in a way that is fair and reasonable, and for the benefit of all stakeholders. The secured creditors have similar interests in relation to the Companies, which include: the nature of the debt owed to the secured creditors by the Companies, that is money advanced as a loan; the type of security held by the secured creditors, that is priority in the Companies' assets and property; the secured creditors all generally have the same enforcement remedies under their security; the secured creditors are all sophisticated lenders who are in the business and aware of the gains and possible risk, and the secured creditors have all dealt with the Companies over an extended period of time.

[56] Moreover, the Companies' secured creditors' rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interests. There are inter-creditor agreements that were clearly negotiated among the majority of secured creditors. There is no evidence that the secured creditors will be unable to consult together with a view to their common interests under the proposed Plan, or that they will be unable to assess their legal entitlement as creditors after the proposed Plan.

[57] GE is the only secured creditor which opposes the proposed classification scheme. However, Counsel for the Companies argues that under the proposed Plan GE stands to recover the most of any secured creditor. Under the proposed Plan GE will receive almost the entire amount due to it. The Monitor is of the view that GE is being treated fairly and will not be prejudiced as a result of the proposed classification.

[58] It must be remembered that the relief GE seeks, namely that it be placed in its own class, stems from its disapproval of the proposed Plan and its apparent goal to position itself to veto power in order to defeat the proposed Plan.

[59] In my view, the classification GE seeks would result in a fragmented approach that could jeopardize and likely defeat the proposed Plan. It would empower GE with the ability to veto the proposed Plan so that it may immediately liquidate its security, to the detriment of all stakeholders of the Companies. As Justice Blair, writing for the Ontario Court of Appeal in ***Re Stelco Inc.,*** supra, explained:

> Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or subclasses of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards "Reorganizations under the Companies Creditors Arrangement Act"; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association – Ontario Continuing Legal Education; Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra, at para 27; Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, supra; Sklar-Peppler, supra; Re Woodwards Ltd., supra.

> In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in Re Canadian Airlines, " the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans.

[60] In my view, the proposed classification in this case as drafted by the Companies and the Monitor, namely a division between secured and unsecured creditors, is both fair and reasonable. It is the most appropriate classification scheme based on commonality of interest and the non-fragmentation approach. Moreover, the proposed scheme is in accordance with the underlying purpose of the CCAA, namely the successful reorganization of companies.

[61] In ***Federal Gypsum Co. (Re)*** [2007] N.S.J. No. 559 Justice McAdam writes at paragraph 21:

> The flexibility afforded the Court, in respect to CCAA applications, is to ensure that Plans of Arrangement and compromise are fair and reasonable as well as designed to facilitate debtor reorganization. Justice Romaine, in *Ontario v. Canadian Airlines Corporation* [2001] A.J. No. 1457, 2001 ABQB 983, at paras. 36-38 stated:
>
> > [36] The aim of minimizing prejudice to creditors embodied in the CCAA is a reflection of the cardinal principle of insolvency law: that relative entitlements created before insolvency are preserved: R. v. Goode, *Principles of Corporate Insolvency Law*, 2nd ed. (London: Sweet & Maxwell, 1997) at 54. While the CCAA may qualify this principle, it does so only when it is consistent with the purpose of facilitating debtor reorganization and ongoing survival, and in the spirit of what is fair and reasonable.
> >
> > [37] Paperny J. (as she then was) also discussed the purpose of the CCAA in *Re Canadian Airlines Corp.*, (2000),

> 265 A.R. 201 (Q.B.), aff'd [2000] A.J. No. 1028 leave refused 2001 S.C.C.A No. 60. At para. 95, she stated that the purpose of the CCAA is to facilitate the reorganization of debtor companies for the benefit of a broad range of constituents.
>
> [38] Paperny J. also noted in para. 95 that, in dealing with applications under the CCAA, the court has a wide discretion to ensure the objectives of the CCAA are met. At para. 94, she identified guidance for the exercise of the discretion in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) at p. 9 as follows:
>
> > 'Fairness' and 'reasonableness' are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction – although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which makes its exercise in equity – and 'reasonableness' is what lends to objectivity to the process.

