

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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 BEN MOSS JEWELLERS WESTERN CANADA LTD.

APPLICANT

BOOK OF AUTHORITIES OF THE APPLICANT

May 17, 2016

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Fax: 416.862.6666

Marc Wasserman (LSUC#44066M)
Tel: 416.862.4908

Michael De Lellis (LSUC#: 48038U)
Tel: 416.862.5997

Karen Sachar (LSUC#: 59944E)
Tel: 416.862.5949

Counsel for the Applicant

TO: SERVICE LIST

SERVICE LIST

<i>Counsel/Party</i>	<i>Telephone</i>	<i>Facsimile</i>	<i>Party</i>
<p>Osler Hoskin & Harcourt LLP P.O. Box 50, 1 First Canadian Place Toronto, ON M5X 1B8</p> <p>Marc Wasserman mwasserman@osler.com</p> <p>Michael De Lellis mdelellis@osler.com</p> <p>David Rosenblat drosenblat@osler.com</p> <p>Karin Sachar ksachar@osler.com</p>	<p>416.862.4908</p> <p>416.862.5997</p> <p>416.862.5673</p> <p>416.862.5949</p>	416.862.6666	Counsel for the Applicant
<p>Alvarez & Marsal Canada Inc. Royal Bank Plaza, South Tower 200 Bay Street, Suite 2900 Toronto, ON M5J 2J1</p> <p>Adam Zalev azalev@alvarezandmarsal.com</p> <p>James Belcher jbelcher@alvarezandmarsal.com</p>	<p>416.847.5154</p> <p>416.847.5164</p>	416.847.5201	Proposed Monitor
<p>Davies Ward Phillips & Vineberg LLP 155 Wellington Street West 40th Floor Toronto, ON M5V 3J7</p> <p>Jay Swartz jswartz@dwpv.com</p> <p>Natasha MacParland nmacparland@dwpv.com</p> <p>Natalie Renner nrenner@dwpv.com</p>	<p>416.863.5520</p> <p>416.863.5567</p> <p>416.367.7489</p>	416.863.0871	Counsel for Proposed Monitor

<i>Counsel/Party</i>	<i>Telephone</i>	<i>Facsimile</i>	<i>Party</i>
Aird & Berlis LLP Brookfield Place Suite 1800, Box 754 181 Bay Street Toronto, ON M5J 2T9 Kenneth R. Rosenstein krosenstein@airdberlis.com	416.865.3427	416.863.1515	Counsel for Salus Capital Partners, LLC
Chaitons LLP 5000 Yonge Street, 10th Floor Toronto, ON M2N 7E9 Harvey Chaiton harvey@chaitons.com	416.218.1129	416. 218.1849	Counsel for Joseph Shilon President and CEO JSN Jewellery Inc.

TABLE OF CONTENTS

Tab **Case Law**

1. *Alberta-Pacific Terminals Ltd., Re*, [1991] B.C.J. No. 1065 (S.C.)
2. *Brainhunter Inc., Re*, [2009] O.J. No. 5207 (Sup. Ct. J.) [Commercial List]
3. *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Sup. Ct. J.) [Commercial List]
4. *Cash Store Financial Services, Re*, 2014 ONSC 2372 [Commercial List]
5. *Cinram International Inc., Re*, 2012 ONSC 3767 [Commercial List]
6. *Collins & Aikman Automotive Canada Inc., Re*, 2007 CarswellOnt 7014 (Sup. Ct. J.)
7. *Comark Inc., Re*, 2015 ONSC 2010
8. *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Sup. Ct. J.) [Commercial List]
9. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72
10. *Ivaco Inc., Re*, [2004] O.J. No. 2483 (Sup. Ct. J.) [Commercial List]
11. *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Gen. Div.) [Commercial List]
12. *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Sup. Ct. J.) [Commercial List]
13. *Nortel Networks Corp., Re*, 2009 CarswellOnt 4806 (Sup. Ct. J.) [Commercial List]
14. *Priszm Income Fund, Re*, 2011 ONSC 2061
15. *Royal Oak Mines Inc., Re*, [1999] O.J. No. 709 (Gen. Div.) [Commercial List]
16. *Sino-Forest Corp., Re*, 2012 ONSC 2063 [Commercial List]
17. *Smurfit-Stone Container Canada Inc., Re*, [2009] O.J. No. 349 (Sup. Ct. J.) [Commercial List]
18. *Stelco Inc., Re*, [2004] O.J. No. 1257 (Sup. Ct. J.) [Commercial List]
19. *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 [Commercial List]
20. *Target Canada Co. (Re)*, 2015 ONSC 303 [Commercial List]
21. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60

Tab Secondary Sources

22. The Standing Senate Committee on Banking, Trade and Commerce, "Seventeenth Report: Bill C-55, without amendment but with observations" (24 November 2005) tabled in the 38th Parliament, 1st Session

Tab 1

1991 CarswellBC 494
British Columbia Supreme Court

Alberta-Pacific Terminals Ltd., Re

1991 CarswellBC 494, [1991] B.C.W.L.D. 1413, [1991] B.C.J. No. 1065, 26 A.C.W.S. (3d) 958, 8 C.B.R. (3d) 99

Re COMPANY ACT, R.S.B.C. 1979, c. 59; Re BUSINESS CORPORATIONS ACT, S.A. 1981, c. B-15; Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36; Re ALBERTA-PACIFIC TERMINALS LTD., FRASER SURREY DOCKS LTD., PACIFIC TERMINALS LTD., JOHNSON MARINE TERMINALS LIMITED and JOHNSTON INTERNATIONAL SERVICES (HONG KONG) LTD.

Huddart J. [in Chambers]

Heard: April 18-19, 1991

Judgment: May 8, 1991

Docket: Doc. Vancouver A903661

Counsel: *M. Copping Hollis* and *G. Hughes*, for applicants Fraser River Harbour Commission.

R. Holmes and *G. Matei*, for petitioners.

J. Dixon and *A. Perry*, for Her Majesty the Queen in right of the Province of Alberta and Alberta Treasury Branch.

S. Jermyn, for Rico Equipment, an unsecured creditor.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Companies' Creditors Arrangement Act — Petitioners operating terminal for Harbour Commission — Order made under Companies' Creditors Arrangement Act staying all proceedings against petitioners and enjoining Commission from terminating operating agreement — Commission's application for order directing payment by petitioners of amounts falling due monthly under operating agreement dismissed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The harbour commission had an agreement (the "operating agreement") with FSDL under which FSDL operated a terminal for the commission. FSDL and its associated companies (collectively, the "petitioners") ran into financial difficulties and sought protection under the *Companies' Creditors Arrangement Act*. An order was made under the Act staying all proceedings against the petitioners, enjoining the commission from taking any steps to terminate the operating agreement (which was the primary asset of FSDL), and ordering that contracts that might give a benefit to any petitioner be maintained in full force and effect pending a further order. The commission applied for an order directing the payment by the practitioners of the amounts that fell due monthly under the operating agreement, and also asked the court to determine the nature of the relationship between the commission and the practitioners.

Held:

The application was dismissed.

This was not the appropriate time to consider the relationship between the parties.

The petitioners should not be ordered to pay moneys pursuant to the operating agreement pending the termination of the stay orders. There was no evidence of any hardship to the commission; the commission's only concern was that its position not be eroded relative to the position of other creditors. The petitioners did not appear to have the money to make the payments sought. The orders under the Act left to the management of the petitioners a considerable area of discretion in the application of its current cash flow. Given the terms of the operating agreement, the history of the relationship between the commission and the petitioners, the nature of the terminal operation, the nature of the line of credit facility, and the petitioners' cash flow statements, it was inappropriate for the court to intervene in the exercise of that discretion without some reason, such as perhaps evidence of hardship to the commission or of erosion of its property value.

Table of Authorities

Cases considered:

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — *applied*

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1 —

s. 178 [am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26(1) and (2)]

Business Corporations Act, S.A. 1981, c. B-15.

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

Company Act, R.S.B.C. 1979, c. 59.

Harbour Commissions Act, R.S.C. 1985, c. H-1.

Application for order directing payment of moneys due under agreement in spite of stay under *Companies' Creditors Arrangement Act*.

Huddart J. [In Chambers]:

1 This application is about the right of the Fraser River Harbour Commission to be paid moneys pursuant to its agreement with Fraser Surrey Docks Ltd. ("FSDL"), under which FSDL operates the deep-sea common user terminal of the Fraser port, while all proceedings against FSDL and its associated companies are stayed by orders made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

2 Under the terms of the operating agreement made January 1, 1989, FSDL is the terminal agent and wharfinger for the commission. The commission administers the Fraser port under the *Harbour Commissions Act*, R.S.C. 1985, c. H-1. The Johnston Group of companies has operated the terminal for more than 20 years, but since the 1989 agreement and related expansion, it has run into financial difficulties. The petitioners attribute these difficulties to a chemical spill in August 1989, and consequential claims for damages; a very high debt/equity ratio and the refusal of the Alberta treasury branch and government to convert their debt to equity; a fire on November 14, 1990; and finally, the commission's threat on November 16, 1990, to terminate the operating agreement.

3 To assist FSDL with the earlier of these difficulties, the commission had agreed on July 27, 1990, to defer payments due under the operating agreement for the months of June to September inclusive, the same to be paid on December 31, 1990. When FSDL defaulted on the regular payment for October due on November 15, 1990, the commission refused a request for

a further deferral, advising that it would consider termination of the operating agreement if payment was not made within the 7 days of grace allowed under the contract.

4 FSDL considers that the commission has the right to terminate the operating agreement only upon its insolvency. When FSDL and its related companies admitted they were insolvent and sought the protection available to them under the *Companies' Creditors Arrangement Act* (the "CCAA") on November 22, 1990, FSDL owed the commission about \$976,000. The commission claims that Johnston Marine Terminals Limited ("JMTL") then owed it \$353,000. The total debt of the petitioners to the Alberta government and the Alberta treasury branches ("Alberta") was \$13 million, some of it secured.

5 The operating agreement is the primary asset of FSDL. Without it and the operating line of credit from the Alberta treasury branches, the petitioners would be unable to operate the terminal.

6 The ex parte order Mr. Justice Skipp made on November 22, 1990, stayed all proceedings against the petitioners until May 31, 1991, specifically enjoined the commission from taking any steps to terminate the operating agreement and the option to lease in favour of Pacific Terminals Ltd. ("Pacific") without further order, and ordered that contracts that might give a benefit to any petitioner "be maintained in full force and effect pending further order of this Court."

7 In December, the petitioners paid \$28,544 to the commission, the amount attributable to the period in November following the CCAA order.

8 On December 18, Mr. Justice Spencer varied the order to provide for the continued provision by the Alberta treasury branches of the "existing \$1.25 million operating credit facility" to the petitioners or any of them. Included in that order was a provision that "interest calculated on the daily outstanding principal amount under the Facility is to be paid monthly." The order was made with the consent of the petitioners, Alberta, and the commission. No similar provision was made with regard to the monthly payments required by the operating agreement.

9 FSDL did not make the payment due on January 15, or any subsequent payments. The payments due exceed \$200,000 per month. FSDL claimed that it could not afford to make the payments, that the payments were prohibited under the order, and that, in any event, to make any payment on account of the operating agreement would be to favour an equity participant over general creditors.

10 The commission interpreted the order and its relationship with FSDL differently. It considered that the order required payments under the operating agreement to be continued. The matter came before Mr. Justice Arkell, who concluded on March 28:

The present orders of the court require the Commission to continue and maintain the operating agreement for the benefit of the Petitioners, pending the reorganization plan, or further order of the court. The present court orders neither prohibit nor do they require the continuation of the monthly payments due under the operating agreement.

The Commission is at liberty to apply to the court to vary the present court orders for a right of preference over other creditors and to receive continuing payments under the terms of the operating agreement. Alternatively, the Commission may apply to the Court for leave to commence an action against the Petitioners and sue for damages or ultimately for termination of the operating agreement.

Because he had reached this conclusion accepting the position of the commission that it was a "creditor" within the meaning of the CCAA, Mr. Justice Arkell did not find it necessary to resolve the dispute as to the nature of the relationship between the petitioners and the commission.

11 This application is a sequel to the application before Mr. Justice Arkell. It revisits the issue as to the nature of the relationship between the petitioners and the commission, and it asks this court to direct the payment by the petitioners of the amounts that fall due monthly under the operating agreement.

12 I find that I need consider only the second issue. The authorities cited by both counsel persuade me that the categorization of any commercial relationship will vary with the issue before the court. If and when a determination of the rights and obligations of the parties to the operating agreement is required, the court may be called upon to determine the nature of their relationship. If and when the court is called upon to fix the classes of creditors for the purpose of voting on a reorganization plan, the court may be required to determine whether or not the commission is a "creditor" within the meaning of the CCAA. Until some such occasion arises, I can see no reason for saying anything about their relationship.

13 It may be that the commission is anxious that the court determine the nature of its relationship with FSDL, JM TL, and Alberta-Pacific Terminals Ltd., before the fixing of the classes of creditors. If so, it did not say so.

14 There is no doubt that the commission is concerned at the hint in the petitioners' argument that they may be seeking the court's and the creditors' approval of a reorganization plan that will restructure their "revenue sharing arrangements" with the commission without the approval of the commission. A question about the judicial nature of the relationship might arise if the petitioners successfully exclude the commission from voting as a creditor, then seek to have it bound by any reorganization plan. From the information available to me on this application and from my understanding of the purpose and scheme of the CCAA, I consider such an idea so far-fetched as not to require further comment.

15 It may be that the commission considers the nature of the relationship material to the issue as to whether or not it should be paid the moneys that have fallen due since November 30 or that will fall due before May 31, or any later termination of the stay. I do not find it to be so because I have not had recourse to the arguments put forward by the petitioners based on joint venture, debt or equity contribution, or equitable subordination, in reaching the conclusion that I should not order the petitioners or any of them to pay moneys pursuant to the operating agreement pending the termination of the stay orders.

16 I have come to that conclusion having regard to the purpose and scheme of the CCAA, the terms of the operating agreement, and the financial circumstances of the petitioners as revealed in the monitor's report.

17 The purpose of the CCAA is to facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue in business, said Mr. Justice Gibbs in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.), at p. 88 [B.C.L.R.]. No creditor is exempted. But neither is anyone who is not a creditor included within its ambit.

18 At p. 90 of the *Chef Ready* case, Mr. Justice Gibbs said of the effect of the CCAA on the property interest acquired by a bank under s. 178 [*Bank Act*, R.S.C. 1985, c. B-1] security:

But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the bank under ss. 178 and 179? It does not detract from the bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; ... it does not breach the 'complete code'. All that it does is postpone the exercise of the right to seize and sell. And here the bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise.

19 From a similar perspective, it can be said that all that the orders pursuant to the CCAA do with regard to the commission's rights under the operating agreement is to postpone the exercise of the right to terminate the agreement on insolvency or to sue for payments not made as they fall due. The commission had already allowed a 4-month postponement. So the petitioners argue. However, the commission seeks neither to sue nor to terminate the agreement. It does not wish to prevent FSDL from carrying on business. It recognizes the purpose of the stay of proceedings.

20 Rather, it says that the orders requiring it to continue to provide its land and facilities without current recompense and without any guarantee of future recompense make it unique among the creditors of the petitioners, unlike the Alberta treasury branches, who are to continue the line of credit facility, but who are to receive current interest on the credit advanced under it, and unlike those creditors who are paid for current supply of goods and services. In effect, it says that the monthly payments should be made in the ordinary course of business for the continued use of the land and facilities, because if they are not, the

commission's position is eroding relative to other creditors. Its debt is growing each month, not only by accrual of interest, but by an additional \$200,000, on average. It is providing the land and facilities from the use of which income is being derived without any compensation from that income. Thus it seeks an order for payment of the moneys as they accrue due to "preserve the status quo."

21 The petitioners say that to accede to the commission's request to be paid would be to give it a preference over general creditors to which it is not entitled, given the terms of the operating agreement and particularly the way in which the payments are structured. The commission disagrees, saying that the operating agreement is valid and enforceable, there being neither an agreement nor an order suspending or prohibiting payments under it, and that to require current payments to be made would not be to prefer one creditor over another with regard to debt accumulated before the stay orders.

22 In *Chef Ready*, supra, Mr. Justice Gibbs described the court's function on applications such as these at pp. 88 and 89, in these words:

When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

23 The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

24 Obviously, the commission is one of the most important of those interests, because it holds and administers the public's interest in the land and facilities.

25 When I have regard to all of the materials put before me by the commission, I find no proof of hardship or even of need. For example, I see no suggestion that the commission is incurring expenses related to the Fraser Surrey dock that it must pay from other sources of revenue. Its only concern is that its position not be eroded relative to the position of other creditors. If the reorganization is successful, it is unlikely the commission will suffer any loss in the value of its position to which it has not agreed. If the reorganization turns out not to be possible, the commission's loss because of the stay may be substantial. Or it may not be. The owner of land and facilities is not in the same position as a creditor owed a fixed sum of money, easily valued.

26 When I have regard to the monitor's cash flow statements, I do not find the money to make the payments sought. The original ex parte order and the subsequent consent order left to management of the petitioners a considerable area of discretion in the application of its current cash flow. Given the terms of the operating agreement, the history of the relationship between the commission and the petitioners, the nature of the terminal operation, the nature of the line of credit facility, and those cash flow statements, I have decided that it is inappropriate for the court to intervene in management's exercise of that discretion without some reason, perhaps evidence of hardship to the commission or of erosion of its property value.

27 I have reached that conclusion despite some considerable reservations about the way in which management has exercised that discretion, as revealed in the monitor's reports. Those reports suggest that payments have been made to other creditors from the petitioners' cash flows, contrary to this court's orders. I do not consider that I should discuss this matter further in these reasons. I advised counsel at the hearing of this application that such matters should be considered on another occasion

on notice to all interested parties. On this hearing, only one unsecured creditor appeared. That creditor did not suggest that it had reason to remain after ascertaining the nature of the application and that its presentation would require the disclosure of information contained in the monitor's reports, sealed by order of Mr. Justice Spencer. It may be that unsecured creditors will wish to request further information if they receive notice of an application authorizing other payments.

Application dismissed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 2

2009 CarswellOnt 7627
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 7627, [2009] O.J. No. 5207, 183 A.C.W.S. (3d) 28

**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 Brainhunter Inc., TrekLogic Inc.,
Brainhunter Canada Inc., Brainhunter (Ottawa) Inc. and Protec Employment Services Limited (Applicants)

APPLICATION UNDER SECTION 18.6 OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Newbould J.

Heard: December 2, 2009
Judgment: December 4, 2009
Docket: 09-8483-00CL

Counsel: Jay A. Swartz, James D. Bunting for Applicants
Grant B. Moffat for Deloitte and Touche Inc.
Edmond Lamek for Toronto-Dominion Bank
Joseph Bellissimo for Roynat Capital Inc.
Daniel R. Dowdall for certain noteholders
Patrick F. Schindler for an unsecured judgment creditor

Subject: Insolvency

Headnote

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court
— Discretion of court**

Canadian Company, located in Toronto, provided human resources services to clients — Bank was secured creditor of Company and agreed to provide applicants with \$7 million to meet working capital requirements during Companies' Creditors Arrangement Act (CCAA) proceedings — Company made application for protection under s. 18.6 of CCAA — Company intended to solicit going concern asset sale of business, which meant no plan of arrangement filed — Application allowed — Court can allow CCAA protection in cases where company does not file formal plan of compromise or arrangement.

Table of Authorities

Cases considered by *Newbould J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 7169 (Ont. S.C.J. [Commercial List]) — considered

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

Generally — referred to

s. 3 — referred to

s. 9 — referred to

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 2005, c. 47, s. 128] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

s. 11.4(4) [en. 1997, c. 12, s. 124] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

s. 36(1) — considered

APPLICATION by company for protection under s. 18.6 of *Companies' Creditors Arrangement Act*.

Newbould J.:

1 On December 2, 2009 after hearing submissions from the parties present, I made an initial order granting CCAA protection to the applicants, with reasons to follow. These are my reasons.

2 There is no question that the Court has jurisdiction to hear the application pursuant to section 9 of the CCAA as the applicants' head offices are located in Toronto, Canada. At the time of the application, Brainhunter Inc. was listed on the TSX. The applicants qualify as debtor companies pursuant to section 3 of the CCAA as the applicants are affiliated companies with total claims against them of more than \$5 million. The applicants are all insolvent.

3 The applicants are in the business of providing human resources with the skill sets to satisfy their clients' needs. The applicants' business operates in large part through umbrella agreements generally referred to as Master Service Agreements. These agreements are entered into by the applicable applicant and each of their respective contract staffing clients.

4 Each time a contract staffing client wishes to retain the services of an individual (each a "Contractor") pursuant to a Master Services Agreement, the client will enter into a sub-agreement referred to as a statement of work in respect of the specific Contractor. The applicable applicant subsequently enters into an agreement with the Contractor to fulfill the statement of work and the Contractor issues invoices to the applicant for the work he or she performs for the client. The applicant then pays the Contractor and bills the client. Because the applicants receive payment from their clients after they pay their Contractors, the

applicants are dependent on having adequate credit facilities available to fund the payments to Contractors until the related invoices from the client can be collected.

5 TD Bank and Roynat are secured creditors with security over all of the assets of the applicants. As at October 31, 2009 there was principal outstanding of \$18.7 million to TD Bank and principal and interest of \$5.9 million owing to Roynat.

6 In addition there are secured subordinated promissory notes secured only on the assets of Brainhunter Inc. The principal and interest outstanding as at October 31, 2009 was \$11.9 million. Most of the material assets of the applicants are not held in Brainhunter Inc., but by the other applicants.

7 TD Bank and the applicants have entered into a debtor-in-possession financing term sheet, pursuant to which the TD Bank has agreed to provide the applicants with \$7 million of DIP financing to enable the applicants to meet their working capital requirements during the CCAA proceedings.

8 This application is in some respects unusual because the applicants state that they intend at the outset to solicit a going concern asset sale of the business, and that it is likely that there will be no plan of arrangement filed. The factum on their behalf states:

5. If protection is granted under the CCAA, the Applicants intend to bring a motion seeking approval of a bid process to solicit going concern asset purchase offers for the Applicants' business, as well as offers to sponsor a plan of arrangement (the "Bid Process"). The Applicants have entered into an agreement to sell substantially all of their assets as a going concern on the understanding that this agreement will serve as a stalking horse bid. The Bid Process will solicit competing offers from prospective investors to bid up the stalking horse bid.

24. Although the proposed Bid Process could result in the filing of a plan of arrangement or plan of compromise, it is more likely to result in the sale of the Applicants' business.

9 The applicants submit that this Court has the jurisdiction to provide them with protection under the CCAA in circumstances such as these where the applicants may not file a formal plan of compromise or arrangement.

10 I agree with the applicants that protection under the CCAA may be granted in these circumstances. I say that for the following reasons.

11 The initial protection is supported by TD Bank and Roynat. It is also supported by the secured noteholders represented by Mr. Dowdall, being a little more than 60% of the noteholders. Mr. Dowdall has other concerns that I will deal with.

12 It is well settled in Ontario that a court in a CCAA proceeding may approve a sale of all or substantially all of the assets of a debtor company as a going concern. In *Consumers Packaging Inc., Re*, 27 C.B.R. (4th) 197 (Ont. C.A.), the Court stated:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

13 Similarly, it is well settled in Ontario that a court in a CCAA proceeding may order the sale of a business in the absence of a plan of arrangement being put to stakeholders for a vote. In *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) Morawetz J. came to this conclusion after analyzing a number of cases that had made such an order. See paras 35 to 40 of his reasons for judgment.

14 It seems to me that if at some point in time after an initial CCAA protection order has been made, it appears appropriate to undertake a sales process to sell the business without a plan of arrangement in place, there is no reason why CCAA protection should not initially be granted if at the outset it is thought appropriate to undertake a sales process without a plan of arrangement in place. It is simply a matter of timing as to when it appears appropriate to pursue a sale of the business without a plan of arrangement in place.

15 *Nortel Networks Corp., Re* was decided before the new CCAA provisions came into force on September 18, 2009. The new relevant provision does not, however, affect the principles accepted by Morawetz J. in that case. Section. 36(1) provides:

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

16 In *Canwest Global Communications Corp., Re* [2009 CarswellOnt 7169 (Ont. S.C.J. [Commercial List])] released November 12, 2009, Pepall J. stated the following regarding s. 36:

The CCAA is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."