[62] A plan under the CCAA can be more generous to some creditors but still be fair to all creditors. Where a particular creditor has invested considerable money in the debtor to keep the debtor afloat, that creditor is entitled to special treatment in the plan, provided that the overall plan is fair to all creditors: ***Uniforêt Inc., Re*** (2003), 43 C.B.R. (4^{th}) 254.

[63] The classification of classes of secured creditors must take into account variations tailored to the situations of various creditors within a particular class. Equality of treatment, as opposed to equitable treatment, is not a necessary, nor even a desirable goal: ***Keddy Motor Inns Ltd., Re*** (1992), 13 C.B.R. (3d) 245; ***Minds Eye Entertainment Ltd. v. Royal Bank,*** 2004 CarswellSask 192.

[64] It is clear that the objective of GE in this case is to defeat the proposed Plan and in order to have the ability to do so it wants to gain veto power.

Allowing GE's motion would, in my opinion, doom the proposed Plan because GE wants to be in a position to veto it and have it fail.

[65] Counsel for GE suggested at the hearing of this Motion that if the relief sought by GE is granted, "*the Companies are going to have to rethink and in the next couple of days they're either going to come to a deal that's going to work, and if it's a viable company they'll be able to do it, or they're not, and it just was never meant to be*." In other words, if GE's motion is granted, its negotiating power would be fortified.

[66] In ***San Francisco Gifts Ltd. (Re)*** [2004] A.J. No. 1062, Madam Justice Topoloniski writes at paragraphs 11 and 12:

> The commonality of interest test has evolved over time and now involves application of the following guidelines that are neatly summarized by Paperny J. (as she then was) in Resurgence Asset Management LLS v. Canadian Airlines Corp. ("Canadian Airlines"):
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interest that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.

> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

[67] Justice Topoloniski goes on to write:

> To this pithy list, I would add the following considerations:
>
> (i) Since the CCAA is to be given a liberal and flexible interpretation classification hearings should be dealt with on a fact specific basis and the court should avoid rigid rules of general application.
>
> (ii) In determining commonality of interests, the court should also consider factors like the plan's treatment of creditors, the business situation of the creditors, and the practical effect on them of a failure of a plan.

[68] I agree with Madam Justice Topoloniski's analysis including her additional considerations. In the case at bar, the Monitor in its Report dated March 27, 2008 states that on balance the proposed Plan is fair to all parties subject to the proposed Plan. The March 27, 2008 Monitor's Report states as follows with respect to the major benefit of a successful restructuring:

> "The major benefit of a successful restructuring will be significant, including:
>
> (a) The continuing employment of approximately 400 direct employees with high paying jobs in New Brunswick and Ontario;
>
> (b) The continuing employment of a further approximately 600 indirect jobs as a result of a high export content of the sales of the Companies;
>
> (c) The payment of a significant portion of the outstanding unsecured debt of the Companies owed to its suppliers; and
>
> (d) The future expenditure of significant amounts other than payroll in Canada and New Brunswick, which expenditures and payroll are of significance to the economy of the areas around the mills and the Province of New Brunswick."

[69] With respect to the practical effect of a failure of the proposed Plan, the Monitor has stated "*the unsecured creditors will receive nothing on their claims which in some cases will result in further hardship and business closures*."

[70] In my opinion, a reclassification of the Companies' creditors for the purposes of voting on the proposed Plan so that GE is in a separate class of creditors could potentially jeopardize a viable plan of arrangement. Bearing in mind that the object of the CCAA to facilitate reorganizations, if possible, I am attracted to the additional consideration referenced by Madam Justice Topoloniski in ***San Francisco Gifts Ltd. (Re)***, supra, namely that in determining commonality of interests, the Court should also consider factors such as a plan's treatment of creditors, the business situation of the creditors and the practical effect on them of a failure of the plan. In my view, the practical effect in this case of a failure of the proposed Plan on the Companies' creditors, other than GE, would be significantly negative and adverse.

[71] In my opinion, for these reasons, GE ought not to be placed in a separate class of creditors and accordingly this request is denied.

Disposition

[72] For these reasons, the motion of GE is denied.

_____

Peter S. Glennie
A Judge of the Court of Queen's Bench of New Brunswick

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada *Respondents*

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada *Intimés*

INDEXED AS: SIERRA CLUB OF CANADA *v.* CANADA (MINISTER OF FINANCE)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

RÉPERTORIÉ : SIERRA CLUB DU CANADA *c.* CANADA (MINISTRE DES FINANCES)

Référence neutre : 2002 CSC 41.

Nº du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(*b*) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.

(3) Adapting the *Dagenais* Test to the Rights and Interests of the Parties

Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 should only be granted when:

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

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

51 Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

52 Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

53 Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

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

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. *Application of the Test to this Appeal*

(1) Necessity

At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms.

The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the Confidential Documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

de l'analyse, les tribunaux doivent avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1re inst.), p. 439, le juge Muldoon.

57 Enfin, l'expression « autres options raisonnables » oblige le juge non seulement à se demander s'il existe des mesures raisonnables autres que l'ordonnance de confidentialité, mais aussi à restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

B. *Application de l'analyse en l'espèce*

(1) Nécessité

58 À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et s'il existe d'autres solutions raisonnables que l'ordonnance elle-même, ou ses modalités.

59 L'intérêt commercial en jeu en l'espèce a trait à la préservation d'obligations contractuelles de confidentialité. L'appelante fait valoir qu'un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l'analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

60 Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. no 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela

CITATION: GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc., 2014 ONSC 1173
COURT FILE NO.: CV-12-9856-00CL
DATE: 20140224

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: GE Canada Real Estate Financing Business Property Company, Applicant

AND:

1262354 Ontario Inc., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Pillon and Y. Katirai, for the Receiver

L. Rogers, for the applicant, GE Canada Real Estate Financing Business Property Company

C. Reed, for the Respondent and for Keith Munt, the principal of the Respondent, and 800145 Ontario Inc., a related subsequent encumbrancer

A. Grossi, for the proposed purchaser, 5230 Harvester Holdings Corp.

HEARD: February 18, 2014

REASONS FOR DECISION

I. Debtor's request for disclosure of commercially sensitive information on a receiver's motion to approve the sale of real property

[1] PricewaterhouseCoopers Inc., the receiver of all the assets, undertaking and properties of the respondent debtor, 1262354 Ontario Inc., pursuant to an Appointment Order made November 5, 2012, moved for an order approving its execution of an agreement of purchase and sale dated December 27, 2013, with G-3 Holdings Inc., vesting title in the purchased assets in that purchaser, approving the fees and disbursements of the Receiver and authorizing the distribution of some of the net proceeds from the sale to the senior secured creditor, GE Canada Real Estate Financing Business Property Company ("GE").

[2] The Receiver's motion was opposed by the Debtor, Keith Munt, the principal of the Debtor, and another of his companies, 800145 Ontario Inc. ("800 Inc."), which holds a subordinate mortgage on the sale property. The Debtor wanted access to the information filed by

the Receiver in the confidential appendices to its report, but the Debtor was not prepared to execute the form of confidentiality agreement sought by the Receiver.

[3] After adjourning the hearing date once at the request of the Debtor, I granted the orders sought by the Receiver. These are my reasons for so doing.

II. Facts

[4] The primary assets of the Debtor were two manufacturing facilities located on close to 13 acres of land at 5230 Harvester Road, Burlington (the "Property"). Prior to the initiation of the receivership the Property had been listed for sale for $10.9 million. Following its appointment in November, 2012, the Receiver entered into a new listing agreement with Colliers Macaulay Nicolls (Ontario) Inc. at a listing price of $9.95 million. In January, 2013, the listing price was reduced to $8.2 million.

[5] In its Second Report dated March 14, 2013 and Third Report dated February 5, 2014, the Receiver described in detail its efforts to market and sell the Property. As of the date of the Second Report Colliers had received expressions of interest from 33 parties, conducted 8 site tours and had received 8 executed Non-Disclosure Agreements from parties to which it had provided a confidential information package. From that 5-month marketing effort the Receiver had received one offer, which it rejected because it was significantly below the asking price, and one letter of intent, to which it responded by seeking an increased price.

[6] Prior to the appointment of the Receiver the Debtor had begun the process to seek permission to sever the Property into two parcels. Understanding that severing the Property might enhance its realization value, the Receiver continued the services of the Debtor's planning consultant and in July, 2013, filed a severance application with the City of Burlington. In mid-November, 2013 the City provided the Receiver with its comments and those of affected parties. The City would not support a parking variance request. Based on discussions with its counsel, the Receiver had concerns about the attractiveness of the Property to a potential purchaser should it withdraw the parking variance request. Since the Receiver had issued its notice of a bid deadline in November, it decided to put the severance application on hold and allow the future purchaser to proceed with it as it saw fit.