17 The applicants have not yet brought their motion for approval of a sales process, and consideration as to whether such a sales process is appropriate will take place when the motion is heard.¹ The fact that the motion was anticipated at the time of the initial order with no plan of arrangement in sight does not mean however that the initial order should not be made.

18 The applicants seek an order declaring that the Contractors are "critical suppliers", permitting the payment of pre-filing amounts to the contractors and creating a charge that secures the obligations owed to the Contractors.

19 The authorization to pay pre-filing amounts is now codified in section 11.4 of the CCAA. Pursuant to this section, the Court has the discretion to:

(a) declare a person to be a critical supplier, if it is satisfied the person is a supplier of goods or services to the company and the goods or services are critical to the company's continued operations (s. 11.4(1));

(b) make an order requiring the "critical supplier" to supply any goods or services specified by the Court to the company on any terms and conditions that are consistent with the supply relationship or the Court considers appropriate (s. 11.4(2));

(c) grant a charge in favour of a person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order (s. 11.4(3)); and

(d) order the security or charge to rank in priority over the claim of any secured creditor of the company (s. 11.4(4)).

20 The rationale for the enactment of section 11.4 is explained in the Industry Canada Clause by Clause Briefing Book as follows:

Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

21 The applicants submit, and I accept, that an order permitting the payment of pre-filing amounts is necessary to ensure the continued provision of personal services from the Contractors to the applicants and to prevent the potentially significant harm that could follow if such payments are not made. If the Contractors are not paid for services provided before the filing of the application, there is a substantial risk they will not continue to perform services under the current statements of work. This would result in a default by the applicants to their clients and impact the ability of the applicants to continue as a going concern.

22 As the Contractors are individuals, the applicants did not seek an order requiring the continued supply of personal services. However, they requested a charge to secure payment to the Contractors in order to provide assurances to the Contractors that their relationship will be unaffected during the CCAA proceedings. The amount of the Contractors' charge requested is \$15 million which represents an estimated average of the amount owing to Contractors. The applicants requested that the Contractors' charge rank in priority to all secured lenders other than the TD Bank. Roynat is agreeable to that and the notesholders represented here do not oppose it. Deloitte & Touche Inc, in their capacity as the proposed monitor, in their pre-filing report support the charge as reasonable.

23 I am satisfied that it is appropriate to provide in the initial order that the Contractors are declared to be critical suppliers, that the applicants shall be entitled to pay outstanding and future amounts owing to Contractors and that a Contractors' charge as requested be provided.

24 The applicants also requested other charges, being (i) an administration charge of \$1 million; (ii) a KERP charge of \$290,000 under which the CEO is to be paid a retention bonus of \$50,000 for two months in addition to his salary and 10 key employees will be paid up to \$190,000 if they remain with the company for four months from the date of filing; (iii) a directors and officers charge of \$1.7 million; and (iv) a DIP charge to secure the \$7 million DIP facility being provided by TD Bank.

25 TD Bank and Roynat support these charges and their priority provided for in the initial order. Deloitte & Touche Inc. expressed the view that the proposed charges are necessary and reasonable and will provide the applicants with the opportunity to successfully complete a restructuring.

26 Mr. Dowdall for the noteholders raised a concern with some of these charges. He said that while counsel for the applicants discussed with him in advance the intention to file, he was not made aware of the details and his clients have not had an opportunity to review the information provided in the material filed with the Court. Thus he wishes to reserve his clients' rights with respect to these charges. He has a concern that while typically such concerns when raised at the initial application are met with the response that there is a come-back clause in the initial order, people start relying on the charges and it becomes difficult to oppose them as time passes. I think his concern is a fair one. In this case, however, not only is there a come-back clause with a 7 days notice requirement, but the matter will be before the Court shortly on December 8, 2009 when the motion to approve a sales process will be dealt with. Mr. Dowdall's clients will have had an opportunity to consider their position before then and be able to move to vary the initial order if they so desire.

27 In the circumstances, on the basis of the record before me, the charges appear appropriate and are approved. This is without prejudice, however, to the noteholders right to contest them. Any delay, however, in taking steps to contest them will obviously seriously affect any attack on them.

28 Mr. Schindler represents an unsecured judgment creditor owed approximately \$250,000. His client of course had not seen the material before it was filed, and Mr. Schindler said that he had been intending to ask that the entire matter be adjourned for a week, and that he was asking that the charges not be made for at least a week to provide his client with time to consider whether they are warranted.

29 In exercising the balancing of interests required in a CCAA application, it would be risky indeed to delay the application or these charges at the request of one unsecured creditor. These are standard charges and deemed necessary by the proposed monitor. It should be noted that the sections of the CCAA under which the charges are authorized, being sections 11.2(1), 11.4(1), 11.51(1) and 11.52(1), provide that notice of a request for such charges is to be given to the secured creditors who are likely to be affected by the charge. Notice is not required to be given to unsecured creditors. In the circumstances, I declined the request to delay the charges.

Application allowed.

Footnotes

1 The motion is now scheduled for December 8, 2009

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 3

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST
GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009

Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

Headnote

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

Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

Table of Authorities

Cases considered by *Pepall J.*:

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

General Publishing Co., Re (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 23 — considered

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

s. 137(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act*.

Pepall J.:

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*.¹ The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other

than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Background Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*². It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US\$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US\$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to \$75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of \$4.855 billion and total consolidated liabilities of \$5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling \$2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately \$954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by \$272 million or 11% compared to the same period in 2008. In addition, operating income

before amortization decreased by \$253 million or 47%. It reported a consolidated net loss of \$1.578 billion compared to \$22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by \$8 million or 4% in the third quarter of 2009 and operating profit was \$21 million compared to \$39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US\$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US\$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US\$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US\$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of \$75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to \$23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of \$100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately \$634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of \$10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US\$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of \$187.3 million and an unsecured promissory note in the principal amount of \$430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than \$2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of \$13.3 million as at the last valuation date and a wind up deficiency of \$32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding \$5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US\$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*³ definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*⁴. Absent these CCAA proceedings, the applicants

would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*⁵; *Smurfit-Stone Container Canada Inc., Re*⁶; and *Calpine Canada Energy Ltd., Re*⁷. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*⁸ and *Global Light Telecommunications Inc., Re*⁹

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to \$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately \$10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is \$10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and

the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

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

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

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

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

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

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to \$15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

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

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

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

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of \$20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank *pari passu* with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first \$85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security

or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company

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

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

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

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of \$20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for \$30 million in coverage and \$10 million in excess coverage for a total of \$40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re*¹⁰ Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of \$5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re*¹¹ have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*¹² provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from \$1000 to \$5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes

the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

Footnotes

- 1 R.S.C. 1985, c. C. 36, as amended
- 2 R.S.C. 1985, c.C.44.
- 3 R.S.C. 1985, c. B-3, as amended.
- 4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).
- 5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).
- 6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).
- 7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).
- 8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).
- 9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).
- 10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).
- 11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
- 12 [2002] 2 S.C.R. 522 (S.C.C.).

Tab 4

2014 ONSC 2372
Ontario Superior Court of Justice

Cash Store Financial Services, Re

2014 CarswellOnt 5127, 2014 ONSC 2372, 239 A.C.W.S. (3d) 558

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

In the Matter of a Plan of Compromise or Arrangement of the Cash Store Financial Services, The Cash Store Inc., TCS Cash Store Inc., Instalozans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., 1693926 Alberta Ltd. doing business as "The Title Store"

Morawetz R.S.J.

Heard: April 14, 2014

Judgment: April 14, 2014

Docket: CV-14-10518-00CL

Counsel: Marc Wasserman, Jeremy Dacks, for Special Committee of the Board of Directors of the Applicants
Robert Chadwick, Brendan O'Neill, for Ad Hoc Committee of Noteholder Heather Meredith and James Gage, for FTI Consulting Canada, proposed Monitor

Brett Harrison, for Timor Fund

Orestes Pasparakis, Alan Merskey, for Coliseum Capital, proposed DIP Lender

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Applicants provided alternative financial products and services and had liabilities of \$185 million, exceeding their assets — Upon commencement of Companies' Creditors Arrangement Act ("CCAA") proceedings, applicants would be no longer in compliance with covenants in note indenture and full \$139.5 million long-term debt would become immediately due and payable, but applicants did not have ability to repay — Debtor companies applied for stay of proceedings under CCAA to attempt restructuring of business with view to emerging as going concern and maintaining employment for as many employees as possible — Application granted — Applicants were affiliated debtor companies with total claims against them exceeding \$5 million and were insolvent — Applicants' chief place of business was Ontario, where application was brought — Applicants faced significant and worsening liquidity crisis, exacerbated by regulatory issues in Ontario — There was urgency and creditor protection was needed — Application for DIP financing would be heard later to allow stakeholders opportunity to respond.

Table of Authorities

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

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

Generally — referred to

s. 2 — considered

s. 9(1) — considered

APPLICATION for stay of proceedings under Companies' Creditors Arrangements Act.

Morawetz R.S.J.:

1 At the conclusion of argument, I endorsed the record: CCAA protection granted. Bluetree appointed CRO. Reasons will follow. Order to be prepared for my review. Counsel to re-attend at 10:00 a.m. on April 15, 2014 to finalize the Order.

2 These are the reasons.

3 The Cash Store Financial Services Inc. ("Cash Store Financial"), The Cash Store Inc., TCS Cash Store Inc., Instalogs Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., 1693926 Alberta Ltd. doing business as "The Title Store" (collectively, the "Applicants") seek relief under the *Companies' Creditors Arrangements Act* ("CCAA").

4 The Applicants are seeking a stay of proceedings under the CCAA in order to attempt a restructuring of their business (as described in the affidavit of Steven Carlson, sworn April 13, 2014 (the "Carlson Affidavit") with a view to emerging as a going concern. In addition, the Applicants seek to maintain employment for as many as possible of their approximately 1,840 employees in Canada.

5 The Applicants take the position that a stay of proceedings will provide them with the necessary "breathing space" to allow them to carry out this restructuring. The Applicants are of the view that a restructuring of their business will be in the interest of all stakeholders, including employees, customers, landlords, class action plaintiffs, bond holders, third party lenders and other creditors. They assert that without this "breathing space", it is very likely that Cash Store Financial will face bankruptcy and liquidation resulting in materially worse recoveries for all stakeholders.

6 Cash Store Financial is a leading provider of alternative financial products and services, servicing individuals for whom traditional banking may be either inconvenient or unavailable.

7 Cash Store Financial owns and operates Canada's largest network of retail branches in the alternative financial products and services industry with 509 branches across Canada (located in every Province and Territory other than Quebec and Nunavut), as well as 27 branches in the United Kingdom. The largest number of branches (176) are located in Ontario.

8 Cash Store Financial offers a wide range of financial products and services such as bank accounts, prepaid MasterCard, private label credit and debit cards, cheque-cashing, money transfers, payment insurance and prepaid phone cards. A number of these products are offered by means of arrangements with third party providers.

9 Cash Store Financial is a publically held Ontario corporation listed on the Toronto Stock Exchange. The other applicants are all privately held corporations that are direct or indirect subsidiaries of Cash Store Financial.

10 The Applicants' corporate headquarters and senior management are located in Edmonton, Alberta.

11 Mr. Carlson states that The Cash Store Financial's chief place of business is the Province of Ontario. There are 176 branches of Cash Store Financial located in Ontario, which is the largest number of Cash Store Financial branches in any province or territory where Cash Store Financial operates. Cash Store Financial has approximately 470 employees in Ontario, more people than Cash Store Financial employs in any other province or territory. Cash Store Financial's Chief Compliance and Regulatory Affairs Officer is located in Toronto because Cash Store Financial is facing its most significant regulatory challenges in Ontario.

12 The Ontario operations of Cash Store Financial accounted for \$57.6 million in revenue for the 2013 fiscal year, which is roughly 30% of Cash Store Financial's total revenue, more revenue than any other province or territory. Furthermore, Cash Store Financial is listed on the Toronto Stock Exchange and files all of its public disclosure documents in Ontario. Cash Store Financial is a corporation incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B16 and its regulatory decisions have significantly curtailed Cash Store Financial's Ontario revenues. Mr. Carlson states that addressing the Ontario regulatory issues will be one of the key aspects of Cash Store Financial's proposed CCAA proceeding.

13 The main act of subsidiaries of Cash Store Financial are The Cash Store Inc. and Instaloes Inc. which act as both lenders and/or brokers, operating in all of the Canadian Provinces and Territories in which Cash Store Financial has a presence.

14 Cash Store Financial operates essential cash management systems, including all bank reconciliations, all accounts payable and payroll (with the exception of the UK corporations, which process their own accounts payable and payroll). Mr. Carlson states in his affidavit that cash is transferred between legal entities and bank accounts, as necessary, on a daily basis. The bank accounts do not segregate the cash belonging to each subsidiary into unrestricted and unrestricted cash.

15 Cash Store Financial operates under two major business models: a direct lending business and the brokered lending business. Cash Store Financial acts as a direct payday lender (as opposed to a broker) in Alberta, British Columbia, Nova Scotia and Saskatchewan. It also formerly acted as a direct lender in Manitoba and Ontario, until the switch to offering line of credit products in those jurisdictions.

16 The affidavit of Mr. Carlson also contains the required interim financial statements and based on these statements, as of December 31, 2013, Cash Store Financial had total assets of approximately \$176 million and total liabilities of approximately \$185 million.

17 Of the liabilities, approximately \$140 million represents long-term debt. This debt is principally composed of two amounts: \$12 million owing to the senior secured lenders under the Credit Agreement and \$127.5 million owing to the Senior Secured Noteholders.

18 The notes mature on January 31, 2017. Mr. Carlson states that upon commencement of the CCAA proceeding, Cash Store Financial will no longer be in compliance with the covenants in the Note Indenture and the full \$139.5 million in long-term debt will become immediately due and payable. Mr. Carlson states that Cash Store Financial does not have the ability to repay the notes at this time and is therefore insolvent.

19 Cash Store Financial has received approximately \$42 million from third party lenders ("TPLs") (the "TPL Funds"). Mr. Carlson states that pursuant to the terms of broker agreements, these funds are contractually required to be used only for the purpose of lending to customers. He further states the TPL Funds that are not loaned to customers are held in Cash Store Financial's bank accounts and are designated, for accounting purposes, as "restricted cash". He further states that despite his nomenclature, "restricted cash" does not represent a segregated fund and is simply an accounting concept. He states that "Restricted cash" is a notional amount that represents the difference between the amount of TPL Funds provided to Cash Store Financial for brokered loans to consumers and the amount of the outstanding broker loans made with the TPL Funds that have not yet been repaid, together with cumulative losses. Mr. Carlson further states that all other cash held by Cash Store Financial is accounted for as "unrestricted cash".

20 Mr. Carlson further states that although the broker agreements permit the TPLs to require Cash Store Financial to hold the TPL Funds in a specifically designated account, no TPL has ever exercised its contractual right to require Cash Store Financial to do so. As a result, Mr. Carlson states that when TPL Funds are provided by the TPLs, no separate bank accounts for TPL Funds is, or is required to be, maintained.

21 The Applicants have brought this application for relief under the CCAA and state that it is being brought on an urgent basis due to the confluence of a number of factors that have put extreme pressure on the combined ability of Cash Store Financial to operate as a going concern. Mr. Carlson describes the situation as "dire".

22 The factors identified by Mr. Carlson include:

- a. Cash Store Financial currently faces numerous regulatory challenges, arising in part out of the relatively recent introduction of payday loan legislation in certain jurisdictions and the transition generally from an unregulated market to a regulated market.
- b. Cash Store Financial has encountered specific regulatory issues in relation to its lending business in Ontario and its inability to secure a licence as a payday lender under applicable Ontario legislation.
- c. The regulatory environment is influx.
- d. Cash Store Financial is defending a number of significant legal proceedings across Canada and the United States. These proceedings include class actions regarding its business model (primarily involving fees and interest rates charged) and regarding its compliance with security laws.
- e. Cash Store Financial has recently incurred significant expenses for audit and special investigation fees.
- f. Due to Cash Store Financial's inability to comply with market capitalization and share price requirements, Cash Store Financial voluntarily delisted its stock from the NYSE.
- g. Cash Store Financial does not have the cash to continue to operate.
- h. Two of the TPLs ("McCann" and "Trimor") have requested the return of the Restricted Cash. It is noted that on April 11, 2014, McCann commenced litigation against Cash Store Financial in the Court of Queen's Bench in Alberta seeking injunctive relief against Cash Store Financial in relation to the TPL Funds and asserting a trust over such funds. I am given to understand that a hearing is scheduled in Edmonton, Alberta for April 17, 2014.

23 The issues on this application are as follows:

- a. Are the Applicants insolvent?
- b. Are the Applicants permitted to use existing cash on hand to meet their operating capital requirements during the post-filing period?
- c. Does this Court have jurisdiction to grant a DIP financing charge on a priority basis over the property of the Applicants and if so, should the Court exercise its discretion to do so?
- d. Does the Court have jurisdiction to grant an order entitling the Applicants to make pre-filing payments to critical suppliers and if so, should the Court exercise its jurisdiction to do so?
- e. Should the Court exercise its discretion to grant the applicants administration and directors charges? and
- f. Should this Court grant protection to the Chief Restructuring Officer ("CRO") and to the Special Committee?

24 CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against or its affiliates exceeds \$5 million. Pursuant to section 2 of the CCAA, a debtor company "means, *inter alia*, a company that is insolvent".

25 I am satisfied that the Applicants are all affiliated debtor companies with total claims against them exceeding \$5 million. Moreover, the evidence of Mr. Carlson is that the Applicants are insolvent.

26 This application is brought in Ontario. Section 9(1) of the CCAA states that

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

27 The Applicants have brought this application in Ontario. I am satisfied that there is sufficient evidence, including statements made at paragraph 23 of Mr. Carlson's affidavit, to support the Applicants' contention that its chief place of business is situated in Ontario. Based on the record, I am satisfied that I have jurisdiction to entertain this application. If this finding becomes an issue at a later date, I reserve the right to elaborate on this point more fully.

28 I am also satisfied that the Applicants are facing a significant liquidity crisis, exacerbated by the regulatory issues in Ontario.

29 I accept that Cash Store Financial's liquidity has declined from \$13.1 million total cash at the end of February 2014 to \$12.6 million at the end of March 2014, and is projected to decline significantly to approximately \$5 million at the end of April 2014.

30 I also accept that as of March 31, 2014, Cash Store Financial has defaulted under several covenants in the Credit Agreement, entitling the senior secured lenders to accelerate the obligations under the Credit Agreement and enforce their security. Further, Mr. Carlson states in his affidavit that Cash Store Financial does not have the funds to repay the Senior Secured Lenders.

31 The materials in support of this application were provided only recently to the parties in attendance at Court. The parties have not, in my view, had sufficient time to respond to this application on the merits. I am therefore treating this application as if it is being presented on no notice.

32 At this stage, I am of the view that urgency has been demonstrated and that creditor protection is required to stabilize the operating environment for the Applicants. I am satisfied that it is both necessary and appropriate to make declaration that the Applicants qualify for protection under the CCAA and a stay of proceedings is granted. With respect to the remaining relief, while I recognize that the Applicants have a liquidity crisis, I am not prepared to entertain the application for a DIP Financing Order until such time as the other stakeholders have had an appropriate time to respond.

33 Counsel are to re-attend at 10:00 a.m. tomorrow, Tuesday, April 15, 2014 to finalize a draft order for my review.

34 I understand there are two competing DIP Financing proposals. It would be helpful if the Monitor could prepare a report prior to the April 15, 2014 hearing which compares the merits of the two proposals.

Application granted.

Tab 5

2012 ONSC 3767
Ontario Superior Court of Justice [Commercial List]

Cinram International Inc., Re

2012 CarswellOnt 8413, 2012 ONSC 3767, 217 A.C.W.S. (3d) 11, 91 C.B.R. (5th) 46

**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 Cinram International Inc., Cinram
International Income Fund, CII Trust and The Companies Listed in Schedule "A" (Applicants)

Morawetz J.

Heard: June 25, 2012

Judgment: June 26, 2012

Docket: CV-12-9767-00CL

Counsel: Robert J. Chadwick, Melaney Wagner, Caroline Descours for Applicants

Steven Golick for Warner Electra-Atlantic Corp.

Steven Weisz for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent

Tracy Sandler for Twentieth Century Fox Film Corporation

David Byers for Proposed Monitor, FTI Consulting Inc.

Subject: Insolvency

Headnote

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

C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group sought protection of Companies' Creditors Arrangement Act — C group brought application seeking initial order under Act, and relief including stay of proceedings against third party non-applicant; authorization to make pre-filing payments; and approval of certain Court-ordered charges over their assets relating to their DIP Financing, administrative costs, indemnification of their trustees, directors and officers, Key Employee Retention Plan, and consent consideration — Application granted — Applicants met all qualifications established for relief under Act — Charges referenced in initial order were approved — Relief requested in initial order was extensive and went beyond what court usually considers on initial hearing; however, in circumstances, requested relief was appropriate — Applicants spent considerable time reviewing their alternatives and did so in consultative manner with their senior secured lenders — Senior secured lenders supported application, notwithstanding that it was clear that they would suffer significant shortfall on their positions.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group brought application seeking initial order under Companies' Creditors Arrangement Act and other relief, including authorization for C International to act as foreign representative in within proceedings to seek recognition order under Chapter 15 of U.S. Bankruptcy Code on basis that Ontario, Canada was Centre of Main Interest (COMI) of applicants — Application granted on other grounds — It is

function of receiving court, in this case, U.S. Bankruptcy Court for District of Delaware, to make determination on location of COMI and to determine whether present proceeding is foreign main proceeding for purposes of Chapter 15.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Stay against third party non-applicant — C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group sought protection of Companies' Creditors Arrangement Act — C LP was not applicant in proceedings; however, C LP formed part of C group's income trust structure with C Fund, ultimate parent of C group — C group brought application seeking initial order under Act, including stay of proceedings against C LP — Application granted — Applicants met all qualifications established for relief under Act — Charges referenced in initial order were approved — Relief requested in initial order was extensive and went beyond what court usually considers on initial hearing; however, in circumstances, requested relief was appropriate.

Table of Authorities

Cases considered by *Morawetz J.*:

Brainhunter Inc., Re (2009), 2009 CarswellOnt 7627 (Ont. S.C.J. [Commercial List]) — referred to

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — considered

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 3658, 56 C.B.R. (5th) 194 (Ont. S.C.J. [Commercial List]) — referred to

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — referred to

Prizm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

Sino-Forest Corp., Re (2012), 2012 CarswellOnt 4117, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

Sulphur Corp. of Canada Ltd., Re (2002), 2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152, 35 C.B.R. (4th) 304 (Alta. Q.B.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 1466, 2012 ONSC 948, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2012 ONSC 106, 2012 CarswellOnt 1059, 89 C.B.R. (5th) 127 (Ont. S.C.J. [Commercial List]) — considered

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — considered

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — referred to

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

Generally — referred to

- s. 2(1) "company" — considered
- s. 2(1) "debtor company" — considered
- s. 3(1) — considered
- s. 3(2) — considered
- s. 11 — considered
- s. 11.2 [en. 1997, c. 12, s. 124] — considered
- s. 11.2(1) [en. 1997, c. 12, s. 124] — considered
- s. 11.2(2) [en. 1997, c. 12, s. 124] — considered
- s. 11.2(4) [en. 1997, c. 12, s. 124] — considered
- s. 11.4 [en. 1997, c. 12, s. 124] — considered
- s. 11.51 [en. 2005, c. 47, s. 128] — considered
- s. 11.52 [en. 2005, c. 47, s. 128] — considered

APPLICATION by group of debtor companies for initial order and other relief under *Companies' Creditors Arrangement Act*.

Morawetz J.:

- 1 Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").
- 2 Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.
- 3 The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.
- 4 Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.
- 5 Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:
 - (i) to ensure the ongoing operations of the Cinram Group;
 - (ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and

(iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").

6 Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

7 The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

8 Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

(i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;

(ii) provides various digital media services through One K Studios, LLC; and

(iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

9 Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

10 The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

11 Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

12 Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

13 Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the

laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

14 Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

15 Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

16 The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

17 All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

18 As at March 31, 2012, there was approximately \$233 million outstanding under the First-Lien Term Loan Facility; \$19 million outstanding under the First-Lien Revolving Credit Facilities; approximately \$12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately \$12 million outstanding under the Second-Lien Credit Agreement.

19 Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

20 Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

21 The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

- (a) the lenders demanding payment in full for money owing under the Credit Agreements;
- (b) potential termination of contracts by key suppliers; and
- (c) potential termination of contracts by customers.