[7] Returning to the marketing process, following its March, 2013 Second Report the Receiver engaged Cushman & Wakefield Ltd. to prepare a narrative report form appraisal for the Property. On June 6, 2013, Cushman & Wakefield transmitted its report stating a value as at March 31, 2013. The Receiver filed that report on a confidential basis. In its Third Report the Receiver noted that the appraised value was less than the January, 2013 listing price, as a result of which on June 4, 2013 the Receiver authorized Colliers to reduce the Property's listing price to $6.8 million. That same day the Receiver notified the secured creditors of the reduction in the listing price and the expressions of interest for the Property it had received up until that point of time.

[8] One such letter was sent to Debtor's counsel. Accordingly, as of June 4, 2013, the Debtor and its principal, Munt: (i) were aware of the history of the listing price for the Property

under the receivership; (ii) knew of the marketing history of the Property, including the Receiver's advice that all offers and expressions of interest received up to that time had been rejected "because they were all significantly below the Listing Price and Revised Listing Price for the Property"; (iii) knew that the Receiver had obtained a new appraisal from Cushman which valued the Property at an amount "lower than the Revised Listing Price, which is consistent with the Offers and the feedback from the potential purchasers that have toured the Property"; and, (iv) learned that the listing price had been lowered to $6.8 million.

[9] On June 18 the Receiver received an offer from an interested party (the "Initial Purchaser") and by June 24 had entered into an agreement of purchase and sale with that party. The Receiver notified new counsel for Munt and his companies of that development on July 29, 2013. The Receiver advised that the agreement contemplated a 90-day due diligence period.

[10] As the deadline to satisfy the conditions under the agreement approached, the Initial Purchaser informed the Receiver that it would not be able to waive the conditions prior to the deadline and requested an extension of the due diligence period until November 5, 2013, as well as the inclusion of an additional condition in its favour that would make the deal conditional on the negotiation of a lease with a prospective tenant. The Receiver did not agree to extend the deadline. Its reasons for so doing were fully described in paragraphs 50 and 51 of its Third Report. As a result, that deal came to an end, the fact of which the Receiver communicated to the secured parties, including Munt's counsel, on September 27, 2013.

[11] The Colliers listing agreement expired on September 30; the Receiver elected not to renew it. Instead, it entered into an exclusive listing agreement with CBRE Limited for three months with the listing price remaining at $6.8 million. CBRE then conducted the marketing campaign described in paragraph 67 of the Third Report. Between October 7, 2013 and January 21, 2014, CBRE received expressions of interest from 56 parties, conducted 19 site tours and received 12 executed NDAs to whom it sent information packages.

[12] In October CBRE received three offers. The Receiver rejected them either because of their price or the conditions attached to them.

[13] By November, 2013, the Receiver had marketed the Property for one year, during which time GE had advanced approximately $593,000 of the $600,000 in permitted borrowings under the Appointment Order. The Receiver developed concerns about how long the receivership could continue without additional funding. By that point of time the Receiver had begun to accrue its fees to preserve cash.

[14] The Receiver decided to instruct CBRE to distribute an email notice to all previous bidders and interested parties announcing a December 2, 2013 offer submission deadline. Emails went out to about 1,200 persons.

[15] In response to the bid deadline notice, four offers were received. The Receiver concluded that none were acceptable.

[16] The Receiver then received five additional offers. It engaged in negotiations with those parties in an effort to maximize the purchase price. On December 13, 2013, the Receiver accepted an offer from G-3 and on December 27 executed an agreement with G-3, subject to court approval.

[17] The Receiver filed, on a confidential basis, charts summarizing the materials terms of the offers received, as well as an un-redacted copy of the G-3 APA. The G-3 offer was superior in terms of price, "clean" - in the sense of not conditional on financing, environmental site assessments, property conditions reports or other investigations – and provided for a reasonably quick closing date of February 25, 2014.