22 As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession ("DIP") Financing in the amount of \$15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of \$15 million.

23 The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

- (a) the active employment of employees in the ordinary course;
- (b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;
- (c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and
- (d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

24 Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

25 The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

26 In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

27 Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

28 Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

29 Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

30 Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

31 The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

32 Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

33 The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

34 Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

35 The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

36 In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

37 As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

38 The Applicants have also requested that the confidential supplement — which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules — be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

39 Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

40 In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

- (a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;
- (b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;

- (c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;
- (d) meetings of the board of trustees and board of directors typically take place in Canada;
- (e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;
- (f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;
- (g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;
- (h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;
- (i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;
- (j) new business development initiatives are centralized and managed from Toronto, Ontario; and
- (k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

41 Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

42 The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15.

43 In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

Schedule "A"

Additional Applicants

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

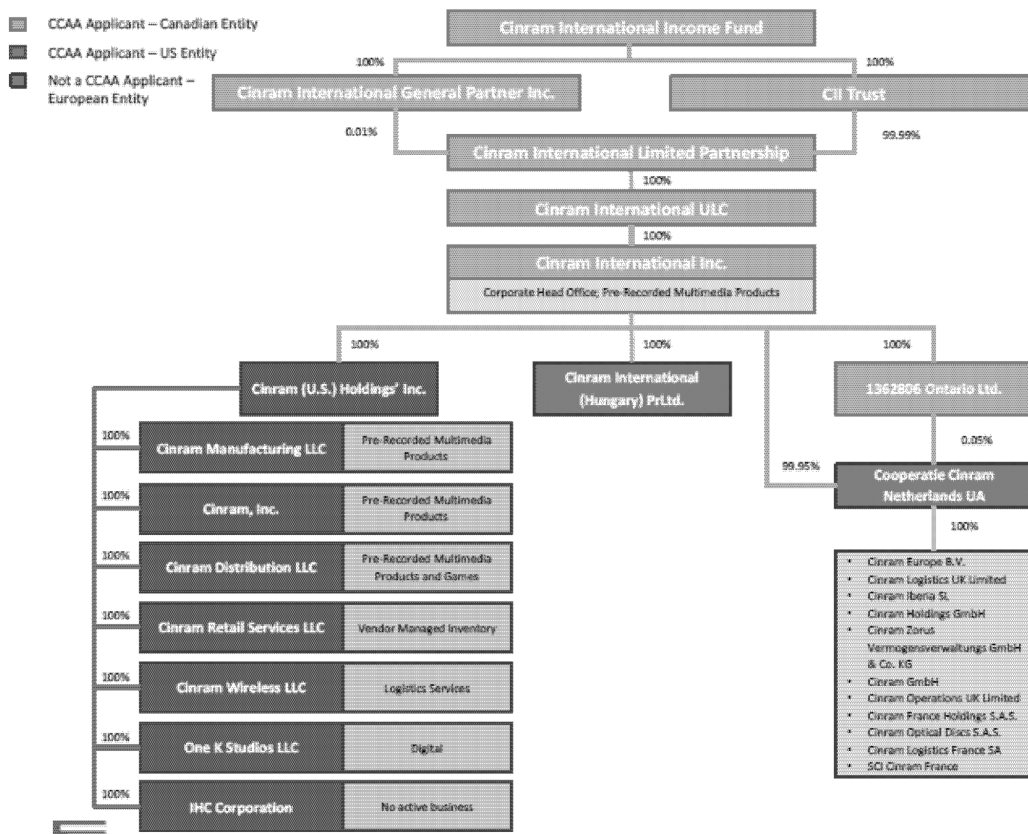
Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

- Cinram Manufacturing LLC
- Cinram Distribution LLC
- Cinram Wireless LLC
- Cinram Retail Services, LLC
- One K Studios, LLC

Schedule "B"



Graphic 1

Schedule "C"

A. The Applicants Are "Debtor Companies" to Which the CCAA Applies

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds \$5 million.

CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds \$5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

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

"debtor company" means any company that:

(a) is bankrupt or insolvent;

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

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

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

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) *The Applicants are "companies"*

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Canwest Global Communications Corp., Re (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants ("*Book of Authorities*"), Tab 1.

Global Light Telecommunications Inc., Re (2004), 2 C.B.R. (5th) 210 (B.C. S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

Global Light Telecommunications Inc., Re, supra at para. 17; Book of Authorities, Tab 2.

Cadillac Fairview Inc., Re (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) *The Applicants are insolvent*

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

- a. is for any reason unable to meet his obligations as they generally become due;
- b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or
- c. the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 ("insolvent person").

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), at para.4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco Inc., Re, supra at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco Inc., Re, supra at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

- a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.
- b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.

d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of \$5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

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

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

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately \$252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately \$12 million in letter of credit exposure) and approximately \$12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed \$5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. The Relief is Available under The CCAA and Consistent with the Purpose and Policy of the CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Nova Metal Products Inc. v. Comiskey (Trustee of), supra at paras. 22 and 56-60; Book of Authorities, Tab 4. *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para. 5; Book of Authorities, Tab 6.

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

Sulphur Corp. of Canada Ltd., Re (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.) ("*Sulphur*") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) *The Stay of Proceedings Against Non-Applicants is Appropriate*

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

- a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;
- b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and
- c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

Lehndorff General Partner Ltd., Re, supra at para. 5; Book of Authorities, Tab 6. *Canwest Global Communications Corp., Re*, supra at para. 27; Book of Authorities, Tab 1.

CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

Lehndorff General Partner Ltd., Re, supra at paras. 5 and 16; Book of Authorities, Tab 6.

T. Eaton Co., Re (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

a. where it is important to the reorganization process;

b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;

c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and

d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10. *Lehndorff General Partner Ltd., Re, supra* at para. 21; Book of Authorities, Tab 6.

Canwest Global Communications Corp., Re, supra at paras. 28 and 29; Book of Authorities, Tab 1.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 5, 18, and 31; Book of Authorities, Tab 11.

Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

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 *Canwest Global Communications Corp., Re*, 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 Communications Corp., Re 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
- 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 Communications Corp., Re supra, at para. 43; Book of Authorities, Tab 1.

Brainhunter Inc., Re, [2009] O.J. No. 5207 (Ont. S.C.J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.

Prizm Income Fund, Re (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of \$15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:

11.2(1) *Interim financing* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2) *Priority* — secured creditors — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Timminco Ltd., Re, 211 A.C.W.S. (3d) 881 (Ont. S.C.J. [Commercial List]) [2012 CarswellOnt 1466] at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

- 11.2(4) Factors to be considered — In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrow funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

Re Catalyst Paper Corporation, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.

Angiotech, supra, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18

Fraser Papers Inc., Re [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

- a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;
- b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;
- c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedings and implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;
- d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;
- e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;
- f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;
- g. the DIP Lenders' Charge will not secure any pre-filing obligations;
- h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings; and
- i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD\$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent, the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

11.52(1) *Court may order security or charge to cover certain costs*

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

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) *Priority*

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

CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco Ltd., Re, Canwest Global Communications Corp., Re* and *Canwest Publishing Inc./Publications Canwest Inc., Re*.

Canwest Global Communications Corp., Re, supra; Book of Authorities, Tab 1.

Canwest Publishing, supra; Book of Authorities, Tab 16.

Timminco Ltd., Re, 2012 ONSC 106 (Ont. S.C.J. [Commercial List] [*Timminco*]); Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

- a. the size and complexity of the business being restructured;
- b. the proposed role of the beneficiaries of the charge;
- c. whether there is unwarranted duplication of roles;
- d. whether the quantum of the proposed charge appears to be fair and reasonable;

- e. the position of the secured creditors likely to be affected by the charge; and
- f. the position of the Monitor.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, supra, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

- a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;
- b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;
- c. there is no unwarranted duplication of roles;
- d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and
- e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD\$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

11.51(1) *Security or charge relating to director's indemnification*

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) *Priority*

The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

11.51(3) *Restriction* — indemnification insurance

The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) *Negligence, misconduct or fault*

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

CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global Communications Corp., Re*, the Court outlined the test for granting such a charge:

I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

Canwest Global Communications Corp., Re, supra at paras 46-48; Book of Authorities, Tab 1.

Canwest Publishing, supra at paras. 56-57; Book of Authorities, Tab 16.

Timminco, supra at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD\$13 million, given:

- a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
- b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;
- c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;
- d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;
- e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
- f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD\$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Grant Forest Products Inc., Re* [2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])] considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

- a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- d. the employees' history with and knowledge of the debtor;
- e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
- h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Grant Forest Products Inc., Re, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.

Canwest Publishing Inc./Publications Canwest Inc., Re supra, at paras 59; Book of Authorities, Tab 16.

Canwest Global Communications Corp., Re supra, at para. 49; Book of Authorities, Tab 1.

Timminco Ltd., Re (2012), 95 C.C.P.B. 48 (Ont. S.C.J. [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest Products Inc., Re, supra at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD\$3 million, given:

- a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora Employees to remain with the Cinram Group while the company pursued its restructuring efforts;
- b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;
- c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;
- d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;
- e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the

Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;

f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest Corp., Re*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

Sino-Forest Corp., Re, supra, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;

b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

Bell Affidavit, para. 176; Application Record, Tab 2.

Application granted.

Tab 6

2007 CarswellOnt 7014
Ontario Superior Court of Justice

Collins & Aikman Automotive Canada Inc., Re

2007 CarswellOnt 7014, [2007] O.J. No. 4186, 161 A.C.W.S. (3d) 675, 37 C.B.R. (5th) 282, 63 C.C.P.B. 125

**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 COLLINS & AIKMAN AUTOMOTIVE CANADA INC.

APPLICATION UNDER the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Spence J.

Heard: September 20, 26, 2007

Judgment: October 31, 2007

Docket: 07-CL-7105

Counsel: M.E. Bailey for Superintendent of Financial Services (Ontario)

K.T. Rosenberg, M.C. Starnino for United Steelworkers

C.E. Sinclair for National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW — Canada)

R.J. Chadwick for Ernst & Young Inc., as Monitor of Collins & Aikman Automotive Canada Inc.

A.J. Taylor, K.L. Mah for Collins & Aikman Automotive Canada Inc.

J.E. Dacks for JP Morgan Chase Bank NA

C.J. Hill for Chrysler LLC

Subject: Insolvency; Corporate and Commercial; Employment; Public

Headnote

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

Motions to amend initial order — Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") — Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors — Court issued initial order under CCAA — Para. 4 of initial order authorized company to retain further assistants if necessary — Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") — Para. 11 authorized company to terminate employees by agreement with other parties or, failing such agreement, to deal with consequences under CCAA — Para. 26 provided that monitor, by fulfilling obligations under initial order, would not be deemed to be employer of company's employees — Para. 29 immunized monitor from liability save for gross negligence or wilful misconduct — Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees — Superintendent and unions brought motions seeking various relief — Motions dismissed — Para. 4 did not provide that further hirings could breach collective agreements — If hirings did so, aggrieved parties could apparently seek relief under CCAA — Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order — Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime — If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might found motion for relief — Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so — CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA — It was inappropriate for court to exercise its discretion under

CCAA to delete "not required" provision, or to order company to make special payments — This would be contrary to reasonable expectations of company and DIP lender — DIP lender had changed its position on basis of existing court orders — Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations — There had been no objections regarding special payments at time of initial order — Union's position, that para. 11 of initial order should be made subject to applicable collective agreements and labour laws, was rejected — Para. 11 did not purport to abrogate collective agreement or labour laws — No reason was advanced why union could not withhold agreement to company's proposed exercise of para. 11, or pursue matter in court under CCAA — Para. 26 was not inconsistent with jurisdiction of board under Labour Relations Act ("LRA") to determine whether monitor was successor employer — Initial order did not purport to determine application of LRA — Application of para. 26 was limited to monitor's role under initial order — Court had jurisdiction to grant limitation of liability as set out in para. 29 — Wording in para. 29 was consistent with limitation of liability given to monitors under standard form model CCAA initial order.

Pensions --- Administration of pension plans — Valuation and funding of plans — Deficiency

Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") — Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors — Court issued initial order under CCAA — Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") — Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees — Superintendent and unions brought motions seeking various relief — Motions dismissed — Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order — Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime — If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might found motion for relief — Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so — CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA — It was inappropriate for court to exercise its discretion under CCAA to delete "not required" provision, or to order company to make special payments — This would be contrary to reasonable expectations of company and DIP lender — DIP lender had changed its position on basis of existing court orders — Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations — There had been no objections regarding special payments at time of initial order.

Annotation

When Air Canada filed for bankruptcy protection under the *Companies' Creditors Arrangement Act* (the "CCAA") in 2003, there existed virtually no judicial guidance as to how issues surrounding its underfunded pension plans would be treated under the CCAA. But the spate of employer insolvencies and pension plan deficits in the four years since (Slater Steel, Stelco, United Air Lines, Ivaco, General Chemical, etc.) has resulted in many of the issues at the intersection of insolvency law and pension law having been litigated and, for now at least, resolved. *Collins & Aikman* is the latest decision to answer one of the questions as to how to deal with pension issues in a CCAA restructuring.

The issue in *Collins & Aikman* was the validity of the employer decision to suspend special payments (i.e. contributions to pay down pension plan solvency deficits) on the basis of a provision in the initial CCAA court order stating that the company could, but need not, make pension plan contributions while under CCAA protection. The suspension of the special payments (but not current service contributions, which have continued to be remitted) was a condition of the interim financing designed to keep the insolvent company afloat during its restructuring, the terms of which financing were approved by the court. Neither the Ontario pension regulator nor the union opposed the financing, but they subsequently challenged the suspension of the special payment remittances to the pension plans.

The Ontario Superior Court held that the regulator and union could not have their cake and eat it too, i.e. they could not give the company the benefit of the interim financing while not allowing it to meet a key condition for that financing. Thus

the validity of the "pension contribution suspension" provision in the initial CCAA order, which has become a relatively standard feature of such orders over the past few years, has been upheld, to the general relief of employers, financial institutions, and many other classes of CCAA stakeholders.

However, the decision is not necessarily a blanket endorsement of such provisions. To begin with, it is unclear whether the decision would automatically have been the same had the suspension of special payments not been a prerequisite to the court-approved financing. Second, the court held out the possibility of the regulator and/or the union being able to challenge the continued validity of the suspension at future stages in the CCAA process; whether such future challenges might be successful is, of course, another matter entirely. And finally, the union has appealed the Superior Court decision to the Ontario Court of Appeal, so this decision will not be the last judicial word on the issue.

Gary Nachshen

Table of Authorities

Cases considered by *Spence J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, 351 N.R. 326, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation*) 2006 C.L.L.C. 220-045, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.*) 271 D.L.R. (4th) 193 (S.C.C.) — considered

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia (2007), 2007 C.L.L.C. 220-035, 363 N.R. 226, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 65 B.C.L.R. (4th) 201, 283 D.L.R. (4th) 40, 137 C.L.R.B.R. (2d) 166, 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290 (S.C.C.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39 (Sask. Q.B.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Ivaco Inc., Re (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]) — considered

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Ivaco Inc., Re (2007), 2007 CarswellOnt 2855, 2007 CarswellOnt 2856, [2006] S.C.C.A. No. 490 (S.C.C.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Mine Jeffrey inc., Re (2003), 35 C.C.P.B. 71, 2003 CarswellQue 90, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.*) [2003] R.J.Q. 420 (Que. C.A.) — considered

Richtree Inc., Re (2005), 2005 CarswellOnt 255, 13 C.B.R. (5th) 111, 10 B.L.R. (4th) 334, 7 C.B.R. (5th) 294, 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

Sulphur Corp. of Canada Ltd., Re (2002), 2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152, 35 C.B.R. (4th) 304 (Alta. Q.B.) — considered

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) — considered

United Air Lines Inc., Re (2005), (sub nom. *United Air Lines Inc. (Bankrupt), Re*) 2005 C.E.B. & P.G.R. 8145, 2005 CarswellOnt 1078, 45 C.C.P.B. 151, 9 C.B.R. (5th) 159 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Generally — referred to

Builders Lien Act, S.B.C. 1997, c. 45

Generally — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 2(d) — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 11(4) — considered

s. 11(6) — considered

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

s. 11.8(1) [en. 1997, c. 12, s. 124] — considered

s. 18.6 [en. 1997, c. 12, s. 125] — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

Generally — referred to

s. 69 — considered

s. 69(1) — considered

s. 69(2) — considered

s. 69(12) — considered

s. 111 — referred to

s. 116 — considered

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

s. 55(2) — considered

s. 75 — considered

Regulations considered:

Pension Benefits Act, R.S.O. 1990, c. P.8

General, R.R.O. 1990, Reg. 909

Generally — referred to

s. 4(2) — considered

s. 5(1)(b) — considered

s. 5(1)(e) — considered

s. 31 — considered

MOTIONS by labour unions and Superintendent of Financial Services to amend initial order made with respect to insolvent company under *Companies' Creditors Arrangement Act*.

Spence J.:

1 Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW — Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

2 On July 19, 2007, Collins & Aikman Automotive Canada Inc. ("Automotive") filed for protection from its creditors pursuant to the CCAA. The Applicant is insolvent. It was clear at the time of the CCAA filing that Automotive would not be able to reorganize and the Court was informed by counsel to Automotive and the Monitor that this proceeding is effectively a liquidation. The Court is advised that the CCAA is being utilized by the Applicant to attempt to maximize the potential recovery for the benefit of all creditors by creating the opportunity to attempt to sell some or all of its remaining operating facilities on a going concern basis.

3 Chrysler LLC (previously known as DaimlerChrysler Company LLC) ("Chrysler") is Automotive's largest remaining customer. In order to provide Automotive with the stability to pursue the sale of its facilities, Automotive, Chrysler, the U.S. Debtors and JPMorgan Chase Bank, N.A. as Agent for the U.S. Debtors' pre-petition secured creditors negotiated a comprehensive funding agreement whereby Chrysler (the "DIP Lender") will fund the costs of this CCAA filing.

4 The relief sought by the moving parties concerns, *inter alia*, the pension plans of Automotive. The Superintendent advises that Automotive maintains seven pension plans which are registered in Ontario,

The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

The USW is concerned that, as presently worded, paragraph 4 of the Initial Order is open to an interpretation that permits the Applicant to employ individuals in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation. In particular, paragraph 4 could be taken to authorize the unilateral contracting out of union positions. Accordingly, the USW proposes that the following text should be appended at the end of paragraph 4: ", provided that such further retainers are not in breach of any of its collective agreements."

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements...

8 The Superintendent objects to any provision that would be inconsistent with the Applicant being required to make any and all required employee contributions to its pension plans.

9 The USW objects to the foregoing provision of the Initial Order on the basis that Automotive appears to be interpreting that provision so as to amend the terms of their employment by staying Automotive's obligation to pay compensation accruing due to employees post filing, including, wages, benefits and special payments to the pension plan. Accordingly, the USW proposes that the words "but not required" be struck from paragraph 6.

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

.....

b. Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in any plan of arrangement or compromise filed by the Applicants under the CCAA (the "Plan");...

d. Repudiate such of its arrangements or agreement of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; ...

The USW is concerned that these provisions are open to an interpretation that permits Automotive to repudiate its collective agreements with the USW's members. Accordingly, the USW proposes that the following text be added at paragraph 11, following the phrase "(as hereinafter defined)":

and any and all applicable collective agreements (including, without limitation, all employee benefit, pension and related agreements, compensation policies, and arrangements), and labour laws....

11 The Superintendent seeks an order directing the Applicant to make all required employer contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Initial Order as is necessary to reflect this relief.

12 The CAW seeks an order compelling the Applicant to make the special payments due to the pension plans operated for the benefit of the CAW's members. The special payments that are referred to include the special payments that are provided for under s. 5(1)(b) and section 5(1)(e) of the Regulation under the PBA. These payments are required to be made to liquidate any unfunded liability in the plan by reason of a going concern deficiency and any insolvency deficiency based on actuarial valuation of the plan. The other special payments referred to are those dealt with in s. 31 of the Regulation. These payments are post wind-up special payments owing under s. 75 of the PBA to address a wind-up deficit. Section 31 states that annual special payments are to commence at the "effective date of wind up" and are equal to "the amount required in the year to fund the employer's liabilities under section 75 of the [PBA] in equal payments, payable annually in advance, over not more than five years".

13 As stated in *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.) at paragraph 25, in the context of going concern special payments, special payments "may fluctuate depending upon the investment results of the pension fund and the employer's ongoing contributions, together with estimated demands on the fund by the beneficiaries" and other factors. The true position of the plan cannot, in fact, be known until the crystallization of all benefits when benefits are settled after a wind-up at which time "it will be known what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim".

14 Accordingly, special payments are better understood as the payments which (in accordance with the PBA and Regulations and actuarial practice) have to be made to a pension plan now to meet the plan's benefit obligations which do not arise until some point in the future (either on retirement or termination for individual members or when benefits are settled in a plan wind up for the plan as a whole).

15 Likewise, post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date. Again, the actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are used to actually purchase annuities from an insurance company (at then prevailing annuity rates) to provide the monthly pension benefit to the member.

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately \$345,000 as of June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been

wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

17 The facts of the USW and the CAW state that the most recently filed valuations for Automotive's various pension plans identify an aggregate wind-up deficiency of approximately \$18.2 million.

Paragraph 26

18 Paragraph 26 provides as follows:

THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof — or be deemed to have been or become an employer of any of the Applicant's employees.

The USW is concerned that this provision usurps the exclusive jurisdiction of the Labour Relations Board (the "Board" or the "OLRB") to determine, on a full factual record, whether someone is a successor employer. Accordingly, the USW proposes that the following text be deleted from paragraph 26: "or be deemed to have been or become an employer of any of the Applicant's employees"; and that the following words be added: ", provided that the foregoing is without prejudice to any rights pursuant to the *Labour Relations Act, 1995*, (Ontario)."

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions on this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

The USW is concerned that this provision provides the Monitor with a blanket immunity on a prospective basis, and that the court has no jurisdiction to provide this immunity and should not provide this immunity even if it did have such authority. Accordingly, the USW proposes that paragraph 29 be deleted and replaced with the following:

THIS COURT ORDERS that nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any other applicable legislation.

The CRO Order

21 On September 11, 2007, Automotive returned a motion for an order approving its engagement of Axis Consulting Group Inc. ("Axis") and Allan Rutman ("Rutman") as Chief Restructuring Officer of Automotive (the "CRO Approval Motion")

22 On September 11, 2007, this court made an order approving Automotive and Axis' engagement (the "CRO Order"), subject to a reservation of rights by the USW to challenge paragraph 4 of the CRO Order.

23 Paragraph 4 of the CRO Order is similar to paragraph 29 of the Automotive Initial Order and the USW objects to it for the same reason. That paragraph provides as follows:

THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided

further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

24 The USW proposes that this paragraph be deleted and replaced with the following:

THIS COURT ORDERS that no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO.

Relevant Statutory and Regulatory Provisions

The Companies Creditors Arrangement Act

25 Section 11(1) of the CCAA provides as follows:

Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

26 Subsections 11(3) and (4) of the CCAA provide as follows:

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

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

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

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

Other than initial application court orders —

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

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

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

27 Section 11(6) of the CCAA provides as follows:

Burden of Proof on Application —

(6) The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

28 Section 11.3 of the CCAA provides as follows:

11.3 No order made under section 11 shall have the effect of

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

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

The Pension Benefits Act

29 Section 55(2) of the PBA provides as follows:

An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times, ...

30 The General Regulation to the Act, R.R.O. 1990, Reg. 909, provides in part as follows:

4. (2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan...shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;

(b) all contributions required to pay the normal cost;

(c) all special payments determined in accordance with section 5; and

(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.

5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4 (2) (c) shall be not less than the sum of,

.....

(b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

.....

(e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

The Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A (the "LRA")

31 Section 69 of the LRA provides in part as follows:

69. (1) In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

.....

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

32 Section 116 of the LRA provides as follows:

Board's orders not subject to review

116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Jurisdiction of the Court under the Companies' Creditors Arrangement Act

33 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306 (Ont. Gen. Div. [Commercial List]), Blair J. adopted, at paragraph 46, the following passage from the decision of Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

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 (citations omitted)

[emphasis added]

34 In *Sulphur Corp. of Canada Ltd., Re* (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.), Lovecchio J. considered the jurisdiction of the Court to make an order under s. 11 of the CCAA with provisions that conflicted with provisions of the *Builders Lien Act* of British Columbia (the "BLA"), a conflict which arose because of the grant under a CCAA order of a priority to the financing charge of a debtor in possession ("DIP financing") over all other creditors of the applicant company. Lovecchio J. decided that the Court has jurisdiction to grant a change under the CCAA to secure DIP financing which ranks in priority to a statutory lien under the BLA of British Columbia (paragraph 16).