III. The adjournment request

[18] The only persons who opposed the proposed sale to G-3 were the Debtor, its principal, Munt, together with the related subsequent mortgagee, 800 Inc. When the motion originally came before the Court on February 13, 2014, the Debtor asked for an adjournment in order to review the Receiver's materials. Although the Receiver had served the Debtor with its motion materials eight days before the hearing date, the Debtor had changed counsel a few days before the hearing. I adjourned the hearing until February 18, 2014 and set a timetable for the Debtor to file responding materials, which it did.

[19] At the hearing the Debtor, Munt and 800 Inc. opposed the sale approval order on two grounds. First, they argued that they had been treated unfairly during the sale process because the Receiver would not disclose to them the terms of the G-3 APA, in particular the sales price. Second, they opposed the sale on the basis that the Receiver had used too low a listing price which did not reflect the true value of the land and was proposing an improvident sale. Let me deal with each argument in turn.

IV. Receiver's request for approval of the sale: the disclosure issue

A. The dispute over the disclosure of the purchase price

[20] The Debtor submitted that without access to information about the price in the G-3 APA, it could not evaluate the reasonableness of the proposed sale. In order to disclose that information to the Debtor, the Receiver had asked the Debtor to sign a form of confidentiality agreement (the "Receiver's Confidentiality Agreement"). A dispute thereupon arose between the Receiver and Debtor about the terms of that proposed agreement.

[21] By way of background, on January 8, 2014, the Receiver had advised the secured creditors (other than GE) that it had entered into the G-3 APA and would seek court approval of the sale during the week of February 10. In that letter the Receiver wrote:

> As you can appreciate, the economic terms of the Agreement, including the purchase price payable, are commercially sensitive. In order to maintain the integrity of the Sale Process, the Receiver is not in a position to disclose this information at this time.

[22] On January 10, 2014, counsel for the Debtor requested a copy of the G-3 APA. Receiver's counsel replied on January 13 that it would be seeking a court date during the week of February 10 and "as is normally the custom with insolvency proceedings, we will not be circulating the Agreement in advance".

[23] On January 23 Debtor's counsel wrote to the Receiver:

> My clients, being both the owner, and secured and unsecured creditors of the owner, and having other interests in the outcome of the sales transaction, have a right to the production of the subject Agreement, and should be afforded a sufficient opportunity to review it and understand its terms in advance of any court hearing to approve the transaction contemplated therein. I once again request a copy of the subject Agreement as soon as possible.

According to the Receiver's Supplemental Report, in response Receiver's counsel explained that the purchase price generally was not disclosed in an insolvency sales transaction prior to the closing of the sale and that the secured claim of GE exceeded the purchase price.

[24] The Receiver's motion record served on February 5 contained a full copy of the G-3 APA, save that the Receiver had redacted the references to the purchase price. An affidavit filed on behalf of the Debtor stated that "it has been Mr. Munt's position that his position on the approval motion is largely contingent upon the terms and conditions of the subject Agreement, particularly the purchase price".

[25] The Debtor and a construction lien claimant, Centimark Ltd., continued to request disclosure of the G-3 APA. On February 11, 2014, Receiver's counsel wrote to them advising that the Receiver was prepared to disclose the purchase price upon the execution of the Receiver's Confidentiality Agreement which confirmed that (i) they would not be bidding on the Property at any time during the receivership proceedings and (ii) they would maintain the confidentiality of the information provided.

[26] Centimark agreed to those terms, signed the Receiver's Confidentiality Agreement and received the sales transaction information. Centimark did not oppose approval of the G-3 sales transaction.

[27] On February 12, the day before the initial return of the sales approval motion, counsel for the Receiver and Debtor discussed the terms of a confidentiality agreement, but were unable to reach an agreement. According to the Receiver's Supplement to the Third Report, "[Munt's counsel] did not inform the Receiver that Munt was prepared to waive its right to bid on the Real Property at some future date".

[28] At the initial hearing on February 13 the Debtor expanded its disclosure request to include all the confidential appendices filed by the Receiver – i.e. the June 6, 2013 Cushman & Wakefield appraisal; a chart summarizing the offers/letters of intent received while Colliers was the listing agent; a chart summarizing the offers/letters of intent received while CBRE had been

the listing agent; and, the un-redacted G-3 APA. Agreement on the terms of disclosure could not be reached between counsel; the motion was adjourned over the long weekend until February 18.