35 After noting that, apart from the circumstances of the case, the lien under the BLA would have priority, Lovecchio J. provided the following analysis under the headings set out below in the following excerpt which addresses the jurisdiction of the Court in helpful detail and is therefore set out fully here:

The Paramountcy Argument and the Jurisdiction of the Courts

¶ 23 Sections 11(3) and 11(4) of the CCAA read as follows:

11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

¶ 24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?

¶ 25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Re Hunters Trailer & Marine Ltd.* [See Note 3 below] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the CCAA and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

Note 3: (2002), 94 Alta. L.R. (3d) 389.

¶ 26 In discussing the objective of the CCAA, Wachowich C.J.Q.B. stated the following at para. 15:

The aim of the CCAA is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors...

At para 18:

I agree with the statement made by Mackenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (BCCA), at 146 that: ...the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the

professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

.....

¶ 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.* [See Note 4 below] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

These statements about the goals and operations of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

Note 4: [1999] A.J. No. 185 (C.A.), online: (AJ).

¶ 28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the CCAA. It is within this context that my initial Order and the June 19 Order were based.

¶ 29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re* [See Note 5 below] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. ...

Note 5: (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div.).

¶ 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* [See Note 6 below], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

Note 6: (1975), [1976] 2 S.C.R. 475..

¶ 31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the *Court of Queen's Bench Act* [See Note 7 below], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the *Mechanics' Liens Act* [See Note 8 below], also a provincial statute.

Note 7: R.S.M. 1970, c. C280.

Note 8: R.S.M. 1970, c. M80

¶ 32 ... In *Smoky*, Hunt J.A. used the words the exercise of discretion — a discretion she found to have been broad and one provided for in the statute.

¶ 33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CCAA, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

¶ 34 In *Re United Used Auto & Truck Parts Ltd.* [See Note 9 below], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

Note 9: (2000), 16 C.B.R. (4th) 141 (BCCA).

¶ 35 Parliament's way of ensuring that the CCAA would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

¶ 36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

¶ 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.

¶ 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* [See Note 10 below] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

Note 10: [1995] B.C.J. No. 1535 (C.A.)

36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), considered the jurisdiction of the Court under s. 11 of the CCAA in connection with an order given under that section removing directors from the board of the applicant company. Paragraphs 31ff of the decision dealt first with the jurisdiction of the Court and then with the exercise of its discretion. The following passages from that decision are relevant with respect to the jurisdiction of the Court:

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17] Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List)); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

.....

[35] ...[I]nherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in *Royal Oak Mines*, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc. (Re)* (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the document], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end of the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

37 As to the exercise of the jurisdiction given by s. 11, the Court in *Stelco* said the following at paragraphs 43 and 44:

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a)--(c) and 11(4)(a)--(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. ...

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff*, *supra*, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

38 The Court in *Stelco* went on to determine that it was not for the Court under s. 11 to usurp the role of the directors and management in conducting the restructuring efforts and found that there was no authority in s. 11 of the CCAA for the Court to interfere with the composition of a board of directors.

In the course of that analysis the Court stated as follows at paragraph 48:

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, *supra*, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps best understood in the

context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

40 On this basis, the limitation expressed by the Court in *Stelco* is not to be understood as restricting the jurisdiction of the Court to make orders which carry out that protective function.

41 Similarly, but in a quite different fact situation, Lax J. of this Court, in her decision in *Richtree Inc., Re* (2005), 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) dismissed a motion to exempt the applicant company from certain filing requirements with regulatory authorities: see paragraphs 13 to 18 of the decision. In paragraph 18 of the decision, Lax J. said that the order that was sought had nothing to do with the restructuring process of the applicant company.

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in *Sulphur Corp. of Canada Ltd., Re, supra*, at paragraph 37, "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

43 This analysis is developed further with regard to the special payments in the part of the text below that deals with the issue relating to paragraph 6 of the Initial Order.

The Context of the Initial Order and the CRO Order

44 On July 19, 2007, the Court issued the Initial Order authorizing, *inter alia*, Automotive to obtain and borrow under a credit facility (the "DIP Facility") from Chrysler as DIP Lender in order to finance certain expenditures contemplated by the cash flows that are approved by the DIP Lender and filed with the Court.

45 The Initial Order provided that the DIP Facility was to be on the terms and subject to the conditions set forth in the DIP Term Sheet and Commitment Letter between Automotive and the DIP Lender dated as of July 18, 2007 (the "Commitment Letter"), filed with the Court.

46 The Commitment Letter provides:

The Borrower covenants as follows

The Borrower shall not, without the Lender's prior written consent, make any material disbursement unless it is contemplated in the Initial cash flow, attached as Schedule "A" to this DIP Term Sheet and Commitment Letter (the "Initial Cash Flow") or any rolling cash flow approved by the Lender (collectively "Cash Flow Projections") and, for greater certainty, the Borrower shall not issue any cheques or make any disbursements until such point in time as the Lender has approved the same and confirmed sufficient funding of the same in accordance with the terms hereof[.]

47 The Initial Order also stated that rights of the DIP Lender under the Commitment Letter shall not be impaired in any way in Automotive's CCAA proceedings or by any provincial or federal statutes and that the DIP Lender shall not have any liability to any person whatsoever resulting from the breach by Automotive of any agreement caused by Automotive entering into the Commitment Letter.

48 The Initial Order provided that the DIP Lender was entitled to the benefit of the DIP Lender's Charge on all of the property of Automotive (except certain tax refunds).

49 The Affidavit of John Boken, dated July 19, 2007, sworn on behalf of Automotive and filed with the Court in connection with the application for the Initial Order (the "Boken Affidavit") stated the following at paragraph 46 with respect to the pension plans of Automotive:

[Automotive] intends to continue to pay current service costs with respect to benefits accruing from the date of filing. The DIP Loan (as defined below), does not provide for the funding of any special payments.

50 In addition, the initial cash flow approved by Chrysler and filed with the Court on the application for the Initial Order clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

51 Automotive brought a motion to the Court on July 30, 2007 for, inter alia, an Order confirming the terms of the DIP Facility (the "DIP Approval Motion"). The DIP Approval Motion was made on notice to, among others, the USW and the Superintendent. The Boken Affidavit was again served in connection with the DIP Approval Motion. As noted above, the Boken Affidavit unequivocally indicated that special payments would not be made and were not permitted by the DIP Facility.

52 In addition, the Monitor filed its First Report with the Court at the return of the DIP Approval Motion and specifically noted that Automotive could not make any payments that were not in the cash flow forecast and that special pension payments were not provided for in the forecast. That point was reiterated in the notes to the cash flow forecast.

53 On July 30, 2007, the Court issued an Order confirming the terms of the DIP Facility (the "DIP Approval Order"). The DIP Approval Order provided:

3. THIS COURT ORDERS that the DIP Facility provided by DCC to the Applicant in the amount of Cdn.\$13.6 million on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and DCC dated as of July 18, 2007, all as set forth in the Initial Order, is hereby confirmed and approved.

54 Based on the First Report of the Monitor and the submissions of all counsel Justice Stinson granted the requested relief and approved the DIP Loan "on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and the DIP Lender dated as of July 18, 2007, all as set forth in the Initial Order". As noted in Justice Stinson's endorsement in respect of the DIP Approval Order, Mr. Bailey on behalf of FSCO and Mr. Starnino on behalf of the USW requested that the Court "record their respective clients' reservation of rights in relation to the pension fund payments and other matters referenced in paragraphs 6(a), 11(b) and (d) of paragraph 26 of the [Initial] Order". Although the CAW did not attend the hearing on July 30, it did receive notice of Automotive's CCAA proceedings on July 23, 2007.

55 No party objected to the approval of the DIP Loan, or the terms and conditions set forth therein. No party appealed Justice Stinson's July 30 order approving the DIP Loan. The appeal period expired on August 20, 2007.

56 The DIP Approval Order was not opposed by the USW or the Superintendent, although they did appear at the DIP Approval Motion.

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

58 On August 23, 2007, the Court issued an Order (the "August 23 Order") approving the Amended DIP Term Sheet and Commitment letter dated August 21, 2007 (the "Amended Commitment Letter"). The Amended Commitment Letter provides that Automotive shall not, without the DIP Lender's prior written consent, make any material disbursement unless it is contemplated in the cash flows approved by the DIP Lender. The Unions and the Superintendent did not oppose the August 23 Order, and they did not seek leave to appeal it.

59 The Boken Affidavit filed in support of the Initial Application indicated that:

- (a) Automotive had no other realistic source of DIP funding to continue operations;
- (b) the DIP Loan was the only basis on which funding was available to keep the potential for the preservation of some of the plants as going concerns; and
- (c) the DIP Loan was being provided as a component of a complex multi-party agreement that represented a compromise of the rights of Chrysler, Automotive and the U.S. Debtors, which agreement was approved by the US Bankruptcy Court.

60 By Order of Justice Pepall dated September 11, 2007, Axis Consulting Group and Allan Rutman was appointed Chief Restructuring Officer ("CRO") of Automotive (the "CRO Order"). Paragraph 4 of that CRO Order states:

THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except for any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection therewith. This last limitation on liability will be effective up until and including Sept. 20, 2007 and thereafter as ordered by the judge hearing the motion on Sept. 20, 2007.

61 The last sentence in paragraph 4 of the CRO Order was added by Justice Pepall in response to submissions by counsel that the issue of protections for the CRO were to be further addressed on this motion by the USW.

The Issues

Paragraph 4

62 The USW states its concern that the provision in paragraph 4 that allows the Applicant to retain further Assistants could be interpreted to allow hiring "in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation" (USW Factum, paragraph 43). How in particular that might come about is not explained. It is not suggested that the Applicant has acted or intends to act in such a manner.

63 Paragraph 4 does not provide that such hirings may be made in the manner that is the cause of concern. No basis was submitted for considering that such a result is implicit in paragraph 4.

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making further hirings. It is conceivable in principle that hirings might be made in a way that would raise issues of the kind raised in *Richtree Inc., Re, supra*. In such circumstances, having regard to the approach taken by the Court in *Richtree*, the aggrieved parties would apparently be able to seek appropriate relief from the Court as part of administrative or supervisory jurisdiction in respect of orders made by the Court under the CCAA. That would be an appropriate context in which to address the question of whether there is a conflict between the Collective Agreement and/or the LRA on the one hand and the CCAA and/or the Initial Order on the other. In the present circumstances, it is unnecessary to address the matter and there is no fact situation before the Court to allow it to be addressed properly.

Paragraph 6

65 The objection taken to the phrase "but not required" in paragraph 6 is that Automotive regards the phrase as staying its obligations to pay various kinds of post-filing employee compensation, including in particular special payments to the pension plan.

66 Under the DIP Approval Order, the Court approved the DIP Facility on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter dated July 18, 2007. As noted, the Commitment Letter precludes Automotive from making distributions not contemplated in approved cash flows and the cash flow filed with the Court stated that special

payments under the pension plans would not be made. These features link the DIP Approval Order to the paragraph 6 provision in the Initial Order that the specified kinds of payments are not required to be made. That is to say, the Initial Order and the DIP Approval Order are an integrated arrangement. The rationale given for this arrangement in the records is that Automotive will not be in a position to carry on business and will not have available funds without the DIP Facility and the terms on which the DIP Lender is prepared to commit to the DIP Facility are as stated.

67 Automotive states in its factum that it has continued to pay all wages and vacation pay during the course of this CCAA proceeding and intends to continue such payments and that the DIP Loan will, subject to certain conditions, provide advances to facilitate payment of statutory severance obligations.

68 The Initial Cash Flow provides for certain operating disbursements in respect of "Payroll, Payroll Taxes, Benefits, Severance, Other". The associated note states:

The Forecast [Initial Cash Flow] assumes that payments are made for medical and health benefits and current service pension payments will be made while a plant is operating and then cease on the end of production date. The Forecast does not provide for the payment of any special pension payments as it is assumed these will be stayed in a CCAA filing.

69 The Court has approved the DIP Facility and, subject to this motion, the Initial Order. It is obvious that the DIP Facility and the Initial Order are integrally related. In consequence, if Automotive were to fail to use the funds available under the DIP Facility for the purposes that have been indicated for those funds in these CCAA proceedings, that would be a matter that might properly found a motion to the Court for relief. So the phrase "but not required" in paragraph 6 does not give Automotive a *carte blanche* to withhold contemplated payments, contrary to a suggestion that was made against the paragraph in the course of the hearing.

70 On the other hand, it is clear that the effect of the terms of the DIP Approval and paragraph 6 of the Initial Order is that Automotive, under the Order, is "not required" to make the special payments under its Pension Plans that would otherwise be required.

71 The requirement for the making of such special payments is a statutory requirement. The special payments are provided for in the pension benefits regime under the PBA and the related regulations, as set out in the relevant provisions excerpted above.

Jurisdiction under the CCAA re the Special Payments

72 The USW and the CAW submitted that the obligation under the pension benefits statutory regime to make special payments is an obligation under their respective collective agreements with Automotive. Those agreements require Automotive to maintain pension plans for members having certain specific features, principally relating to the amount of the pension to be earned and paid for the period of employment served by the employee. It was not shown that any provisions in the collective agreements do expressly require Automotive to comply with the statutory regime as to special payments. Rather, the submission seemed to be that because Automotive has an obligation under the Collective Agreement to maintain the pension plan and also has a statutory obligation in respect of pension plans it maintains to make certain special payments, that the contractual obligation impliedly includes the statutory obligations and therefore, any relief from the statutory obligation also constitutes relief from the contractual obligation under the Collective Agreement. Whenever it is argued, as here, that a term should be implied in a contract, the necessary question is why that is so and in this case, no answer is evident from the submissions. The implication was perhaps that it is self-evident but that may be debatable. The pension plan provisions in the collective agreements are addressed to the pension benefits that the plan is required to make available to the members and not to how that is to be done. On this basis, it would seem to be a stretch to say that just because a pension plan is required to conform to the statutory regime, the company sponsoring the plan has impliedly agreed with the bargaining agent to do so. This would suggest that all that the company has agreed to do in the Collective Agreement is to maintain a plan that provides for the benefits contracted for in the collective bargain.

73 However, that analysis may be unduly technical for purposes of the issues on this motion. The commitment of Automotive in its collective agreement to maintain pension plans would give rise to a reasonable expectation that it would keep those

plans in good standing in accordance with applicable regulatory requirements designed to ensure that the plans will be able to meet their payment obligations. Moreover, at least one of the pension plans contains a provision which requires the making of all payments required by the applicable statutes. So the better approach is probably to regard the maintenance of the special payments as effectively contemplated by the collective agreements.

74 Even so, this consideration would be relevant to the issue of the jurisdiction of the Court to make the impugned order only if this relationship to the collective agreements gives rise to jurisdictional considerations that are different from those that arise by reasons of the payments being required pursuant to the PBA.

75 As observed by the Supreme Court of Canada in its decision in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (S.C.C.) at paragraph 86, collective bargaining is a fundamental aspect of Canadian society, which has emerged as the most significant collective activity through which the freedom of association protected by s. 2(d) of the Charter is expressed in the labour context. Recognizing that workers have the right to bargain collectively reaffirms the values of dignity, personal autonomy, equality and democracy.

76 This fundamental process of collective bargaining is entrenched in the laws of Ontario by the LRA, which provides a comprehensive scheme for employment relations. Among other things, that statute directs that:

- (a) there shall only be one collective agreement in force between a trade union and an employer;
- (b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;
- (c) the collective agreement is binding upon the employer and the employees;
- (d) the collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or the statute without the consent of the Labour Board on the joint application of the parties;
- (e) a provision of a collective agreement may only be revised on the mutual consent of the parties;
- (f) no employer and no person acting on behalf of an employer shall interfere with the representation of employees by a trade union; and,
- (g) no employer shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

77 Based on these elements of the LRA, it appears that the employees cannot legally terminate their employment under their collective agreement before "it ceases to operate in accordance with its provisions or the LRA without consent of the O.L.R.B. on the joint application of the parties". The USW submits that therefore, the employees cannot legally terminate their services. However, whether this is so would depend first on whether the making of the Initial Order or its terms would allow the Collective Agreement to be terminated. No submissions were made that assist on this point.

78 Secondly, since the LRA provides that the Collective Agreement could be terminated with the consent of the Board, there is a question whether that consent could be obtained — a matter that was not canvassed in the submissions.

79 The above considerations relating to the LRA do not suggest that the relationship of the PBA requirements for special payments to the collective agreements should be considered to give those requirements any jurisdictional status for the issues in this case that would go beyond the implications that arise from the fact of those requirements being imposed pursuant to statute.

80 This result is not altered by the Court's recognition that collective bargaining is a fundamental aspect of Canadian society involving the exercise of the freedom of association protected by s. 2(d) of the *Charter*. It was not suggested that the Initial Order constitutes a breach of the *Charter* rights of the employees.

81 The Moving Parties rely upon the decision of Farley J. in *United Air Lines, Inc., Re* (2005), 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) as authority for the proposition that a CCAA debtor must in all circumstances continue to make special payments post-filing. *United Air Lines* involved a motion brought by UAL for an order authorizing it to cease making contributions to its Canadian pension plans. UAL applied for protection from its creditors pursuant to section 18.6 of the CCAA, whereby it sought recognition of a Chapter 11 proceeding in the United States. UAL had filed for bankruptcy protection in the United States in December 2002 and filed under section 18.6 of the CCAA in 2003. The motion was not brought until February 2005.

82 UAL was a large U.S. corporation that was attempting to restructure. It had an international workforce, including a small Canadian workforce. In its motion, it was seeking authority to cease making all contributions to its Canadian pension plans even though it continued to meet its pension funding commitments in all countries other than the United States and Canada. UAL's U.S. employees and retirees had the benefit of the protections provided by the Pension Benefits Guarantee Corporation, while the Canadian employees, as the beneficiaries of a federally regulated scheme, did not. UAL had not presented any evidence of its inability to make the pension payments.

83 After reviewing all of the facts, Farley J. summarized as follows at paragraph 7:

As discussed above, the relative size of the Canadian problems *vis-a-vis* the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring — given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

84 *United Air Lines* does not appear to stand for the proposition that all pension contributions, including special payments, must in all cases be paid by a CCAA debtor absent an agreement with its unions and FSCO. On the contrary, Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

85 Based on the decision of the Court of appeal for Quebec in *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.), there is a reason to consider that the "not required" clause does not purport to abrogate the pension plan obligations. It authorizes the company not to make payments on account of its obligations during the currency of the Initial Order. Unpaid obligations would constitute debts of the company to be dealt with at the termination of its protection under the CCAA: see *Mine Jeffrey* paragraphs 60 to 62.

86 It was submitted that the text of the *Mine Jeffrey* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Mine Jeffrey* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

87 Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.

88 Reference was made to s. 11.3(a) of the CCAA, which provides that no order made under s. 11 is to have the effect of prohibiting a person from requiring payment for services provided after the order is made. The Applicant is paying the wages and the current service obligations under the pension plans of the employees who continue to be employed. The special payments do not relate exclusively to the continuing employees. It is not shown (and does not seem to be submitted) that the amounts that might be required under the special payments arise from or are in connection with the current service obligations to the plan (assuming those obligations are paid in due course). The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

89 Accordingly, this point does not alter the conclusion that the Court has the jurisdiction to approve the "not required" clause, notwithstanding its effect in respect of the special payments.

Exercise of the Statutory Discretion under the CCAA

90 There is a separate question raised whether it is a proper exercise of the discretion of the court for it to approve the provision in question. That question must be addressed in the context discussed above.

91 The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own. In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately \$5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional \$12 million. Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.

92 Two other important considerations are evident in the present case. First, for the reasons given above, the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.

93 Secondly, the moving parties each had a full opportunity to object to the approval of the DIP Facility and none of them did so, even though it was clear from the terms of the DIP Facility and the terms of the Initial Order that they are an integrated arrangement. Instead of objecting to the DIP Facility, they have allowed it to be approved and have objected only to the related provisions of the Initial Order. In proceeding this way, it appears they have avoided facing the question whether if they opposed the DIP Approval Order for the reasons they now advance in respect of the special payments, the DIP Lender might have resisted their demands at the first moment, to the detriment of the continuing employment of members, and they now seek to raise the issue now that the DIP lender is in place and has been advancing funds, in circumstances where the only practical consequence could be to raise the question which would have appropriately been raised at the earlier stage.

94 Chrysler submitted that this conduct is a collateral attack on the DIP Approval Order and should not be countenanced by the Court.

95 The Initial Order was approved on July 19, 2007 with a provision in paragraph 3 providing for a further hearing on July 30, 2007 (the "Comeback Date") at which time the Initial Order could be supplemented or otherwise varied. On July 30, 2007 the Court ordered the approval of the DIP Facility. It ordered an extension of the Stay Period to August 24, 2007.

96 The Court did not make any order to supplement or vary the Initial Order in any other respects. Neither did it make any order to the contrary. Nor does it appear from the recitals in the DIP Approval Order that the Court was asked on that motion to deal with the Initial Order in other respects. Stinson J., in his endorsement of July 30, 2007 approving the issuance of the DIP Approval Order, recorded the requests on behalf of the Superintendent and the USW that he record their respective clients' reservation of rights in relation to the pension fund payment and other matters referenced in paragraphs 6(a), 11(b) and (d) and paragraph 26 of the Initial Order. Since this reservation was recorded at the same time as the DIP Approval Order was granted and without any order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

97 It is important that, in the Initial Order at paragraph 34, the DIP Facility was ordered to be on the terms and conditions in the DIP Term Sheet and Commitment Letter dated as of July 18, 2007 which was approved in that paragraph subject to a further hearing on the Comeback Date. Covenant No. 1 in the DIP Term Sheet and Commitment Letter provides that the Borrower shall not without the Lender's prior written consent make any material disbursement unless it is contemplated in the initial cash flow or any subsequent cash flow approved by the Lender.

98 As noted earlier, on the motion to approve the Initial Order the Court had affidavit information from Automotive that the DIP Loan does not provide for the funding of any special payments, along with a copy of the cash flow which states that no provision is made for the payment of any special pension payments.

99 So, based on the above analysis, the Court, in the Initial Order, by reason of paragraph 34 (as to which no reservation of a right to object has been made or is now asserted), has ordered that the DIP Loan is not to be applied to special payments except with the consent of the DIP Lender.

100 The Superintendent seeks an order requiring the Applicant to pay the Special Payments. For the reasons given above, such an order would constitute a collateral attack on DIP Approval because the evidence is that the Applicant has no funds available to it other than the DIP Loan. Consequently, the order the Superintendent requests would effectively order the Applicant to use the DIP Loan for a purpose which, pursuant to paragraph 34 of the Initial Order, is not permitted.

101 Chrysler's agreement to act as DIP lender is based on the fact that the Applicant's supply is required to maintain Chrysler's own just-in-time vehicle manufacturing operations. The Superintendent submits that if Chrysler has concluded that it requires the output derived from the labour of the employees, then it is only fair and equitable that Chrysler bears the cost, in terms of remuneration to the employees including special payments to the Pension Plans, of that labour.

102 In the decision in *Ivaco Inc., Re* (2005), 47 C.C.P.B. 62 (Ont. S.C.J. [Commercial List]) at paragraph 4 (affirmed (2006), 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490 (S.C.C.)) at the first instance, Farley J. characterized the nature of special payments, stating that "notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a 'fresh' obligation".

103 The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period.

104 The Superintendent objects that the approach that has been taken by the Applicant in the present case has been done without the requisite negotiation with the Superintendent and the pension plan stakeholders. In the decision in *United Airlines Inc., supra*, Farley J. cited the example of a case where the company obtained specific relief from the requirement to make special payments although current service costs were made. The Court, however, concluded that such an arrangement "is not a 'given right' of the company" and is to be achieved "on a consensual basis after negotiation" with the pension plan stakeholders.

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been, each side could have assessed its own interests *vis-à-vis* the position of the other and the extent to which it would take the risk of insisting on its position or instead seek a compromise. Instead, what has happened is that the DIP Facility has proceeded without objection and the DIP Lender has changed its position on the basis of the Court orders given to date and now, after it has done so, an effort is made to put it in a position where it has no choice but to increase its funding or risk the loss of the continuing operations. This might yield a negotiation but it would be a lopsided one by reason of the DIP Lender already having provided funding in accordance with the Court orders.

106 The USW contends that its submissions in respect of paragraph 6 of the Initial Order are not in conflict with paragraph 34 because they do not seek an order that the DIP Lender provide the funds that Automotive would require to make the special payments or that Automotive make the payments, but only that it not be ordered that Automotive is not required to make those payments.

107 Since the material before the Court is to the effect that Automotive had and has no funds and has no expectation of having funds available which could be used to make the special payments, other than the monies available under the DIP Facility, if the Court were now to countenance and make the amendment to paragraph 6 which the moving party seeks, the necessary practical consequence of that amendment would be to allow pressure to be put on the DIP Lender to increase its funding commitment to Automotive and consent to Automotive making the special payments, because Automotive would otherwise be potentially vulnerable to proceedings to force it to meet its payment obligations and there would inevitably be concerns about the consequences that could flow from default on its part. That situation would be contrary to the expectations which both Automotive and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order. It might well be different if the moving party had instead sought an order that the "not required" clause in paragraph 6 should be subject to a proviso that it would not apply to the extent that payment of such amounts could be funded out of monies other than from the DIP Facility. There is no alternative request for such a proviso, perhaps because no one expects it would be of any use.

108 So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

109 Moreover, the failure of the moving parties to reserve in respect of and then dispute paragraph 34 of the Initial Order has the following unsatisfactory effect. If the moving parties had duly disputed paragraph 34 there would have been an opportunity for the Court to consider what would have been the two opposing positions on whether the DIP terms proposed by the DIP Lender should be accepted. If that question had properly been put in issue, then there would also have been an opportunity for each side to consider whether it would seek to press its position or would compromise for the sake of the respective potential benefits to each side. No such opportunity would exist with the request that is now before the Court. So the request should not be granted.

110 For the reasons given above, there is no fair way at the present time to put the parties on a level playing field for negotiation about the special payments. For the reasons mentioned at other points above, it is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible. With these considerations in mind, it is appropriate to take into account that the period of the application of the Initial Order was extended by Court order and will expire on the date set by the last such Order unless further extended. If a motion is made for a further extension of the Initial Order beyond its present expiry date, there would seem to be no basis in the above reasons to object to the legitimacy of interested parties raising an objection to paragraph 6 at that time, provided they are also prepared to object to paragraph 34.

Paragraph 11

111 The objection taken by the USW is that the provisions of s. 11 are open to an interpretation that would permit Automotive to repudiate its collective agreements with the USW's members.

112 Paragraph 11 is stated to be subject to covenants in the Definitive Documents as defined in the Initial Order. (They appear to be certain security documents.) The provision does not state that the right to terminate is subject only to such covenants. No mention is made in paragraph 11 of other obligations to which the Applicant may or may not be subject.

113 The USW seeks to have the rights provided for in clauses (b) and (d) of paragraph 11 made subject to all applicable collective agreements and labour laws. Those rights can only be exercised by agreement with the affected employees or other counterparty or under a plan filed under the CCAA, failing which the matters are to be left to be dealt with in any plan of arrangement filed by the Applicant under the CCAA. Nothing in the provision purports to abrogate any applicable collective agreement or labour laws. No reason was advanced why the authorized bargaining agent could not withhold agreement to any proposed exercise of clause (b) or (d) and if Automotive then sought to deal further with the matter pursuant to the CCAA there is no apparent reason why the matter could not be pursued against Automotive in court under the CCAA.

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

115 The USW and the CAW object to the part of paragraph 26 which provides that the monitor, by fulfilling its obligations under the Initial Order, shall not be deemed to have taken control of the business or be deemed to have "been or become an employer of any of the Applicant's employees." [The word "employees" does not appear in the text of the Order in certain of the materials, but it is obviously intended.]

116 The USW objects to the provision on the basis that the determination of whether the monitor is an employer is within the exclusive jurisdiction of the O.L.R.B. by reason of s. 69, s. 111 and s. 116 of the LRA. Section 69(2) of that Act provides that a person to whom an employer sells its business becomes the employer (the "successor employer") for the purposes specified in that section until the Board declares otherwise.

117 The Initial Order does not expressly purport to determine the application of s. 69(2) of the LRA, since it does not refer to that Act. The application of paragraph 26 is stated to be limited to the monitor in its limited role under the Initial Order, which leaves the Applicant in possession and control of the business and, therefore, as the employer. This consideration has been regarded as determinative in finding such a provision to be acceptable: see the *Mine Jeffrey* decision at paragraph [76].

118 The discussion in *Mine Jeffrey ic., Re* about a provision of this kind did not address statutory provisions such as s. 69(2) of the LRA.

119 As worded, it is not apparent that paragraph 26 warrants the concern expressed by the USW. It seems reasonable to assume that if the monitor were to take action of a kind that would suggest that the monitor has started to act *de facto* as the employer, in breach of paragraph 26, a motion might be brought before the Court under the CCAA and/or to the Ontario Labour Relations Board and the matter would then be considered in the context of an actual fact situation rather than in the present abstract and ill-defined circumstances. No order to give effect to the objection of the USW and the CAW in respect of this feature of paragraph 26 is appropriate at the present time.

Paragraph 29

120 The USW objects that the immunity, or limitation of liability, provided to the monitor in the first sentence of paragraph 29 is not within the jurisdiction of the Court under the CCAA, or if it is, the granting of this immunity is not a proper exercise of the discretion of the Court. The impugned provision limits liability to gross negligence and willful misconduct.

121 There was no reservation of rights in the endorsement of Stinson J. of July 30, 2007 with respect to this paragraph.

122 The USW cites no authority that has been decided with respect to the CCAA in support of its contention that the limitation of liability is beyond the jurisdiction of the Court under the CCAA. In view of the stay jurisdiction of s. 11 of the CCAA and taking into account the "on such terms" jurisdiction under that section, it might seem that the better view is that the Court does have the jurisdiction to make such an order and that the only issue is whether the grant of limited liability of the kind specified is a proper exercise of the discretion of the Court.

123 The USW submits that other court decisions show that the Court does not have the jurisdiction to grant a limitation of liability to the monitor of the kind set out in paragraph 29.

124 In *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123 (S.C.C.) ("*T.C.T. Logistics*"), the Supreme Court of Canada held that the "boiler plate" immunization of the receiver, though not uncommon in receivership orders, was invalid in the absence of "explicit statutory language" to authorize such an extreme measure:

Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.

.....

As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:

...explicit statutory language is required to divest persons of rights they otherwise enjoy at law... [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

125 The USW also relies on s. 11.8(1) of the CCAA. Indeed, subsection 11.8(1) explicitly exempts a monitor from liability in respect of claims against the company which arise "before or upon the monitor's appointment":

Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

126 The decision in *TCT Logistics Inc.* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *TCT Logistics Inc.* decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

127 Section 11.8(1) deals with the situation where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees and it provides a blanket immunity against claims which arose before or upon the monitor's appointment. It is understandable that in the situation addressed in the section that the immunity would be limited to such claims and that it would be a blanket immunity in respect of such claims. The existence of s. 11.8(1) does not give rise to any implication as to what kind of limitation of liability would be reasonable in respect of a monitor with the limited powers given in the present case.

128 The specific wording in paragraph 29 of the Initial Order is consistent with the standard limitation of liability protections granted to monitors under the standard-form model CCAA Initial Order, which was authorized and approved by the Commercial List Users' Committee on September 12, 2006.

129 That is, of course, not determinative but it suggest that the clause has received serious favourable consideration from members of the bar in a context unrelated to particular party interests.

130 The monitor submitted in its factum a list of twelve recent CCAA proceedings in which orders have been granted with similar provisions to the limitation of liability in this case. This would seem to suggest that in those cases the clause limiting liability was not disputed or, if it was, the Court found the clause to be acceptable.

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

132 The USW advances the submissions made with respect to jurisdiction as regards the monitor based on *TCT Logistics Inc.* against the clause limiting the liability of the CRO.

133 Automotive does not have D&O insurance in place. The protection set out in paragraph 4 of the CRO Order can reasonably be regarded as a fundamental condition of Axis Consulting Group Inc. and Mr. Rutman's agreement to accept and continue as CRO. Automotive would probably be severely restricted in its ability to appoint a capable and experienced Chief Restructuring Officer without the ability to offer a limitation on potential liability.

134 The USW's claim that the Court does not have authority to grant this protection to the CRO is contrary to established practice. These protections are consistent with limitations of liability granted to Chief Restructuring Officers in other CCAA proceedings, and are consistent with the protections granted to Monitors under the standard-form CCAA Initial Order. The same or similar language was used in paragraph 19 of the Order of July 29, 2004 in the *Stelco Inc.* CCAA proceedings and in paragraph 3 of the Order of November 28, 2003 in the *Ivaco Inc.* CCAA proceeding, both granted by Farley J.

135 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 154 (Sask. Q.B.) the Saskatchewan Court of Queen's Bench upheld a similar limitation of liability for the Chief Restructuring Officer of Bricore. In dismissing a motion to lift the stay against the Chief Restructuring Officer, Koch J. stated:

The [CCAA] is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

136 The Saskatchewan Court of Appeal upheld the decision [2007 CarswellSask 324 (Sask. C.A.)].

137 The terms of the limitation of liability given to the CRO are similar to the limitation in the indemnity ordered in paragraph 21 of the Initial Order to be given by the Applicant to the directors and officers of the Applicant. The moving parties have not requested any amendment of that paragraph.

138 It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.

139 Paragraph 4 of the CRO Order appears satisfactory for the above reasons.

Conclusion

140 For the reasons given above, the motions are dismissed.

141 Counsel may make written submissions as to costs if necessary.

Motions dismissed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 7

CITATION: Comark Inc. (RE), 2015 ONSC 2010
COURT FILE NO.: CV-15-10920-00CL
DATE: 2015-04-01

SUPERIOR COURT OF JUSTICE - ONTARIO

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

**AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF COMARK INC.**

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Marc Wasserman and Caitlin Fell*, for the Applicant

Brian Empey and Ryan Baulke, for Alvarez & Marsal Canada Inc., Proposed
Monitor

Sam Babe, for Salus Capital Partners, LLC (DIP Lender)

HEARD and

ENDORSED: March 26, 2015

REASONS: April 1, 2015

ENDORSEMENT

[1] The Applicant, Comark Inc. ("Comark"), brings this application for relief under the *Companies' Creditors Arrangement Act* ("CCAA").

[2] Comark operates 343 retail stores across Canada under three distinct divisions: Ricki's, Bootlegger and Cleo (together, the "Banners"). Comark sells predominantly exclusive private label merchandise. Comark employs approximately 3,400 people.

[3] Comark is a privately held corporation that is a portfolio company of an investment fund managed by KarpReilly LLC ("KarpReilly"). Comark's corporate headquarters are in Mississauga, Ontario (the "Corporate Headquarters") and employ 83 full time employees. Comark operates an essential distribution centre in Laval, Quebec, which employs approximately 200 people and processes approximately 9.3 million and 2 million units of merchandise each year for stores and online sales, respectively.

[4] Comark has over 300 product suppliers, primarily located in Asia and North America. Approximately 80% of Comark's unit purchases were sourced from foreign manufacturers and the remaining 20% were sourced in North America. Purchases are typically made in US dollars.

[5] Comark transports all products to its stores through third party transportation companies. Purolator is Comark's primary third party transportation provider. The Applicant is of the view that Purolator's continued services are critical to the company's ongoing operations. Approximately 90% of Comark's products are transported using Purolator.

[6] Comark has over 60 third party landlords from which it leases all of its retail and distribution locations. As part of its restructuring under these proceedings, Comark anticipates that it will disclaim certain leases in respect of Comark stores.

[7] Comark participates in co-brand community events and cause marketing with charitable organizations. Comark customers have donated amounts intended for various charities, and these donated funds are currently comingled with Comark's other funds. As of March 17, 2015, Ricki's has (Cdn.) \$40,057, Bootlegger has (Cdn.) \$108 and Cleo has (Cdn.) \$107,917 in funds received from customers in respect of donations to various charitable organizations.

[8] Comark has experienced declining financial results over the past two years.

[9] As of February 28, 2015, Comark had total assets of (Cdn.) \$112.4 million and its total indebtedness was approximately (Cdn.) \$126.1 million.

[10] Comark is financed primarily through a term loan and revolving credit facilities under a credit agreement dated as of October 31, 2014 between Comark, as the lead borrower, and Salus, as administrative collateral agent and lender thereto (the "Salus Credit Agreement").

[11] As of March 17, 2015, the Applicant reports that there was approximately U.S.\$43.1 million outstanding under the term loan facility and (Cdn.) \$24.8 million outstanding under the revolving credit facility (the "Revolving Credit Facility"). The Salus Credit Agreement has a maturity date of October 31, 2018. All of the obligations of Comark under the Salus Credit Agreement are secured by all of Comark's assets.

[12] Comark has been noted in default of the Agreement and Salus has made a demand for repayment. Comark advises that it is not able to repay its debt obligations to Salus.

[13] Comark reports that its adjusted EBITDA fell to approximately (Cdn.) \$16.5 million for the year end February 28, 2015. Comark acknowledges that this constitutes an event of default under the Salus Credit Agreement. On the occurrence of an event of default, Salus has the right to terminate the Salus Credit Agreement and declare that all obligations under it are due and payable with presentment, demand, protest or other notice of any kind.

[14] Salus delivered a Reservation of Rights Letter on March 5, 2015. On March 25, 2015, Salus made a demand for repayment for all amounts owing under the Salus Credit Agreement. Comark acknowledges that it is not able to pay the full amount owing under the Salus Credit

Agreement, which has become immediately due and payable as a result of the event of default and the demand made by Salus. Comark acknowledges that it is insolvent.

[15] The Applicant seeks the granting of an initial order. With the benefit of the protection of the stay of proceedings, Comark is of the view that it will be provided with the necessary "breathing space" in order to allow it to develop a plan to restructure and reorganize the business and preserve enterprise of value.

[16] Comark is of the view that it requires interim financing for working capital and general corporate purposes and for post-filing expenses and costs during the CCAA proceedings.

[17] Salus has agreed to act as DIP lender (the "DIP Lender") and provide an interim financing facility (the "DIP Facility") under an amended and restated credit agreement with Salus (the "DIP Agreement"). It is a condition of the DIP Agreement that advances made to Comark be secured by a court ordered security interest, lien and charge over all of the assets and undertakings of Comark (the "DIP Lender's Charge").

[18] The Applicant advises that under the draft initial order, the charges, including the DIP Lender's Charge, do not prime TD Bank and creditors with a purchase money security interest, which are Comark's only secured creditors. Further, the company advises that it is also an express term of the DIP Agreement that advances made thereunder may not be used to satisfy pre-filing obligations under the Salus Credit Agreement. Further, the company states that the DIP Lender's Charge will not secure any obligation that exists before the date of the initial order.

[19] It is anticipated that the proceeds from Comark's operations will be used to reduce pre-filing obligations outstanding under the Salus Revolver Facility in order to free-up availability under the DIP Facility. In accordance with the DIP Facility and the current cash management system in effect, Comark's cash from business operations will be deposited into the blocked account and swept by Salus in order to reduce amounts outstanding under the Salus Revolver Facility prior to the commencement of these proceedings.

[20] In his supplementary affidavit, Mr. Bachynski states that Comark requires \$15 million during the week ending April 11, 2015 and as such, Comark is proposing a maximum DIP Charge of (Cdn.) \$28 in the draft initial order with a restriction on borrowing of (Cdn.) \$15 million prior to the proposed comeback hearing scheduled for April 7, 2015.

[21] Mr. Bachynski goes on to state that Comark will not be able to satisfy its ordinary course obligations in the CCAA proceedings without the DIP Facility.

[22] In its pre-filing report, the Monitor reports at length on the debtor-in-possession financing. In its report, the Monitor states that Salus has exercised cash dominion pursuant to the Blocked Account Agreement and the Salus Credit Agreement and has made demand under the Salus Credit Agreement. As a consequence, the Monitor states that Comark does not have access to liquidity to discharge its financial obligations. Further, given the deterioration in the Applicant's financial position and its current liquidity crisis, the Monitor states that the Applicant cannot continue to operate without the DIP Facility.

[23] The Monitor also advises that senior management and the Applicant’s advisors believe that the DIP Facility is the only realistic source of funding available, given the urgency of the proposed filing, the position of the lender in the capital structure of the Applicant and the minimal level of Comark’s existing cash on hand.

[24] At section 9.5 of this report, the Monitor summarizes the DIP Facility Terms. This chart is reproduced below.

Comark	
Summary of DIP Facility Terms	
Total Availability	<ul style="list-style-type: none"> • The lesser of: (a) the Maximum Amount of \$32 million, (b) the Borrowing Base, or (c) extensions of credit required under and set out in the Budget, plus outstanding principal amount of pre-filing Revolving Credit Facility.
Effective Date	<ul style="list-style-type: none"> • Date of the Initial Order
Purpose/Permitted Payments	<ul style="list-style-type: none"> • Limited to amounts set out in the Restructuring Plan and the Budget approved by Salus.
Significant Terms	<ul style="list-style-type: none"> • Initial Order must be granted and issued and provide for a DIP Lender's Charge; • The establishment of a cash flow budget and a restructuring plan that is satisfactory to the DIP Lender; • The DIP Lender shall have received control agreements with respect to the deposit accounts of the Borrower which effectively provides for a sweeping of the Borrower’s gross receipts, such collections are to be applied to reduce pre-filing Revolving Credit Facility; and • Other covenants which appear customary under the circumstances.
Fees and Interest	<ul style="list-style-type: none"> • Interest Rate per annum: LIBOR + 5.75 (as at March 24, 2015 LIBOR was approximately 0.25%; however, the DIP Facility contains a LIBOR floor of 1.00%) • Exit fee of 4% of total outstanding borrowing at exit under the DIP, the pre-filing Revolving Credit Facility and the pre-filing Term Loan Facility • Collateral monitoring fee of US\$7,000 per month
Security	<ul style="list-style-type: none"> • All assets and property of the Borrower and DIP Lender’s Charge.
Maturity	<ul style="list-style-type: none"> • The earliest of: (i) completion of a transaction in compliance with the SISF; and (ii) a default.
DIP Lender’s Charge	<ul style="list-style-type: none"> • DIP Lender’s Charge to rank subordinate only to the Administration Charge and the Directors’ Charge (all further defined herein). DIP Lender’s Charge in amount of \$32 million to ensure fees, costs and expenses are covered.

[25] The DIP Facility contains various affirmative covenants, negative covenants, events of default and conditions that, in the proposed Monitor’s view, are reasonable and customary for this type of financing.

[26] The Monitor further comments that the DIP Facility is not a new facility layered on top of the pre-filing credit facilities, rather it is an amended version of the pre-filing Salus Credit Agreement pursuant to which Salus would be prepared to commence to provide liquidity, despite the prior default. Importantly, the Monitor comments that ultimately, the DIP Facility will not result in a greater level of secured debt than was contemplated under the pre-filing facilities (absent the default that occurred). Furthermore, the Monitor reports that as there is no indication of any deficiencies with Salus' security package, and the Applicant has advised that it does not intend that the DIP Lender's Charge prime any other secured party's purchase money security interests or statutory deemed trusts, the fact that the DIP Lender's Charge will increase while the pre-filing Revolving Credit Facility would be paid down, should have no negative impact on the other stakeholders.

[27] The proposed Monitor recommends that the Court approve the DIP Facility. In arriving at this recommendation, the proposed Monitor considered:

- (i) the facts and circumstances of the Applicant;
- (ii) section 11.2(4) of the CCAA;
- (iii) the financial terms of the DIP Facility relative to comparable facilities and the fact that it is the only realistic source of funding available given the urgency of the proposed filing, the prominent position of the Lender in the capital structure of the Applicant and the minimal level of Comark's existing cash on hand;
- (iv) the stability and flexibility of the DIP Facility will provide to ensure there is sufficient liquidity to facilitate the CCAA proceedings and a Sale and Investment Facilitation Process ("SISP"), to maximize realization; and
- (v) the interests of the Applicant's stakeholders.

[28] In providing its recommendation, the proposed Monitor specifically stated that it has considered the provisions of section 11.2(1) of the CCAA which prohibit the DIP Lender's Charge from securing an obligation that exists before the requested order is made. The Monitor reports that having consulted with its counsel, it is of the view that since the pre-filing Revolving Credit Facility is being reduced by the use of the Applicant's cash generated from its business, the DIP Lender's Charge is only securing advances made post-filing under the DIP Facility.

[29] For the purposes of this application, I accept the foregoing submissions and recommendation of the Monitor and, specifically, its view that the form of DIP Facility being proposed, does not contravene the provisions of section 11.2(1) of the CCAA.

[30] Comark proposes a key employee retention plan (the "KERP") for certain employees (the "Key Employees") which Comark considers critical to a successful proceeding under the CCAA. Key Employees include certain key senior management employees, both at the Corporate

Headquarters and Banner level that possess unique professional skills and experience with Comark's business and operations.

[31] The proposed Monitor agrees that the KERP is reasonable in the circumstances.

[32] The Applicant has retained Houlihan Lokey Capital, Inc. as financial advisor (the "Financial Advisor") to advise on a possible restructuring, refinancing or sale for Comark.

[33] The Applicant also reports that it has worked with the Financial Advisor, in consultation with the proposed Monitor and Salus, to develop the Sale and Investor Solicitation Process ("SISP"). The purpose of the SISP is to solicit and assess available opportunities for the acquisition of or investment in Comark's business and property.

[34] In its factum, the Applicant submits that the application addresses the following issues:

- (a) the Applicant's entitlement to seek protection under the CCAA;
- (b) the Applicant's entitlement to a stay of proceedings;
- (c) the granting of the DIP Lender's Charge on a priority basis over the property and approval of the DIP Facility;
- (d) the approval of the KERP and KERP Charge;
- (e) the sealing of the KERP Schedule;
- (f) the granting of the Director's Charge on a priority basis over the property;
- (g) the approval of pre-filing payments to "critical" suppliers and to certain charitable organizations to which Comark's customers donated funds; and
- (h) the approval of the SISP.

[35] I am satisfied that Comark meets the definition of "debtor company" under the CCAA. It is a corporation incorporated under the *Canada Business Corporations Act*.

[36] I am also satisfied that the total claims against Comark far exceed \$5 million and that Comark is insolvent.

[37] In arriving at the conclusion that Comark is insolvent, I have taken into account that, as a result of the event of default and the acceleration of all amounts due under the Salus Credit Agreement, it is apparent that Comark does not have sufficient liquidity to satisfy its liabilities as they become due.

[38] The required financial statements and cash-flow statements are included in the record.

[39] I am also satisfied that the Applicant is entitled to a stay of proceedings pursuant to section 11.02 of the CCAA.

[40] With respect to the request to approve the DIP Facility and to grant a DIP Financing Charge on a priority basis, the authority to approve same is found in section 11.2 of the CCAA. In its factum, the Applicant specifically references section 11.2(1) and submits that it is clear on the facts that the DIP Lender's Charge meets this requirement. Counsel submits that the DIP Facility expressly provides that Comark may not use any advances under the DIP Facility to repay pre-filing obligations. Counsel goes on to state that to the extent that Salus is repaid pre-filing amounts owing to it, this repayment will be made from operational receipts as a result of lending, security and enforcement arrangements in place prior to the CCAA filing. Further, the repayment is not made out of proceeds of the DIP Facility. Rather, the payments to Salus simply maintain the status quo as of the CCAA filing date under the existing Salus asset-based lending credit facility.

[41] For the purposes of this application, I accept the submissions of the Applicant and recommendations of the Monitor and have concluded that the DIP Facility should be approved and the Court should grant the DIP Lender's Charge to a maximum DIP Charge of (Cdn.) \$28 million with a restriction on borrowing of (Cdn.) \$15 million up to April 7, 2015.

[42] Counsel to the Applicant requests approval of the KERP and the KERP Charge. Submissions in support of this request are made at paragraphs 26 - 32 of the Amended Factum. I accept these submissions and approve the KERP and the granting of the KERP Charge.

[43] Insofar as the KERP Schedule contains confidential personal information, the Applicant seeks a sealing of the KERP Schedule. The Applicant references *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] SCC 41, in support of its request to seal the Schedule.

[44] I am satisfied, having considered the *Sierra Club* principles, that it is appropriate to seal the confidential KERP Schedule.

[45] The Applicant also seeks a Directors Charge in the amount of up to (Cdn.) \$3 million, to act as security for indemnification obligations for Comark's directors' potential liabilities. It is contemplated that the Directors Charge would stand in priority to the proposed DIP Charge, but subordinate to the proposed Administration Charge.