[29] The Receiver's Confidentiality Agreement contained a recital which read:

> The undersigned 1262354 Ontario Inc., 800145 Ontario Inc. and Keith Munt have confirmed that it, its affiliates, related parties, directors and officers (collectively the "Recipient"), have no intention of bidding on the Property, located at 5230 Harvester Road, Burlington, Ontario.

The operative portions of the Receiver's Confidentiality Agreement stated:

> 1. The Recipient shall keep confidential the Confidential Information, and shall not disclose the Confidential Information in any manner whatsoever including in respect of any motion materials to be filed or submissions to be made in the receivership proceedings involving 1262354 Ontario Inc. The Recipient shall use the Confidential Information solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement and the transaction contemplated therein, and not directly or indirectly for any other purpose.
>
> 2. The Recipient will not, in any manner, directly or indirectly, alone or jointly or in concert with any other person (including by providing financing to any other person), effect, seek, offer or propose, or in any way assist, advise or encourage any other person to effect, seek, offer or propose, whether publicly or otherwise, any acquisition of some or all of the Property, during the course of the Receivership proceedings involving 1262354 Ontario Inc.
>
> 3. The Recipient may disclose the Confidential Information to his legal counsel and financial advisors (the "Advisors") but only to the extent that the Advisors need to know the Confidential Information for the purposes described in Paragraph 1 hereof, have been informed of the confidential nature of the Confidential Information, are directed by the Recipient to hold the Confidential Information in the strictest confidence, and agree to act in accordance with the terms and conditions of this Agreement. The Recipient shall cause the Advisors to observe the terms of this Agreement and is responsible for any breach by the Advisors of any of the provisions of this Agreement.
>
> 4. The obligations set out in this Agreement shall expire on the earlier of: (a) an order of the Ontario Superior Court (Commercial List) (the "Court") unsealing the copy of the Sale Agreement filed with the Court; and (b) the closing of a transaction of purchase and sale by the Receiver in respect of the Property.

[30] Following the adjourned initial hearing of February 13, Debtor's counsel informed the Receiver that his client would sign the Receiver's Confidentiality Agreement if (i) paragraph 3 was removed and (ii) the last sentence of paragraph 1 was revised to read as follows:

> The Recipient shall use the Confidential Information solely in connection with the Receiver's motion for an order approving the Sale Agreement and other relief, and not directly or indirectly for any other purpose.

[31] By the time of the February 18 hearing the Debtor had not signed the Receiver's Confidentiality Agreement.

B. Analysis

[32] In *Sierra Club of Canada v. Canada (Minister of Finance)*[1] the Supreme Court of Canada sanctioned the making of a sealing order in respect of materials filed with a court when (i) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk and (ii) the salutary effects of the order outweighed its deleterious effects.[2] As applied in the insolvency context that principle has led this Court to adopt a standard practice of sealing those portions of a report from a court-appointed officer – receiver, monitor or trustee – filed in support of a motion to approve a sale of assets which disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought.

[33] The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.[3]

[34] To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.

[35] From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information about the sales transaction, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lacked access to such information.

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[1] 2002 SCC 41
[2] *Ibid.*, para. 53.
[3] *8857574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Gen. Div.).

[36] Applying those principles to the present case, I concluded that the Receiver had acted in a reasonable fashion in requesting the Debtor to sign the Receiver's Confidentiality Agreement before disclosing information about the transaction price and other bids received. The provisions of the Receiver's Confidentiality Agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale:

(i) Paragraph 1 of the agreement specified that the disclosed confidential information could be used "solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement". In other words, the disclosure would be made solely to enable the Debtor to assess whether the proposed sales transaction had met the criteria set out in *Royal Bank of Canada v. Soundair Corp.*,[4] specifically that (i) the Receiver had obtained the offers through a process characterized by fairness, efficiency and integrity, (ii) the Receiver had made a sufficient effort to get the best price and had not acted improvidently, and (iii) the Receiver had taken into account the interests of all parties. The Debtor was not prepared to agree to that language in the agreement and, instead, proposed more general language. The Debtor did not offer any evidence as to why it was not prepared to accept the tailored language of paragraph 1 of the Receiver's Confidentiality Agreement;

(ii) The recital and paragraphs 2 and 4 of the agreement would prevent the Debtor, its principal and related company, from bidding on the Property during the course of the receivership – a proper request. The Debtor was prepared to agree to that term;

(iii) However, the Debtor was not prepared to agree with paragraph 3 of the Receiver's Confidentiality Agreement which limited disclosure of the confidential information to the Debtor's financial advisors only for the purpose of evaluating the Receiver's proposed sale transaction. Again, the Debtor did not file any evidence explaining its refusal to agree to this reasonable provision. Although Munt filed an affidavit sworn on February 14, he did not deal with the issue of the form of the confidentiality agreement.

[37] In sum, I concluded that the form of confidentiality agreement sought by Receiver from the Debtor as a condition of disclosing the commercially sensitive sales transaction information was reasonable in scope and tailored to the objective of maintaining the integrity of the sales process. I regarded the Debtor's refusal to sign the Receiver's Confidentiality Agreement as unreasonable in the circumstances and therefore I was prepared to proceed to hear and dispose of the sales approval motion in the absence of disclosure of the confidential information to the Debtor.

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[4] (1991), 4 O.R. (3d) 1 (C.A.)

V. Receiver's request for approval of the sale: The *Soundair* analysis

[38] The Receiver filed detailed evidence describing the lengthy marketing process it had undertaken with the assistance of two listing agents, the offers received, and the bid-deadline process it ultimately adopted which resulted in the proposed G-3 APA. I was satisfied that the process had exposed the Property to the market in a reasonable fashion and for a reasonable period of time. In order to provide an updated benchmark against which to assess received bids the Receiver had obtained the June, 2013 valuation of the Property from Cushman & Wakefield.

[39] The offer received from the Initial Purchaser had contained the highest purchase price of all offers received and that price closely approximated the "as is value" estimated by Cushman & Wakefield. That offer did not proceed. The purchase price in the G-3 APA was the second highest received, although it was below the appraised value. However, it was far superior to any of the other 11 offers received through CBRE in the last quarter of 2013. From that circumstance I concluded that the appraised value of the Property did not accurately reflect prevailing market conditions and had over-stated the fair market value of the Property on an "as is" basis. That said, the purchase price in the G-3 APA significantly exceeded the appraised land value and the liquidation value estimated by Cushman & Wakefield.

[40] Nevertheless, Munt gave evidence of several reasons why he viewed the Receiver's marketing efforts as inadequate:

(i) Munt deposed that had the Receiver proceeded with the severance application, it could have marketed the Property as one or two separate parcels. As noted above, the Receiver explained why it had concluded that proceeding with the severance application would not likely enhance the realization value, and that business judgment of the Receiver was entitled to deference;

(ii) Munt pointed to appraisals of various sorts obtained in the period 2000 through to January, 2011 in support of his assertion that the ultimate listing price for the Property was too low. As mentioned, the June, 2013 appraisal obtained by the Receiver justified the reduction in the listing price and, in any event, the bids received from the market signaled that the valuation had over-estimated the value of the Property;

(iii) Finally, Munt complained that the MLS listing for the Property was too narrowly limited to the Toronto Real Estate Board, whereas the Property should have been listed on all boards from Windsor to Peterborough. I accepted the explanation of the Receiver that it had marketed the Property drawing on the advice of two real estate professionals as listing agents and was confident that the marketing process had resulted in the adequate exposure of the Property.

[41] Consequently, I concluded that the Receiver's marketing of the Property and the proposed sales transaction with G-3 had satisfied the *Soundair* criteria. I approved the sale agreement and granted the requested vesting order.

VI. Request to approve Receiver's activities and fees

[42] As part of its motion the Receiver sought approval of its fees and disbursements, together with those of its counsel, for the period up to January 31, 2014, as well as authorization to make distributions from the net sale proceeds for Priority Claims and an initial distribution to the senior secured, GE. The Debtor sought an adjournment of this part of the motion until after any sale had closed and the confidential information had been unsealed. I denied that request.

[43] As Marrocco J., as he then was, stated in *Bank of Montreal v. Dedicated National Pharmacies Inc.*,[5] motions for the approval of a receiver's actions and fees, as well as the fees of its counsel, should occur at a time that makes sense, having regard to the commercial realities of the receivership. For several reasons I concluded that it was appropriate to consider the Receiver's approval request at the present time.