[46] Pursuant to section 11.51 of the CCAA, the Court has authority to grant a "super priority" charge to the Directors and Officers as security for the indemnity. The factors to be considered on such a request were set out by Pepall J. (as she then was) in *Canwest Global Communications Corp., Re* (2009), OJ No. 4286.

[47] Comark has estimated the potential exposure of the Directors and Officers for unpaid statutory amounts, including wages, unremitted source deductions, vacation pay, sales and service taxes, termination pay, employee health tax and unpaid workers' compensation to be approximately (Cdn.) \$7.15 million.

[48] I accept the submissions of the Applicant and have concluded that the Directors Charge is necessary and appropriate and is granted in the requested amount.

[49] The Applicant also requests authorization to make certain pre-filing payments, specifically to critical suppliers.

[50] The argument in support of the granting of this request is set out in the Amended Factum at paragraphs 44 – 52. I accept these submissions and concluded that it is appropriate to authorize Comark to make the pre-filing payments. I note that the Monitor will be involved in this process and that the consent of the Monitor to make such payments is required.

[51] I have also been persuaded that it is appropriate for the Court to exercise its jurisdiction to authorize Comark to pay certain amounts that were donated by Comark's customers to the charitable organizations for which the amounts were intended. This authorization is made notwithstanding that the donated amounts are currently comingled with Comark's other funds.

[52] The Applicant also requests approval of the SISP for the reasons set out at paragraphs 54 – 59 of the Amended Factum. I accept these submissions and authorize and approve the SISP.

[53] This application was brought without notice to the creditors of Comark, with the exception of Salus. As such, I treat it as an *ex parte* application.

[54] The requested relief is granted and the order has been signed to reflect the foregoing.

[55] A come-back hearing has been scheduled for April 7, 2015. A further hearing has been scheduled for April 21, 2015.

[56] The come-back hearing is to be neutral in all respects.

[57] The stay of proceedings is in effect up to and including April 24, 2015, or such later date as the Court may order.


Regional Senior Justice G.B. Morawetz

Date: April 1, 2015

Tab 8

2009 CarswellOnt 4699
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

2009 CarswellOnt 4699, [2009] O.J. No. 3344, 179 A.C.W.S. (3d) 517, 57 C.B.R. (5th) 128

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT
FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (Applicants)

Newbould J.

Heard: August 6, 2009

Judgment: August 11, 2009

Docket: CV-09-8247-00CL

Counsel: A. Duncan Grace for GE Canada Leasing Services Company

Daniel R. Dowdall, Jane O. Dietrich for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP

Sean Dunphy, Katherine Mah for Monitor, Ernst & Young Inc.

Kevin McElcheran for Toronto-Dominion Bank

Stuart Brotman for Independent Directors

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Applicant companies were leading manufacturer of oriented strand board — Parent company was G Inc — L was executive vice-president of G Inc — He owned no shares in G Inc — Employee retention plan ("ERP") agreement between G Inc. and L provided that if at any time before L turned 65 years of age, termination event occurred, and he was to be paid three times his then base salary — Agreement provided that obligation was to be secured by letter of credit and that if company made application under Companies' Creditors Arrangement Act, it would seek order creating charge on assets of company with priority satisfactory to L — In initial order, ERP agreement was approved and ERP charge on all of property of applicants as security for amounts that could be owing to L under ERP agreement was granted to L, ranking after administrative charge and investment offering advisory charge — Initial order was made without prejudice to G Co. to move to oppose ERP provisions — G Co. brought motion for order to delete ERP provisions in initial order on basis that provisions had effect of preferring interest of L over interest of other creditors, including G Co. — Motion dismissed — ERP agreement and charge contained in initial order were appropriate and were to be maintained — To require key employee to have already received offer of employment from someone else before ERP agreement could be justified would not be something that is necessary or desirable — ERP agreement and charge were approved by board of directors of G Inc., including approval by independent directors — Once could not assume without more that these people did not have experience in these matters or know what was reasonable — Three-year severance payment was not so large on face of it to be unreasonable or unfair to other stakeholders — Though ERP agreement did not provide that payment should not be made before restructuring was complete, that was clearly its present intent, which was sufficient.

Table of Authorities

Cases considered by *Newbould J.*:

MEI Computer Technology Group Inc., Re (2005), 19 C.B.R. (5th) 257, 2005 CarswellQue 3675, [2005] R.J.Q. 1558 (C.S. Que.) — distinguished

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1519 (Ont. S.C.J. [Commercial List]) — considered

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

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — considered

Warehouse Drug Store Ltd., Re (2006), 24 C.B.R. (5th) 275, 2006 CarswellOnt 5128 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

MOTION by creditor for order to delete employee retention plan provisions in initial order.

Newbould J.:

1 KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

2 GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

3 The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

4 The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek

an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

5 Grant Forest has total funded debt obligations of approximately \$550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately \$400 million. The second lien lenders are owed approximately \$150 million.

6 Grant Forest has unsecured trade creditors of over \$4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. \$6.5 million.

7 The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately \$50 million for debt financing provided to the business.

Analysis

8 Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

9 In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

10 I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

11 The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

12 Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the

KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

13 It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.). In that case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from *Warehouse Drug Store Ltd., Re.*, [2006] O.J. No. 3416 (Ont. S.C.J.), that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

14 I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Nortel Networks Corp., Re.*, [2009] O.J. No. 1188 (Ont. S.C.J. [Commercial List]), Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

15 In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

16 It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

17 It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

18 A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a

court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

19 The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

20 The first lien security holders owed approximately \$400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

21 With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately \$400 million are consenting and the second lien lenders owed approximately \$150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately \$50 million, supports the KERP provisions for Mr. Lynch.

22 In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

23 In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

24 I have been referred to the case of *MEI Computer Technology Group Inc., Re* (2005), 19 C.B.R. (5th) 257 (C.S. Que.), a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included

statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

25 The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

Motion dismissed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 9

2007 SKCA 72
Saskatchewan Court of Appeal

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.

2007 CarswellSask 324, 2007 SKCA 72, [2007] 9 W.W.R. 79, [2007] S.J. No.
313, 159 A.C.W.S. (3d) 671, 299 Sask. R. 194, 33 C.B.R. (5th) 50, 408 W.A.C. 194

**ICR Commercial Real Estate (Regina) Ltd. (Appellant) and
Bricore Land Group Ltd., Bricore Investment Group Ltd., 624796
Saskatchewan Ltd. 603767 Saskatchewan Ltd.,(Respondents)**

Klebus C.J.S., Jackson, Smith J.J.A.

Heard: June 7, 2007
Judgment: June 13, 2007
Docket: 1443, 1452

Proceedings: affirming *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157 (Sask. Q.B.); additional reasons at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.); and reversing *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.)

Counsel: Fred C. Zinkhan for Appellant
Jeffrey M. Lee for Respondents
Kim Anderson for Monitor, Ernst & Young

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

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish "prima facie case" — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — "Sound reasons" test was better than "prima facie case" test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO's position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless

of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish "prima facie case" — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — "Sound reasons" test was better than "prima facie case" test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO's position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Debtors and creditors --- Receivers — Actions by and against receiver — Actions against receiver

Against chief restructuring officer — Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for acts of fraud, gross negligence or wilful misconduct, but order was ambiguous about acts of bad faith — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against CRO personally based on bad faith was dismissed — Supervising judge held that realtor was required to allege fraud, gross negligence or wilful misconduct, and failed to do so — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge did not err in refusing to lift stay to permit action against CRO personally — Supervising judge considered status of CRO as officer of court, noted ambiguity in order, and weighed evidence to certain extent.

Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — Costs

On application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were

sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Against chief restructuring officer — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

Table of Authorities

Cases considered by *Jackson J.A.*:

Air Canada, Re (2004), 47 C.B.R. (4th) 182, 2004 CarswellOnt 643 (Ont. S.C.J. [Commercial List]) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

Caterpillar Financial Services Ltd. v. 360networks corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95 (B.C. C.A.) — referred to

Hadmor Productions Ltd. v. Hamilton (1982), [1983] 1 A.C. 191, [1982] 1 All E.R. 1042 (U.K. H.L.) — referred to

Hashemian v. Wilde (2006), [2007] 2 W.W.R. 52, 40 C.P.C. (6th) 10, 2006 SKCA 126, 2006 CarswellSask 740, 382 W.A.C. 105, 289 Sask. R. 105 (Sask. C.A.) — followed

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2003), 2003 CarswellOnt 6097, 1 C.B.R. (5th) 204, 6 P.P.S.A.C. (3d) 261 (Ont. S.C.J. [Commercial List]) — considered

Ivaco Inc., Re (2006), 2006 CarswellOnt 8025 (Ont. S.C.J.) — considered

Ma, Re (2001), 143 O.A.C. 52, 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68 (Ont. C.A.) — followed

Martin v. Deutch (1943), [1943] O.R. 683, 1943 CarswellOnt 36, [1943] 4 D.L.R. 600 (Ont. C.A.) — referred to

Mosaic Group Inc., Re (2004), 2004 CarswellOnt 2254, 3 C.B.R. (5th) 40 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*) 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*) 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

Ptarmigan Airways Ltd. v. Federated Mining Corp. (1973), 1973 CarswellNWT 10, [1973] 3 W.W.R. 723 (N.W.T. S.C.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105, 1990 CarswellBC 384, 2 C.B.R. (3d) 303 (B.C. C.A.) — referred to

Ramsay Plate Glass Co. v. Modern Wood Products Ltd. (1954), 1954 CarswellQue 24, 34 C.B.R. 82 (C.S. Que.) — considered

Siemens v. Bawolin (2002), 2002 SKCA 84, 2002 CarswellSask 448, 46 E.T.R. (2d) 254, [2002] 11 W.W.R. 246, 219 Sask. R. 282, 272 W.A.C. 282 (Sask. C.A.) — followed

Smart v. South Saskatchewan Hospital Centre (1989), 75 Sask. R. 34, 60 D.L.R. (4th) 8, [1989] 5 W.W.R. 289, 1989 CarswellSask 266 (Sask. C.A.) — considered

Smith Brothers Contracting Ltd., Re (1998), 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264, 13 P.P.S.A.C. (2d) 316 (B.C. S.C.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 5024, 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]) — considered

360networks Inc., Re (2003), 45 C.B.R. (4th) 151, 2003 BCSC 1030, 2003 CarswellBC 1636 (B.C. S.C.) — considered

Statutes considered:

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

Generally — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

Generally — referred to

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

Generally — referred to

s. 11 [rep. & sub. 2005, c. 47, s. 128] — referred to

s. 11(3) — considered

s. 11(4) — considered

s. 11(4)(c) — considered

s. 11(6) — considered

s. 11(6) [en. 1997, c. 12, s. 124] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.11 [en. 2001, c. 9, s. 577] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 12(1) "claim" — considered

s. 13 — referred to

Real Estate Act, S.S. 1995, c. R-1.3

Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules

R. 173 — referred to

Words and phrases considered:

Substantial indemnity costs

[Jackson J.A. (Klebuc C.J.S. and Smith J.A. concurring):] . . . while [the judge, in awarding substantial indemnity costs,] indicated he was not awarding solicitor-and-client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and-client costs is still a punitive order and, as there

is no authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs.

APPEAL by creditor from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39 (Sask. Q.B.) dismissing application to lift stay against debtor under Companies Creditors' Arrangement Act, and from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264, 33 C.B.R. (5th) 46 (Sask. Q.B.) ordering costs against creditor.

Jackson J.A.:

I. Introduction

1 This appeal concerns a claim arising on a "post-filing" basis after a restructuring order had been made under the *Companies' Creditors Arrangement Act*¹ (the "CCAA"). The restructuring failed. The principal assets of the companies have been sold and the net proceeds are being held for distribution. The post-filing claim is asserted against: (i) the companies, which are subject to the CCAA order; and (ii) against the companies' Chief Restructuring Officer.

2 The post-filing claimant is ICR Commercial Real Estate (Regina) Ltd. ("ICR"). ICR claims a real estate commission with respect to the sale of a building belonging to Bricore Land Group Ltd. Bricore Land and four related companies (collectively "Bricore") are all subject to an initial order ("Initial Order") granted by Koch J. on January 4, 2006 pursuant to s. 11(3) of the CCAA. The Chief Restructuring Officer, Maurice Duval (the "CRO"), was appointed by Koch J. on May 23, 2006 (the "CRO Order"). Koch J. has been the supervising CCAA judge since the Initial Order.

3 The Initial Order and the CRO Order impose the usual stay of proceedings against Bricore and prohibit the commencement of new actions against Bricore and the CRO, without leave of the Court.

4 ICR applied to Koch J. for directions and, in the alternative, for leave to commence actions against Bricore and the CRO. By fiats dated April 9, 2007 and April 25, 2007, Koch J. held that the Initial Order and the CRO Order prohibiting the commencement of actions apply to ICR and that leave of the Court is required. He refused leave and also awarded substantial indemnity costs against ICR.

5 On May 23, 2007, ICR applied in Court of Appeal chambers for leave to appeal, pursuant to s. 13 of the CCAA, and received leave to appeal the same day. The appeal was heard on June 7, 2007 and dismissed in relation to the lifting of the stay application and allowed in relation to the costs order on June 13, 2007, with reasons to follow. These are those reasons.

II. Issues

6 The issues are:

1. Does the stay of proceedings imposed by the supervising CCAA judge J. under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?
2. Does s. 11.3 of the CCAA mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?
3. If leave is required, did the supervising CCAA judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?
4. Did the supervising CCAA judge make a reviewable error in refusing leave to commence an action against the CRO?
5. Did the supervising CCAA judge err in awarding costs on a substantial indemnity basis?

III. Background

7 ICR's claim to a real estate commission arises as a result of these brief facts. Bricore owned four commercial real estate properties in Saskatoon and three such properties in Regina (the "Bricore Properties"). ICR argued that it had marketed one of the Regina properties, known as the Department of Education Building (the "Building"), to the City of Regina.

8 Bricore sold the Building, at a purchase price of \$700,000,² to a proposed purchaser, which assigned its interest to 101086849 Saskatchewan Ltd. 101086849 Saskatchewan in its turn sold the Building to the City of Regina for a price of \$1,075,000.³ The certificate of title to the Building issued in early January, 2007 to 101086849 Saskatchewan, and the certificate of title issued to the City of Regina in late January, 2007. The Building came to be sold pursuant to a series of Court Orders made by Koch J., which I will now summarize.

9 As I have indicated, the Initial Order was made on January 4, 2006. On February 13, 2006 Koch J. appointed CMN Calgary Inc. as an Officer of the Court to pursue opportunities and to solicit offers for the sale or refinancing of the Bricore Properties. He also authorized Bricore to enter into an agreement with CMN Calgary dated as of January 30, 2006 entitled "Exclusive Authority To Solicit Offers To Purchase."

10 In May 2006, it was determined that Bricore could not be reorganized and, therefore, all the Bricore Properties should be sold. On May 23, 2006, Koch J. appointed Maurice Duval, C.A., of Saskatoon, Saskatchewan as an officer of the Court to act as CRO, and to assist with the sale of the assets.

11 The CRO Order confers these powers on the CRO pertaining to the proposed sale of the Bricore Properties:

7 ...

(e) subject to the stay of proceedings in effect in these proceedings, the power to take steps for the preservation and protection of the Bricore Properties, including, without restricting the generality of the foregoing, (i) the right to make payments to persons, if any, having charges or encumbrances on the Bricore Properties or any part or parts thereof on or after the date of this Order, which payments shall include payments in respect of realty taxes owing in respect of any of the Bricore Properties, (ii) the right to make repairs and improvements to the Bricore Properties or any parts thereof and (iii) the right to make payments for ongoing services in respect of the Bricore Properties;

.....

(g) subject to paragraphs 7C, 7D and 7E hereof, **the power to work with, consult with and assist the court-appointed selling officer (CMN Calgary Inc.) to negotiate with parties who make offers to purchase** the Bricore Properties in a manner substantially in accordance with the process and proposed timeline for solicitation of such offers to purchase the Bricore Properties recommended by the Monitor in the Monitor's Third Report. ...⁴ [Emphasis added.]

12 On June 19, 2006, Koch J. authorized the CRO to accept an offer to purchase the Bricore Properties, including the Building, made by an undisclosed purchaser (the "Proposed Purchaser"), which offer to purchase was filed with the Court and temporarily sealed. The order directed that any further negotiations between the CRO and the Proposed Purchaser were to be completed by August 1, 2006.

13 Negotiations were protracted resulting in a further series of orders:

(a) August 1, 2006: Koch J. extended the timeframe for due diligence and further negotiations to be completed by August 15, 2006;⁵

(b) August 18, 2006: Koch J. authorized the CRO to accept an Amended Offer to Purchase made the 15th day of August, 2006. The Amended Offer to Purchase contemplated the sale by Bricore to the Proposed Purchaser of six of the seven Bricore Properties including the Building;⁶

(c) September 25, 2006: The closing date for the proposed sale by Bricore to the Proposed Purchaser of the six properties was extended from October 15, 2006 to November 15, 2006;⁷

(d) October 10, 2006: Koch J. approved the sale of the six properties to their respective purchasers; in the case of the Building, it was sold to 101086849 Saskatchewan Ltd.⁸

Koch J. ultimately approved the sale of the Building to 101086849 Saskatchewan Ltd. as of November 30, 2006.

14 ICR said it had introduced the City of Regina to the opportunity to purchase the Building and it was therefore entitled to a real estate commission based on the sale price to the City of Regina. Once its claim was denied by the Monitor, ICR applied to Koch J. on March 22, 2007 contending that (a) "prior Orders of this Court requiring leave to commence action" against Bricore and the CRO "do not apply in the circumstances"; and (b) in the alternative, "it is entitled to an order granting leave to commence the proposed proceedings." In support of its notice of motion, ICR filed a draft statement of claim and a supporting affidavit with exhibits.

15 This is the substance of ICR's draft statement of claim against Bricore and the CRO:

4. At all material times Duval's actions in relation to the matters in issue in the within proceedings were carried out in his capacity as chief restructuring officer for the Bricore Group.

.....

7. Duval, pursuant to Order of the Court under the *Companies' Creditors Arrangement Act*, was authorized in accordance in such order to market various assets of the Bricore Group, including the [Building]. [sic]

8. In the course of his efforts to market the [Building], Duval enlisted the aid of the plaintiff and its commercial realtors, licensed as brokers under *The Real Estate Act*.

9. The plaintiff, in its efforts to market the properties of the Bricore Group under the direction of Duval, including the [Building], introduced a prospective purchaser to Duval, namely the City of Regina.

10. By agreement dated September 27, 2006 made between the Plaintiff, the Bricore Group and Duval, it was agreed that the Plaintiff would be protected as the agent of record to a commission for the sale of any of the Bricore Group Properties for which the Plaintiff had located a purchaser.

11. The Plaintiff says that at the time of execution of the said Agreement by Duval on September 28, 2006, the City of Regina was in the process of doing its "due diligence" on the [Building] and it was expected that a sale of the [Building] to the City of Regina would be completed in the near future.

12. The Plaintiff says that, contrary to the Agreement entered into between the Plaintiff and the Defendants, Duval, **without the Plaintiff's knowledge and in bad faith**, proceeded to arrange to sell the [Building] to a third party, namely 101086849 Saskatchewan Ltd., which became the owner of the [Building] on or about January 3, 2007.⁹ [Emphasis added.]

16 While the words "bad faith" are not repeated in the affidavit evidence, Paul Mehlsen, the principal of ICR, swore an affidavit in support of the application for leave, stating that he had examined the statement of claim and that to the best of his knowledge the allegations contained therein are true. His affidavit also states:

13. Insofar as the attached letter states that "ICR is protected as agent of record", this is commonly understood in the industry as meaning that in the event a sale of the property took place in the protected period to a purchaser introduced by the agent of record, then they would receive the usual commission for such sale, which in this case would be 5%.

14. It would appear from the attached exhibit "A" that Larry Ruf arranged to have the Respondent, Maurice Duval, agree to the arrangement, as well as adding that the protection would extend to the closing of any sale or December 31, 2006, whichever was the earlier.

15. Attached hereto and marked as exhibit "B" to this my Affidavit is a true copy of an email dated October 31, 2006 from Larry Ruf to Evan Hubick, Jim Kambeitz and Jim Thompson of the proposed plaintiff, ICR. Such email states in part:

I can confirm, on behalf of the CRO, that protection for the potential deals referenced in your letter of September 27, 2006 will be honoured to November 30, 2006.¹⁰

17 Exhibit "A" is a letter dated September 27, 2006 from Mr. Jim Thompson of ICR to Mr. Larry Ruf of Horizon West Management Inc. It reads, in material part, as follows:

Please be advised that we have had ongoing discussions with potential buyers and tenants as follows:

1. 1500 — 4th Avenue [Department of Education Building] — we have been in regular contact with the City of Regina Real Estate Department for over a year regarding the possibility of this site being acquired by the City. In July a large contingent of City employees including a number from the Works and Engineering Department toured the building over several hours. We have had continuous follow up with a Real Estate Department official who confirmed recently that there still is an interest in the property and officials are in the due diligence stage. In addition, we have exposed the property to Alfords Furniture and Flooring who have an ongoing interest.

.....

The purpose of this memo is to reinforce our ongoing efforts to market and represent the Bricore assets in Regina. We are aware that the properties are under contract to sell and request that ICR be protected in the specific situations as outlined.

In the event we are not able to carry on in a formal fashion we would ask that you sign where indicated to acknowledge that ICR is protected as the agent of record for the Tenants/Buyers noted herein for a period to extend to December 31, 2006.¹¹

The words "December 31, 2006" are struck out and these words are added: "Date of closing of a sale or December 31, 2006 whichever is earlier." Mr. Ruf's name is crossed out and the signature of Maurice Duval, Chief Restructuring Officer is added in its place.

18 Mr. Ruf, on behalf of Bricore, refuted ICR's claim in a sworn affidavit stating:

3. At no time did I approach ICR Regina in 2006 to initiate discussions regarding the sale or lease of the Department of Education Building.

4. I received two or three unsolicited telephone calls regarding the Department of Education Building in September of 2006 from representatives of ICR Regina (including Paul Mehlsen, Jim Kambeitz and Evan Hubick). During those calls, representatives of ICR Regina informed me that they knew of certain parties who would be interested in purchasing the Department of Education Building. In response to each of these inquiries, I informed representatives of ICR:

(a) that I had no authority to participate in communications regarding a sale of the Department of Education Building, and that all such inquiries should be directed to Maurice Duval, the court-appointed Chief Restructuring Officer of Bricore Group; and

(b) that further information on the status of the restructuring of Bricore Group could be obtained on the website of MLT.¹²

19 The CRO filed a report in response to ICR:

6. At the time of my review of the September 27, 2006 letter from ICR Regina, I was working very hard to attempt to negotiate and conclude the final closing of the sale of the Bricore Properties to the purchasers identified in the Accepted Offer to Purchase. I fully expected that sale to close (as it ultimately did effective November 30, 2006). However, I determined that, in the event that such sale failed to close, Bricore Group would need to identify other potential purchasers of the Bricore Properties very quickly. I therefore decided that it would be appropriate for Bricore Group, by the CRO, to agree to protect ICR Regina for a commission in the unlikely event that the sale contemplated by the Accepted Offer to Purchase did not close, and it subsequently became necessary for Bricore Group instead to conclude a sale of the Bricore Properties to one or more of the prospective purchasers of the three Bricore Properties located in Regina (as specifically identified in Mr. Thompson's September 27, 2006 letter). For that reason, and that reason only, I agreed to sign the September 27, 2006 letter.

7. In signing the September 27, 2006 letter, my intention, as court-appointed CRO of Bricore Group, was to strike an agreement that, in the unlikely event that:

(a) the sale of the Bricore Properties identified in the Accepted Offer to Purchase fell apart; and

(b) it subsequently became necessary for Bricore Group to sell the Bricore Properties to one or more of the prospective purchasers identified in the September 27, 2006 letter;

then Bricore Group would agree to pay a commission to ICR Regina. In regard to the Department of Education Building located at 1500 — 4th Avenue in Regina (the "Department of Education Building"), the two prospective purchasers in respect of which ICR Regina was protected for a commission were the City of Regina and Alford's Furniture and Flooring. The reference to closing date was to the closing of the Avenue Sale, which occurred effective November 30, 2006.

8. In January of 2007, after much effort and expenditure of resources, the sale of the Bricore Properties contemplated in the Accepted Offer to Purchase was unconditionally closed (effective November 30, 2006). The entity named as purchaser of the Department of Education Building in the final closing documents was a numbered Saskatchewan company controlled by Avenue Commercial Group of Calgary. Such entity was a nominee corporation operating entirely at arm's length from the City of Regina and Bricore Group. At all times after June 2006, the CRO had no authority to sell the property, as it was already sold.

9. It was subsequently brought to my attention that the numbered company which purchased the Department of Education Building had promptly "flipped" such property to the City of Regina. I knew nothing of such a proposed flip prior to learning of it from ICR Regina.¹³

20 To rebut this, Mr. Mehlsen of ICR swore a further affidavit deposing:

3. As indicated in my Affidavit sworn March 22, 2007, ICR had an ongoing relationship with the Bricore Companies prior to 2006. This relationship continued after the Initial Order in January 2006 in that ICR continued to show Bricore Properties for lease or sale, including the [Building].

4. Attached hereto and marked as Exhibit E to this my Affidavit is a true copy of an e-mail from my contact at the City of Regina ... dated April 13, 2006 advising that the City was interested in purchasing the [Building].

5. I immediately passed this information along to Larry Ruf, as evidenced in the e-mail dated April 13, 2006 attached hereto and marked as Exhibit "F" to this my affidavit.

6. In reply to paras. 2 and 12 of Mr. Duval's Report, it was not known to ICR that all of the Bricore Properties were sold as claimed; rather, it was known that some of the Bricore Properties had been sold, but not the subject property, [the Building], as it was the "ugly duckling" of the Bricore Properties and therefore had been excluded from the reported sale. ICR's efforts were directed at the sale of [the Building] and leasing the other two Regina properties.

7. In response to para. 13 of Mr. Duval's Report, it is true that there were no direct communications between ICR and Mr. Duval as all communications were with Larry Ruf, who indicated that he acted under the authority and with the knowledge of Mr. Duval.

8. As a result of contact in early summer with Mr. Ruf, ICR actively marketed the [Building] by placing signage on the property, developing an "information" or "fact" sheet detailing aspects of the building, and showed the property to the City of Regina and other prospective purchasers.

.....

11. Because of delays on the part of the City of Regina in its due diligence and the fact that ICR has been working without any formal agreement, I caused the letter of September 27, 2006 (exhibit "A" to my Affidavit sworn March 22, 2007) to be sent.

12. At no time did either Mr. Ruf or Mr. Duval advise that the [Building] was sold and that ICR's role was merely that of a "backup offer". The signed letter of September 27, 2006 and Mr. Ruf 's e-mail of October 31, 2006 make no mention of these events and this was never disclosed to myself or ICR.

.....

14. In hindsight, it would appear that the confidential information concerning the intention of the City of Regina to purchase the [Building] that was provided by myself and representatives of ICR to Mr. Ruf and Mr. Duval was communicated to the [Proposed Purchaser], who then incorporated 101086849 Saskatchewan Ltd. to take advantage of this opportunity. Attached hereto and marked as exhibit "I" to this my Affidavit is a true copy of a Profile Report from the Corporate Registry indicating that 101086849 Saskatchewan Ltd. was incorporated by solicitors as a "shelf company" on May 31, 2006, with new Directors in the form of Garry Bobke and Steven Butt taking office on August 17, 2006.

15. My understanding is that the [Proposed Purchaser] initially excluded the [Building] from their offer to purchase the Bricore Group properties and made a separate offer through 101086849 Saskatchewan Ltd. when they were made aware of the confidential information about the City of Regina's plans to purchase the property.¹⁴

21 In refusing ICR leave to commence action, Koch J. wrote:

[1] On January 4, 2006, I granted an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "CCAA") protecting the respondent corporations Bricore Land Group Ltd. et al. (collectively "Bricore"), from claims of their respective creditors. The order (paragraph 5) explicitly provides in accordance with the authority conferred upon the Court pursuant to s. 11(3) of the CCAA that "no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property". The initial period of 30 days has been extended many times. The stay of proceedings continues in effect. Ernst & Young Inc. was appointed monitor. That appointment continues.

.....

[16] Although the interpretation of s. 11.3 of the CCAA is not necessarily well settled in all aspects, it appears that the import of s. 11.3, which was introduced as an amendment to the Act in 1997, is this:

(a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the CCAA which is to promote re-organization and restructuring of companies. If s. 11.3 is interpreted too literally, it can render the stay provisions ineffective, leaving the collective good of the restructuring process subservient

to the self-interest of a single creditor. Clearly, s. 11.3 must be construed so as not to defeat the overall objectives of the Act. See *Smith Brothers Contracting Ltd. (Re)* (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.).

(b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).

(c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re)*, *supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. Counsel have cited the case of *GMAC Commercial Credit Corporation — Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, 2006 SCC 35. The circumstances in that case are somewhat analogous but it is of limited assistance because the CCAA does not contain a provision equivalent to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which expressly provides that no action lies against the superintendent, an official receiver, an interim receiver or a trustee in certain circumstances without leave of the Court.

[17] For reasons outlined *supra*, I do not find the cause of action ICR asserts against Bricore to be tenable, not even as against Bricore Land Group Ltd. Therefore, the application to lift the stay of proceedings to permit the proposed action against Bricore is dismissed.

[18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.

[19] As stated previously, the overriding purpose of the CCAA must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.¹⁵

IV. Issue #1: Does the Stay of Proceedings Imposed by the Supervising CCAA Judge under the Initial Order Apply to an Action Commenced by ICR, a Post-Filing Claimant, Such That Leave to Commence an Action Against Bricore Is Required?

22 ICR argues that, as a post-filing creditor, the Initial Order does not apply to it, either as a matter of law or on the basis of a proper interpretation of the Initial Order.

23 The authority to make an order staying and prohibiting proceedings against a debtor company is contained in s. 11(3) of the CCAA:

11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

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

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

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

24 Pursuant to s. 11(3) of the CCAA, Koch J. granted the Initial Order providing for a stay and prohibition of new proceedings in these terms:

5. During the 30-day period from and after the date of filing of this application on January 4, 2006 or during the period of any extension of such 30-day period granted by further order of the Court (the "Stay Period"), no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property. Any and all Enforcement or Proceedings already commenced (as at the date of this Order) against or in respect of Bricore Group or the Property are hereby stayed and suspended.

6. During the Stay Period, no person shall assert, invoke, rely upon, exercise or attempt to assert, invoke, rely upon or exercise any rights:

a) against Bricore Group or the Property;

b) as a result of any default or non-performance by Bricore Group, the making or filing of this proceeding or any admission or evidence in this proceeding, or

c) in respect of any action taken by Bricore Group or in respect of any of the Property under, pursuant to or in furtherance of this Order.

.....

11. Notwithstanding any of the provisions of this Order:

a) no creditor of Bricore Group shall be under any obligation, by reason only of the issuance of this Order, to advance or re-advance any monies or otherwise extend any credit to Bricore Group, except as such creditor may agree; and

b) Bricore Group may, by written consent of its counsel of record, agree to waive any of the protections that this Order provides to them, whether such waiver is given in respect of a single creditor or class of creditors or is given in respect of all creditors generally.

.....

13. Any act or action taken or notice given by creditors or other Persons or their agents, from and after 12:01 a.m. (local Saskatoon time) on the date of the filing of the application for this Order to the time of the granting of this Order, to commence or continue Enforcement or to take any Proceeding (including, without limitation, the application of funds in reduction of any debt, set-off or the consolidation of accounts) is, unless the Court orders otherwise, deemed not to have been taken or given.

"Proceeding" is defined in para. 22 of Schedule "A" to the Initial Order as "a lawsuit, legal action, court application, arbitration, hearing, mediation process, enforcement process, grievance, extrajudicial proceeding of any kind or other proceeding of any kind."

25 The authority to extend an initial order is contained in s. 11(4) of the CCAA:

11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

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

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

Koch J., pursuant to this subsection, extended the stay many times and the stay continues in force.

26 As authority for the proposition that the Initial Order does not stay proceedings with respect to claims that arise after the Initial Order, ICR's counsel cites Professor Honsberger's *Debt Restructuring Principles & Practice*:

The scope of an order staying proceedings extends only to claims that arose prior to the order. A proceeding based on a claim that arose after an order was made staying proceedings is not affected by the stay.¹⁶ [Footnote omitted.]

The only case footnoted is *Ramsay Plate Glass Co. v. Modern Wood Products Ltd.*¹⁷ In my respectful view, the facts in *Ramsay Plate Glass* narrow its application.

27 In *Ramsay Plate Glass Co.*, the initial CCAA order, dated April 12, 1951, suspended all proceedings against Modern Wood Products Ltd. Modern Wood Products made an offer of compromise that was accepted by its existing creditors and approved by the Court on May 21, 1951. Ramsay Glass sought to enforce a claim against Modern Wood Products that arose in 1953. Modern Wood Products sought to strike Ramsay Glass's claim on the basis that its proceedings were stayed by the April 1951 order.

28 In dismissing the application to strike, Prevost J. wrote:

CONSIDERING that said claim is not provable in bankruptcy and that under *The Bankruptcy Act* an order staying proceedings would not apply to such a claim: *Richardson & Co. v. Storey*, 23 C.B.R. 145, [1942] 1 D.L.R. 182, Abr. Con. 301; *In re Bolf*, 26 C.B.R. 149, [1945] Que. S.C. 173, Abr. Con. 303;

CONSIDERING that s. 10 of *The Companies' Creditors Arrangement Act* and the judgments rendered under its authority should receive the same interpretation in this respect as s. 40 of *The Bankruptcy Act*;

CONSIDERING that the present claim is in no way affected by the judgment rendered on April 12, 1951 by Boyer J. under *The Companies' Creditors Arrangement Act*, ordering suspension of all proceedings against defendant company the present claim being posterior to said date and having not been made the subject of any compromise or arrangement homologated by this Court;

CONSIDERING that the present claim arose in 1953, two years after the judgment of Boyer J. homologating the compromise following the non-payment by defendant company of merchandise purchased by it from plaintiff company during said year;¹⁸

I do not interpret *Ramsay Plate Glass* as permitting a post-filing claimant to commence an action against a debtor company without obtaining leave while the CCAA stay is in effect. In my opinion, *Ramsay Plate Glass* can be read as authority for the proposition that a post-filing creditor need not apply for leave after the stay has been lifted. In that respect, it parallels *360networks Inc., Re*;¹⁹ *Stelco Inc., Re*;²⁰ and *Campeau v. Olympia & York Developments Ltd.*²¹

29 In *360networks*, a creditor (Caterpillar Financial Services Limited) had both pre-filing and post-filing claims. Caterpillar applied, *inter alia*, for an order lifting the stay of proceedings. Tysoe J. wrote:

8 On the hearing of the applications, Caterpillar continued to take the position that all of its claims could properly be determined within the CCAA proceedings on the first of its two applications. I agree that the Deficiency Claim and the Secured Creditor Claim are properly determinable within the CCAA proceedings, but it is my view that it would not be appropriate to make determinations in respect of the Trust Claim or the Post-Filing Claim in the CCAA proceedings. The only remaining thing to be done in the CCAA proceedings is the determination of the validity of claims for the purposes of the Restructuring Plan (with Caterpillar's claims being the only unresolved ones). **Neither the Trust Claim nor the Post-Filing Claim falls into this category of claim because each of these types of claim is not affected by the Restructuring Plan.** Indeed, the Post-Filing Claim was not asserted in Caterpillar's proof of claim and surely cannot be adjudicated upon within Caterpillar's appeal of the disallowance of its proof of claim. The B.C. Court of Appeal has recently affirmed, in *United Properties Ltd. v. 642433 B.C. Ltd.*, 2003 BCCA 203 (B.C.C.A.), that it is appropriate for the court to decline jurisdiction to resolve a dispute in CCAA proceedings which, although it may relate to them, is not part and parcel of the proceedings. [Emphasis added.]

.....

11 Counsel for Caterpillar relies for the first ground on the fact that s. 12 of the CCAA authorizes the court to deal with secured and unsecured claims. However, s. 12 deals with the determination of claims for the purposes of the CCAA and does not authorize the court to determine claims which fall outside of CCAA proceedings, such as the Trust Claim and the Post-Filing Claim.²²

In the result, Tysoe J. lifted the stay so as to permit an action to be commenced to resolve all of Caterpillar's claims. The significance of the decision for our purposes is that the Court in *360networks* considered the stay as applying to claims that arose after the initial order.

30 In *Stelco*, Farley J., relying on *360networks*, also held that the post-filing creditor's claim in that case "continues to be stayed and is to be dealt with in the ordinary course of litigation after Stelco's CCAA protection is terminated."²³

31 *Campeau* does not deal with a post-filing creditor, but it does address the situation where a creditor, whose claim is not accepted as part of the plan of arrangement, wants to commence action. Blair J. (as he then was) refused an application brought by Robert Campeau and the Campeau Corporations to lift the stay of proceeding imposed by the initial order. In doing so, he wrote:

24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with — at least for the purposes of that proceeding — in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York — whose alleged misdeeds are the real focal point of the attack on both sets of defendants — is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e. the action and the CCAA proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (United Kingdom) (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim, supra*.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.²⁴ [Emphasis added.]

Campeau is further authority for the proposition that a supervising CCAA judge can refuse a prospective creditor, who is not part of the plan of arrangement, leave to commence proceedings and that the creditor may commence action after the stay is lifted.

32 Each of *360networks*²⁵, *Stelco*²⁶ and *Campeau*²⁷ supports the proposition that while a stay of proceedings is extant, an application to lift the stay must be made to permit an action to be commenced against a debtor that is subject to a CCAA order, regardless of whether the claim arises before or after the initial order, or whether the prospective creditor is able to take part in the plan of arrangement.

33 Prevoist J. in *Ramsay Plate Glass* points out that under the *Bankruptcy and Insolvency Act*²⁸ (the "BIA") the stay of proceedings does not extend to a claim not provable in bankruptcy. This is so, however, because of the definition of "claim provable in bankruptcy" and ss. 69.3(1) and s. 121. (See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*.²⁹) While s. 12 of the CCAA defines "claim" by reference to "claim provable in bankruptcy," it has not been interpreted as limiting the extent of the stay.

34 On the face of ss. 11(3) and (4) of the CCAA, the authority to safeguard the company is not limited to staying existing actions, but extends to "prohibiting, until otherwise ordered by the court, the commencement of ... any other action, suit or proceeding against the company." Unlike the BIA there are no words limiting this phrase to debts or claims in existence at the time of the initial order.

35 With respect to the wording of the Initial Order, there can be no question that it applies to post-filing creditors. The broad wording of paras. 5 and 6 of the Initial Order and the definition of "proceeding" confirm this. No distinction is made between creditors in existence at the time of the Initial Order and those who become creditors after. Paragraph 11(b) also establishes a mechanism for post-filing creditors to seek relief by obtaining an exemption from the protection afforded Bricore, which would include the prohibition of proceedings. The obvious implication is that the prohibition of proceedings applies to post-filing creditors, subject, of course, to obtaining leave of the Court to commence action.

V. Issue #2. Does s. 11.3 of the CCAA Mean That a Post-Filing Claimant Cannot Be Subject to the Stay of Proceedings Imposed by the Initial Order?

36 ICR argued that by the addition of s. 11.3 in 1997³⁰ to the CCAA, Parliament intended to grant a post-filing creditor the right to sue without obtaining leave.

37 In my respectful view, s. 11.3 cannot be interpreted in the way in which ICR contends. Indeed, a more logical and internally consistent reading of s. 11.3 and the other sections of the CCAA is to permit the supervising judge to determine, as a matter of discretion, whether an action commenced by a post-filing creditor should be permitted to proceed.

38 Section 11.3 forms part of a comprehensive series of sections addressing the question of stays added in 1997 and 2001:³¹

No stay, etc., in certain cases

11.1 (2) No order may be made under this Act **staying or restraining** the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association. (Added by S.C.1997, c. 12, s. 124)

No stay, etc., in certain cases

11.11 No order may be made under this Act **staying or restraining**

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

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

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*. (Added by S.C. 2001, c. 9, s. 577.)

No stay, etc. in certain cases

11.2 No order may be made under section 11 **staying or restraining any action, suit or proceeding** against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company. (Added by S.C.1997, c. 12, s. 124)

11.3 No order made under section 11 shall have the effect of

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

(b) requiring the further advance of money or credit. (Added by S.C.1997, c. 12, s. 124)

[Emphasis added.]

39 In ss. 11.1(2), 11.11 and 11.2, Parliament uses the words "staying or restraining" to describe those circumstances limiting the scope of the stay power, but these words are not repeated in s. 11.3. This application of the *expressio unius* principle supports the obvious implication that s. 11.3 does not limit the authority of the court to stay all proceedings.

40 While the debates of the House of Commons in Hansard do not comment on s. 11.3, several text book authors assist with the task of interpretation. Professor Honsberger states:

A distinction is made between the compulsory supply of goods and services and the extension of credit by suppliers to a debtor company in CCAA proceedings.

Suppliers may be enjoined from cutting off services or discontinuing the supply of goods by reason of there being arrears of payment provided the debtor commences regular payments for current deliveries.

However, no order made under s. 11 of the Act has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.

.....

... A court could make a similar order after the 1997 amendments provided it stipulated that the debtor company made immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.³²

[Footnotes omitted.]

41 Professor McLaren similarly comments in his text "Canadian Commercial Reorganization":³³

3.800 ... Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in issuing stays. Under s. 11.3(a), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(a) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.

42 Finally, Professor Sarra in *Rescue! The Companies' Creditors Arrangement Act*³⁴ provides this insight:

While the court cannot compel a supplier to continue to extend credit to the debtor during a CCAA proceeding, the court can protect trade suppliers that choose to supply goods or credit during the stay period by granting them a charge on the assets of the debtor that will rank ahead of other claims. While section 11.3 of the CCAA states that no stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods, services or the use of leased or licensed property, or requiring the further advance of money or credit, trade suppliers were often continuing credit only to find that they had lost further assets during the workout period because of their priority in the hierarchy of claims. Hence the practice of post-petition trade credit priority charges developed, first recognized in Alberta.³⁵ [Footnotes omitted.]

43 *Smith Brothers Contracting Ltd., Re*³⁶ also supports a narrow reading of s. 11.3. After citing *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*³⁷ and *Quintette Coal Ltd. v. Nippon Steel Corp.*³⁸ with respect to the intention of Parliament and the object and scheme of the CCAA, Bauman J. in *Smith Brothers* wrote:

45 It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:

... where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries ...

46 Parliament has now precluded that by adding s. 11.3(a) to the CCAA. It is instructive to note, however, that the subsection has been added against the backdrop of jurisprudence which has underlined the very broad scope of the court's jurisdiction to stay proceedings under s. 11.

47 To repeat the relevant portion of the section:

11.3 No order made under s. 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for ... use of leased or licenced property ... provided after the order is made;

It is noted that the remedy which is preserved for creditors is a relatively narrow one; it is the right to require immediate payment for the use of the leased property.³⁹

Thus, Bauman J. interpreted s. 11.3 in accordance with Parliament's intention and the object and scheme of the CCAA as creating a narrow right — the right to withhold services without immediate payment.

44 I agree with Bricore's counsel. When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the CCAA, s. 11.3 allows the supplier the right:

- (a) to refuse to supply any such goods or services at all;
- (b) to supply such goods or services on a "cash on demand" basis only;
- (c) to negotiate with the insolvent corporation for the amendment of the CCAA Order to create a post-filing supplier's charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or
- (d) to take the risk of supplying goods or services on credit.

Where the Initial Order imposes a stay of proceedings and prohibits further proceedings, s. 11.3 does not permit the supplier of goods or services to sue without obtaining leave of the court to do so.

VI. Issue #3: If Leave Is Required, Did the Supervising CCAA Judge Commit a Reviewable Error in Refusing ICR Leave to Commence an Action Against Bricore?

45 Having determined that the stay and prohibition of proceedings applies to ICR, notwithstanding its status as a post-filing creditor, the next issue is whether Koch J. erred in refusing to lift the stay on the basis that the claim was not tenable.

46 The claim against Bricore is presumably against Bricore both in its own right and pursuant to its indemnification agreement with the CRO. Paragraph 18 of the CRO Order requires Bricore to indemnify the CRO:

18. Bricore Group shall indemnify and hold harmless the CRO from and against all costs (including, without limitation, defence costs), claims, charges, expenses, liabilities and obligations of any nature whatsoever incurred by the CRO that may arise as a result of any matter directly or indirectly relating to or pertaining to any one or more of:

- (a) the CRO's position or involvement with Bricore Group;
- (b) the CRO's administration of the management, operations and business and financial affairs of Bricore Group;
- (c) any sale of all or part of the Property pursuant to these proceedings;
- (d) any plan or plans of compromise or arrangement under the CCAA between Bricore Group and one or more classes of its creditors; and/or
- (e) any action or proceeding to which the CRO may be made a party by reason of having taken over the management of the business of Bricore Group.⁴⁰

47 The authority to lift the stay imposed by the Initial Order against Bricore is contained in s. 11(4) of the CCAA:

11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

.....

(c) prohibiting, **until otherwise ordered by the court**, the commencement of or proceeding with any other action, suit or proceeding against the company. [Emphasis added.]

48 This is a discretionary power, which invokes the standard of appellate review stated as follows:

[22] ... [T]he function of an appellate court is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that members of the appellate court would have exercised the discretion differently. The function of the appellate court is one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order.⁴¹

It is often expressed as permitting intervention where the judge acts arbitrarily, on a wrong principle, or on an erroneous view of the facts, or when the appeal court is satisfied that there is likely to be a failure of justice as a result of the refusal. See: *Martin v. Deutch*⁴²

49 With respect to discretionary decisions made under the CCAA, there is a particular reluctance to intervene. The reluctance is justified on the basis of the specialization of the judges who have carriage of complex proceedings that are often replete with compromised solutions.⁴³ This does not mean that the Court of Appeal can turn a blind eye or permit an injustice, but it does provide the backdrop against which CCAA discretionary decisions are reviewed.

50 Unlike the BIA,⁴⁴ the CCAA contains no specific statutory test to provide guidance on the circumstances in which a CCAA stay of proceedings is to be lifted. Some guidance, nonetheless, can be found in the statute and in the jurisprudence.

51 Subsection 11(6) of the CCAA states:

11 (6) The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

While the reference to "order" in the opening clause "[t]he court shall not make an order under s. (3) or (4)" may very well be to the Initial Order and not to the order lifting the stay, s. 11(6) and, in particular, its legislative history, are also relevant to an application to lift the stay.

52 Subsection 11(6) was brought into effect in 1997 by Bill C-5, which enacted "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act." When Bill C-5 received third reading on October 23, 1996, s. 11(6) took this form:

11 (6) The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that:

- (i) the applicant has acted, and is acting, in good faith and with due diligence,
- (ii) a viable compromise or arrangement could likely be made in respect of the company, if the order being applied for were made, and
- (iii) no creditor would be materially prejudiced if the order being applied for were made.

After Bill C-5 received third reading, it was referred to the Standing Senate Committee on Banking, Trade and Commerce.⁴⁵ The Committee reported:

A number of insolvency experts were of the opinion that the proposed amendment would make it virtually impossible to obtain extensions of the initial 30-day stay under the CCAA and force companies to file plans of arrangement within 30 days after the making of the initial stay order.

Others suggested that some CCAA reorganizations would have turned out differently if the amendment had been in place.

.....

Of the submissions received about proposed subsection 11(6), all but one condemned the provision. ...

The CLHIA [Canadian Life and Health Insurance Association] argued that the amendment to the bill would be a significant improvement to the CCAA for four reasons:

- (a) it would give direction to the courts as to the tests that must be met before the extension order was granted;
- (b) it would more closely align the CCAA with the BIA;
- (c) the tests are well-established under the BIA and have received extensive scrutiny and study; and
- (d) the tests would direct the courts to consider how the stay would affect creditors. [Footnote omitted.]

.....

The Committee shares the concerns expressed about the potential impact of proposed subsection 11(6) of the CCAA, particularly the concern that the CCAA may no longer be a sufficiently flexible vehicle for large, complex corporate reorganizations.

While the Committee fully supports initiatives to align the provisions of the CCAA more closely with those of the BIA, these initiatives must be the subject of thorough discussion and analysis before [making] their way into legislation.

Unfortunately, such discussion did not take place prior [to] the introduction of proposed subsection 11(6).⁴⁶

Notwithstanding the submissions of the Canadian Life and Health Insurance Association, the Standing Committee recommended that Bill C-5 be amended by striking subparagraphs 11(6)(b)(ii) and (iii).