[44] First, one had to take into account the economic reality of this receivership – i.e. that given the cash-flow challenges of this receivership, the Receiver had held off seeking approval of its fees and disbursements for a considerable period of time during which it had been accruing its fees.

[45] Second, the Receiver filed detailed information concerning the fees it and its legal counsel had incurred from September, 2012 until January 31, 2014, including itemized invoices and supporting dockets. The Receiver had incurred fees and disbursements amounting to $356,301.40, and its counsel had incurred fees approximating $188,000.00. That information was available for the Debtor to review prior to the hearing of the motion.

[46] Third, with the approval of the G-3 sale, little work remained to be done in this receivership. By its terms the G-3 APA contemplated a closing date prior to February 27, 2014, and the main condition of closing in favour of the purchaser was the securing of the approval and vesting order.

[47] Fourth, the Receiver reported that GE's priority secured claim exceeded the purchase price. Accordingly, GE had the primary economic interest in the receivership; it had consented to the Receiver's fees. Also, the next secured in line, Centimark, had not opposed the Receiver's motion.

[48] Which leads me to the final point. Like any other civil proceeding, receiverships before a court are subject to the principle of procedural proportionality. That principle requires taking account of the appropriateness of the procedure as a whole, as well as its individual component parts, their cost, timeliness and impact on the litigation given the nature and complexity of the litigation.[6] In this receivership the Receiver had served this motion over a week in advance of

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[5] 2011 ONSC 346, para. 7.
[6] *Hryniak v. Mauldin*, 2014 SCC 7, para. 31.

the hearing date and the Debtor had secured an adjournment over a long weekend; the Debtor had adequate time to review, consider and respond to the motion. I considered it unreasonable that the Debtor was not prepared to engage in a review of the Receiver's accounts in advance of the second hearing date, while at the same time the Debtor took advantage of the adjournment to file evidence in response to the sales approval part of the motion.

[49] Debtor's counsel submitted that an adjournment of the fees request was required so that the Debtor could assess the reasonableness of the fees in light of the purchase price. Yet, it was the Debtor's unreasonable refusal to sign the Receiver's Confidentiality Agreement which caused its inability to access the purchase price at this point of time, and such unreasonable behavior should not be rewarded by granting an adjournment of the fees portion of the motion.

[50] Further, to adjourn the fees portion of the motion to a later date would increase the litigation costs of this receivership. From the report of the Receiver the Debtor's economic position was "out of the money", so to speak, with the senior secured set to suffer a shortfall. It appeared to me that the Debtor's request to adjourn the fees part of the motion would result in additional costs without any evident benefit. I asked Debtor's counsel whether his client would be prepared to post security for costs as a term of any further adjournment; counsel did not have instructions on the point. In my view, courts should scrutinize with great care requests for adjournments that will increase the litigation costs of a receivership proceeding made by a party whose economic interests are "out of the money", especially where the party is not prepared to post security for the incremental costs it might cause.

[51] For those reasons, I refused the Debtor's second adjournment request.

[52] Having reviewed the detailed dockets and invoices filed by the Receiver and its counsel, as well as the narrative in the Third Report and its supplement, I was satisfied that its activities were reasonable in the circumstances, as were its fees and those of its counsel. I therefore approved them.

VII. Partial distribution

[53] Given that upon the closing of the sale to G-3 the Receiver will have completed most of its work, I considered reasonable its request for authorization to make an interim distribution of funds upon the closing. In its Third Report the Receiver described certain Priority Claims which it had concluded ranked ahead of GE's secured claim, including the amounts secured by the Receiver's Charge, the Receiver's Borrowing Charge and an H.S.T. claim. As well, it reported that it had received an opinion from its counsel about the validity, perfection and priority of the GE security, and it had concluded that GE was the only secured creditor with an economic interest in the receivership. In light of those circumstances, I accepted the Receiver's request that, in order to maximize efficiency and to avoid the need for an additional motion to seek approval for a distribution, authorization should be given at this point in time to the Receiver to pay out of the sale proceeds the priority claims and a distribution to GE, subject to the Receiver maintaining sufficient reserves to complete the administration of the receivership.

VIII. Summary

[54] For these reasons I granted the Receiver's motion, including its request to seal the Confidential Appendices until the closing of the sales transaction.

D. M. Brown J.

Date: February 24, 2014