53 The House of Commons concurred in the Amendments recommended by the Senate on April 15, 1997.⁴⁷ Bill C-5, as thus amended, received Royal Assent on April 25, 1997 and was proclaimed in its present skeletal form on September 30, 1997.⁴⁸ Neither the amending legislation⁴⁹ nor the proposed Bill presently before the Senate⁵⁰ make any change to s. 11 in this regard.

54 The Senate's and Parliament's specific rejection of a limitation on the court's discretion is a strong indication of Parliamentary intention. The fact that Parliament did not see fit to limit the discretion in any significant manner, despite having been given the opportunity to do so, confirms the broad discretion given in ss. 11(3) and (4) to the supervising CCAA judge. Discretion is never completely unfettered, but an appellate court should be reluctant to impose rigid tests, standards or criteria where Parliament has declined to do so. Some guidance can be taken from the jurisprudence.

55 In *Canadian Airlines Corp., Re*⁵¹ Paperny J. (as she then was) indicated that the obligation of the supervising CCAA judge is to "always have regard to the particular facts" and "to balance" the interests. As Farley J. said in *Ivaco Inc., Re*,⁵² the supervising CCAA judge must also be concerned not to permit one creditor to mount "an indirect but devastating attack on the CCAA stay" so as to give one creditor an inappropriate advantage over other unsecured creditors as well as over secured creditors with priority.

56 In *Ivaco Inc., Re*⁵³ Ground J. stated this to be the criteria to determine whether a stay should be lifted:

20 It appears to me that the criteria which the court must consider in determining whether to lift a stay, being whether the proposed cause of action is tenable, the balancing of interests as between the parties, the relative prejudice to the parties, and whether the proposed action would be oppressive or vexatious or an abuse of the court process, would all be met with respect to a trial of issues to resolve interpretation of the APAs with respect to the calculation of the working capital adjustments.

Ground J. went on to confirm that finding a tenable or reasonable cause of action is not the only factor to be considered:

30 Even if the Statement of Claim did disclose a tenable or reasonable cause of action, there are a number of other factors which this court must consider which militate against the lifting of the stay in the circumstances of this case. The institution of the Proposed Action, even if a tight timetable is imposed, would inevitably result in considerable delay and complication with respect to the full distribution of the estate to the detriment of many small trade creditors and individual creditors as well as to pension claimants. In addition, it would appear from the evidence before this court that Heico has been aware of most of the matters alleged in the Statement of Claim for approximately 2 years and there does not appear to be any valid reason given for the delay in commencing the application to lift the stay.

57 Turning back to the case before us, Koch J.'s reasons for refusing to lift the stay were:

[16] . . .

(a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the CCAA which is to promote re-organization and restructuring of companies.

(b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).

(c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re)*, *supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. ...⁵⁴

He went on to find that the proposed action against Bricore was not "tenable."

58 On an application made by a post-filing creditor, a supervising CCAA judge can refuse to lift the stay on the basis that the creditor's claim is outside the CCAA process and the action can be commenced after the CCAA order is lifted. (See *360networks*⁵⁵ and *Stelco*⁵⁶). Koch J. did not exercise this option. He was no doubt motivated in part by the fact that by the time ICR's claim could be tried, after the stay is no longer in effect, there may be no funds for it to claim as Bricore has now liquidated all of its assets and there remains, for all intents and purposes, a pool of funds only. The funds are subject to a plan of distribution, approved by the creditors, and will be distributed over this year.

59 Instead of simply rejecting the claim, Koch J. appears to have weighed the evidence to a certain extent as a means of deciding the next step. He concluded that the claim was not frivolous within the meaning of a Queen's Bench Rule 173 striking motion, but it was nonetheless an untenable claim. The question becomes whether a supervising CCAA judge can weigh a post-filing claim in this manner.

60 Professor Sarra comments on the anomalous position of liquidating CCAA proceedings:

One policy issue that has not to date been fully explored is whether the CCAA should be used to effect an organized liquidation that should properly occur under the BIA or receivership proceedings. Increasingly, there are liquidating CCAA proceedings, whereby the debtor corporation is for all intents and purposes liquidated, but not under the supervision of a trustee in bankruptcy or in compliance with all of the requirements of the BIA. While creditors still must vote in support of such plans in the requisite amounts, there may be some public policy concerns regarding the use of a restructuring statute, under the broad scope of judicial discretion, to effect liquidation. ...⁵⁷

The issue of whether the CCAA should be used for a liquidating, as opposed to a restructuring purpose, is not before us. In the case at bar, when the Initial Order was granted, it was thought possible that Bricore could be restructured. It was only some months after the Initial Order that it became clear that all of the assets would have to be sold. Our task at this point is to address the position of an undetermined claim arising post-filing in such a context.

61 If a claim had some reasonable prospect of success and were otherwise meritorious in the CCAA context, it seems inappropriate to refuse simply to lift the stay on the basis that the claim is outside the CCAA process knowing that, by the time the matter is heard in the ordinary course, there will be no assets remaining. On the other hand, it also seems inappropriate to delay distribution of the assets under a plan of arrangement, or make some other accommodation, for an action that is likely to fail. I should make it clear that I am not addressing the issue of whether a meritorious claimant can share in a proposed plan of distribution as a result of the liquidation of the assets. The issue before this Court is whether a post-filing creditor should be permitted to commence action, in the context of what is now a liquidating CCAA, and avail itself of whatever pre-judgment remedies might be available to it as a result of its claim.

62 In the face of a liquidating plan of arrangement, given the broad jurisdiction conferred by the CCAA on the Court, it seems appropriate that the supervising judge establish some mechanism to weigh the post-filing claim to determine the next step. The next step might entail permitting the claimant to commence action and attempt to convince a chambers judge to grant it a pre-judgment remedy in relation to the funds. It is also possible that the supervising judge may delay distribution of the funds, or some portion thereof, with or without full security for costs, or on such other terms as seems fit. Mechanisms to test the claim could include referral to a special claims officer, examination of the pertinent principal parties, or a settlement conference, or, as in this case, a preliminary examination by the supervising CCAA judge in chambers based on affidavit evidence.

63 In the case at bar, having determined that it was appropriate to assess ICR's claim in some way, did Koch J. err either in his statement of the appropriate test or in its application?

64 Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in *Ivaco Inc., Re*,⁵⁸ but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.⁵⁹

65 Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or

will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the CCAA proceeding.

66 Given the broad discretion granted to a supervisory judge under the CCAA, as well as the knowledge and experience he or she gains from the ongoing dealings with the parties under the proceedings, it would be contrary to the purpose of the CCAA for the law under it to develop in a restrictive way. Having regard for this, there ought not to be rigid requirements imposed on how a supervising CCAA judge must exercise his or her discretion with respect to lifting the stay.

67 Nonetheless, a broad test articulated along the lines of that in *Ma, Re*⁶⁰ may be of assistance. The test from *Ma, Re* is:

3 ... As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

While the *Ma, Re* test was developed for use under the *BIA*, a test based on sound reasons, consistent with the scheme of the CCAA, to relieve against the stay imposed by ss. 11(3) and (4) of the CCAA, may be a better way to express the task of the chambers judge faced with a liquidating CCAA than a test based simply on *prima facie* case. It must be kept firmly in mind that the Court is dealing with a claimant that did not avail itself of the remedy of withholding services under s. 11.3. It is also useful to remind oneself that, in a case such as this, the CCAA proceeding began as a restructuring exercise with the attendant possibility of creating s. 11.3 claimants. The threshold must be a significant one, but not insurmountable.

68 In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

- (a) the balance of convenience;
- (b) the relative prejudice to the parties;
- (c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising CCAA judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising CCAA judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

69 While Koch J. did not state the test as broadly as I have, I agree that ICR does not reach the necessary threshold. ICR did not structure its affairs or establish a claim with the specificity that justifies the development of a remedy to allow it to participate in the liquidation of the Bricore assets. There is also no aspect of the liquidation that requires the Court in this case to be concerned. In particular, the stay need not be lifted, and no other step need be taken in the context of the CCAA proceedings in light of these facts:

1. as of January 30, 2006, the Building was subject to an exclusive Selling Officer Agreement that provided CMN Calgary with the exclusive right to sell the property and to earn a commission of 1.25% of the purchase price,⁶¹ which is significantly less than that being claimed by ICR at a 5% commission;
2. the sale to the Proposed Purchaser was a sale of six of the seven Bricore properties;
3. the trial judge received a report dated September 25, 2006 from the CRO recommending approval of the sale, which is two days before the alleged contract with ICR was proposed;⁶²

4. in the September 25 report, the CRO advised the Court that "the total aggregate purchase price for the Bricore Properties obtained by Bricore in the Accepted Offer to Purchase represented the greatest value which it would be possible to obtain for all of the Bricore Properties;"⁶³

5. the September 27, 2006 letter from ICR to Bricore, states "we are aware that the properties are under contract to sell ..."; and,

6. there was no sale from Bricore to the City of Regina.

70 While ICR denies knowledge of the sale, it is important to come back to the September 27th letter from ICR to Mr. Ruf. It states:

We are aware that the properties are under contract to sell and request that ICR be protected in the specific situations as outlined.⁶⁴ [Emphasis added]

The addition by the CRO of these words, "Date of closing of *a sale* or December 31, 2006 whichever is earlier," to that letter adds further support to the veracity of the CRO's report to the effect that the CRO entered into discussions with ICR to provide for the eventuality of a failed sale to the purchaser with whom Bricore already had a contractual relationship.

71 Finally, in assessing Koch J.'s decision, and in determining the deference that is owed to it, I am not unmindful that he issued some 20 orders in 2006, pertaining to the Bricore restructuring, at least five of which dealt substantively with the Building and its prospective sale to the Proposed Purchaser.

72 Thus, applying the standard of review previously articulated, I cannot say that Koch J. acted arbitrarily, on a wrong principle, or on an erroneous view of the facts, or that a failure of justice is likely to result from the exercise of his discretion in the manner he did.

VII. Issue #4. Did the Supervising CCAA Judge Make a Reviewable Error in Refusing Leave to Commence an Action Against the CRO?

73 In addition to the indemnification provided by para. 18 of the CRO Order quoted above, the Order goes on to indicate the only circumstances in which the CRO can be sued personally:

20. For greater clarity, the CRO [*sic*]:

.....

(c) the CRO shall incur no liability or obligation as a result of his appointment or as a result of the fulfillment of his powers and duties as CRO, except as a result of instances of fraud, gross negligence or wilful misconduct on his part; and

(d) no Proceeding shall be commenced against the CRO as a result of or relating in any way to his appointment or to the fulfillment of his powers and duties as CRO, without prior leave of the Court on at least seven days' notice to Bricore Group, the CRO and legal counsel to Bricore Group.

21. Subject to paragraph 20 hereof, nothing in this Order shall restrict an action against the CRO for acts of gross negligence, bad faith or wilful misconduct committed by him.

Setting aside the obvious ambiguity in this Order, it can be taken that to assert a claim against the CRO personally, ICR had to claim "fraud, gross negligence, wilful misconduct or bad faith." ICR claimed "bad faith."

74 Based on para. 20(d) of the Initial Order, there is no question that ICR was required to obtain prior leave of the court. The issue thus becomes whether the supervising CCAA judge erred in exercising his discretion in refusing to lift the stay.

75 Koch J.'s reasons for refusing to lift the stay are these:

[18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.

[19] As stated previously, the overriding purpose of the CCAA must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.⁶⁵

76 Again, Koch J. employed the same mechanism that he used to assess the claim against Bricore. He considered the status of the CRO as an officer of the court, noted the ambiguity in the Order and weighed the evidence to a certain extent. The question he was answering was the sufficiency of the claim to permit an action to be commenced against the Court's officer.

77 Again, applying the standard of review with respect to discretionary orders, there is no basis upon which the Court can intervene with Koch J.'s refusal to lift the stay so as to permit an action against the CRO in his personal capacity.

VIII. Issue #5. Did the Supervising CCAA Judge Err in Awarding Costs on a Substantial Indemnity Basis?

78 Koch J. awarded substantial indemnity costs for this reason:

[6] In my view, allegations of misconduct against a court officer are rare and exceptional. Therefore costs on this motion should be imposed on a substantial indemnity scale, although not on the full solicitor and client basis sought. Bricore is entitled to costs on the motion of \$2,000.00, and Maurice Duval is entitled to costs of \$1,000.00, payable in each instance by the applicant, ICR Commercial Real Estate (Regina) Ltd.⁶⁶

79 I note that Newbury J.A. in *New Skeena Forest Products Inc., Re*⁶⁷ dismissed a challenge to a costs award, holding that "these are the kinds of considerations which the [CCAA] Chambers judge ... was especially qualified to make." And, of course, all costs orders are discretionary orders.

80 Nonetheless in this case, it would appear that the supervising CCAA judge erred. There is no basis upon which to order substantial indemnity costs with respect to the application to lift the stay in relation to Bricore. Bad faith was not alleged on its part. With respect to the CRO, the only basis upon which the stay could be lifted was to make an allegation of "bad faith." In the absence of some other factor, ICR cannot be faulted for making the very allegation that it was required to make in order to bring its application within the ambit of the stay of proceedings that had been granted.

81 In addition, while Koch J. indicated he was not awarding solicitor-and-client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and-client costs is still a punitive order and, as there is no authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs. As such, the award does not seem to meet the test established in *Siemens v. Bawolin*⁶⁸

and *Hashemian v. Wilde*⁶⁹ wherein it is stated that solicitor-and-client costs are generally awarded where there has been reprehensible, scandalous or egregious conduct on the part of one of the parties in the context of the litigation.

82 If the parties are unable to agree with respect to costs in the Court of Queen's Bench and in this Court, they may speak to the Registrar to fix a time for a conference call hearing regarding costs.

Appeal allowed in part.

Footnotes

- 1 R.S.C. 1985, c. C-36.
- 2 Appeal Book, pp. 17a and 22a [Affidavit of Paul Mehlsen].
- 3 *Ibid.* at pp. 27a and 32a.
- 4 Order (Appointment of Chief Restructuring Officer, Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.
- 5 Order (Extension of Stay of Proceedings) made August 1, 2006.
- 6 Order (Extension of Stay of Proceedings) made August 18, 2006.
- 7 Order (Extension of Stay of Proceedings, Extension of Appointment of CRO and Increase in Maximum CRO Remuneration; Increase to Administrative Charge) made September 25, 2006.
- 8 Order (Approving Sale; Extending Stay of Proceedings; Extending Appointment of CRO) made October 10, 2006.
- 9 Appeal Book, p. 7a-8a.
- 10 *Ibid.* at p. 12a.
- 11 *Ibid.* at pp. 14a-15a.
- 12 *Ibid.* at p. 46a.
- 13 *Ibid.* at pp. 38a-39a.
- 14 *Ibid.* at p. 51a-52a.
- 15 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 121 (Sask. Q.B.).
- 16 John D. Honsberger, *Debt Restructuring: Principles and Practice*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 9.61.
- 17 (1954), 34 C.B.R. 82 (C.S. Que.). There are no cases referring to *Ramsay Plate Glass* on the point that Prof. Honsberger raises in his text. (*Ptarmigan Airways Ltd. v. Federated Mining Corp.*, [1973] 3 W.W.R. 723 (N.W.T. S.C.) mentions *Ramsay Plate Glass* but not in reference to the point made here.)
- 18 *Ibid.* at p. 83.
- 19 (2003), 45 C.B.R. (4th) 151 (B.C. S.C.), appeal dismissed [*Caterpillar Financial Services Ltd. v. 360networks corp.*] (2007), 27 C.B.R. (5th) 115 (B.C. C.A.).
- 20 (2005), 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]).
- 21 (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

- 22 *360networks*, *supra* note 19.
- 23 *Stelco*, *supra* note 20 at para. 11.
- 24 *Campeau*, *supra* note 21.
- 25 *360networks*, *supra* note 19.
- 26 *Stelco*, *supra* note 20.
- 27 *Campeau*, *supra* note 21.
- 28 R.S.C. 1985, c. B-3.
- 29 Lloyd W. Houlden & Geoffrey B. Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2006) at pp. 562 and 789.
- 30 *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12, s. 124.
- 31 *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, s. 577.
- 32 *Debt Restructuring Principles and Practice*, *supra* note 16 at p. 9-88.1.
- 33 Richard H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 3-17.
- 34 Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007).
- 35 *Ibid.* at pp. 110-11.
- 36 (1998), 53 B.C.L.R. (3d) 264 (B.C. S.C.). See also *Air Canada, Re* (2004), 47 C.B.R. (4th) 182 (Ont. S.C.J. [Commercial List]), and *Mosaic Group Inc., Re* (2004), 3 C.B.R. (5th) 40 (Ont. S.C.J.).
- 37 (1990), [1991] 2 W.W.R. 136 (B.C. C.A.).
- 38 (1990), 51 B.C.L.R. (2d) 105 (B.C. C.A.).
- 39 *Smith Brothers Contracting Ltd.*, *supra* note 36.
- 40 Order (Appointment of Chief Restructuring Officer; Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.
- 41 Bayda C.J.S., for the majority, in *Smart v. South Saskatchewan Hospital Centre* (1989), 75 Sask. R. 34 (Sask. C.A.), paraphrasing Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.) at 1046.
- 42 [1943] O.R. 683 (Ont. C.A.) at 698.
- 43 *Rescue! The Companies' Creditors Arrangement Act*, *supra* note 34 at pp. 88-92.
- 44 *Supra* note 28.
- 45 Twelfth Report of the Standing Senate Committee on Banking, Trade and Commerce, February 1997, unnumbered p. 3 of the Chairman's Report, and p. 18.
- 46 *Ibid.* at pp. 17-18.

- 47 Canada Legislative Index, 2nd Session, 35th Parliament, Bill C-5, S.C. 1997, c. 12, pp. 1 & 2.
- 48 *Ibid.*
- 49 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47, s. 128.
- 50 Bill C-62, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2005, 1st Sess., 39th Parl., 2006-2007.
- 51 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para 15.
- 52 (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial List]) at para 3.
- 53 [2006] O.J. No. 5029 (Ont. S.C.J.).
- 54 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, *supra* note 15.
- 55 *360networks*, *supra* note 19.
- 56 *Stelco*, *supra* note 20.
- 57 *Rescue! The Companies' Creditors Arrangements Act*, *supra* note 34 at p. 82.
- 58 *Ivaco Inc., Re*, *supra* note 53.
- 59 *Ma, Re* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*, *supra* note 29 at p. 403.
- 60 *Ibid.*
- 61 Order (Extension of Stay, DIP Financing, Sale Process & Shareholder Proceedings) of Koch J. in Chambers dated February 13, 2006.
- 62 Order made September 25, 2006, *supra* note 7.
- 63 Appeal Book, p. 37a, para. 3.
- 64 *Supra* note 11.
- 65 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, *supra* note 15.
- 66 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 144 (Sask. Q.B.).
- 67 [2005] 8 W.W.R. 224 (B.C. C.A.) at para. 23.
- 68 2002 SKCA 84, [2002] 11 W.W.R. 246 (Sask. C.A.).
- 69 2006 SKCA 126, [2007] 2 W.W.R. 52 (Sask. C.A.).

Tab 10

2004 CarswellOnt 2397
Ontario Superior Court of Justice [Commercial List]

Ivaco Inc., Re

2004 CarswellOnt 2397, [2004] O.J. No. 2483, [2004] O.T.C. 499, 131 A.C.W.S. (3d) 802, 3 C.B.R. (5th) 33

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

Cumming J.

Heard: June 9, 2004
Judgment: June 10, 2004
Docket: 03-CL-5145

Counsel: M.P. Gottlieb for Applicants
Michael E. Barrack, Geoff R. Hall for QIT
E. Lamek for National Bank of Canada
Peter Howard for Monitor, Ernst & Young Inc.
D.V. MacDonald for Bank of Nova Scotia
J.T. Porter for UBS
Ken Rosenberg for United Steel Workers of Canada

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Company began proceedings under Companies' Creditors Arrangement Act — Company sought directions on possible sale proposal — Corporate restructuring officer to be part of sales process — Parties agreed that monitor could observe negotiations between QIT and bidders, and that disclosure be made of supply agreement between QIT and company — Corporate restructuring officer was required to understand all aspects of possible sale.

Table of Authorities

Statutes considered:

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

RULING regarding arrangement under *Companies' Creditors Arrangement Act*.

Cumming J.:

The Motion

1 The moving party Applicants, Ivaco Rolling Mills Limited Partnership, comprising some eight affiliated corporations ("IRM"), seek directions from the Court in respect of the sales process for its business under the *Companies' Creditors Arrangement Act* ("CCAA"). The motion raises an important issue relating to the respective roles of the Monitor and Chief Restructuring Officer in that process. The Court provided a decision at the conclusion of the hearing, with reasons to follow.

Background

2 IRM is engaged in the steel manufacturing and processing business in Canada. QIT-Fer Et Titane Inc. ("QIT") is a major supplier to IRM of steel billets pursuant to a long-standing supply agreement. QIT is also a major unsecured creditor of IRM, being owed some \$62 million.

3 The Applicants obtained an Initial Order under the CCAA September 16, 2003. A Chief Restructuring Officer ("CRO") was appointed October 24, 2003.

4 On December 11, 2003 this Court authorized IRM to pursue a dual-track restructuring process: one track is a stand-alone restructuring plan; the second track is the pursuit of a sales process.

5 The Monitor, the CRO and the unsecured creditors of IRM have a concern that QIT seeks a way whereby it will be paid the monies owing to it by IRM outside the parameter of the CCAA proceeding. The record gives some force to this concern.

6 A Court Order dated March 22, 2004 authorized a limited number of prospective purchasers to submit offers for the assets of one or more of the Applicants. Some four bidders have now submitted proposals in this regard. Understandably, it is a condition of the proposals that the bidders be able to satisfy themselves as to the nature and status of the historical and existing relationship between QIT and IRM and the nature of any relationship for the future between a buyer of IRM's business and QIT.

7 The concern that has been raised by the Monitor, CRO and a number of IRM's creditors is that QIT may seek to enter into a relationship with a bidder whereby QIT could achieve some recovery of IRM's pre-filing debt of \$62 million at the expense of other unsecured creditors.

8 Any purchaser of IRM requires a supply contract with QIT as there are no apparent competitors for its product sold to IRM. The concern is that QIT could insist upon a supply arrangement with the bidder at an unreasonably high price with the bidder offering an unreasonably low price for the assets of IRM. The creditors, Monitor, and the Applicants are concerned that QIT might enter into a supply arrangement with a bidder at the expense of IRM by virtue of the price for IRM's assets being lower than would otherwise be the case in a normal market transaction.

9 Meetings have been set up to take place between the bidders, the Applicants through the CRO, the Monitor and QIT with a view to determining whether any one or more bidder can achieve a supply agreement with QIT within a context of a satisfactory unconditional bid by that bidder for the assets of one or more of the Applicants.

The Issue

10 Several issues raised at the outset of the motion were settled by agreement as discussions progressed. It is not necessary to discuss these settled issues. The settled position provides that the Monitor can observe the negotiations to take place between QIT and each bidder. The settled position also provides that disclosure can be made to bidders of the existing supply agreement between IRM and QIT.

11 A single issue remained for determination by the Court at the conclusion of the hearing, being whether or not the CRO was to be part of the sales process. QIT took the position that the CRO should not be part of the process. The Applicants, the Monitor and the other major unsecured creditors all took the position that the CRO should be part of the sales process. Only QIT, supported by the United Steel Workers of Canada, took the contrary view.

12 The only support for QIT came from the United Steel Workers of Canada, being the Union representing the workers of IRM through a collective bargaining agreement. The position expressed by counsel for the Union was that the continuity of IRM's business is critical to the direct welfare of its employees and is of indirect benefit to the community at large. There is a clear public interest in the welfare of the workers. Undoubtedly, that is a correct, and important observation.

13 Thus, counsel for the Union argued further, the Court should accede to the position of QIT even though it might result in a failure to maximize the value of the IRM assets through the CAA proceeding. In my view, the Union's quite proper concern for the welfare of the workers cannot justify trumping the concern of creditors that they be treated fairly. Nor would it ever be in the broader notion of the public interest to allow a sales process perceived to be unfair to go forward. The public policy underlying the CCAA and its objectives would be undermined. Indeed, it might well be that any proposed sale would not then garner the requisite support of creditors required for approval under the CCAA. It might be that the business of IRM is more likely to fail, to the ultimate disadvantage of its workers, through a compromise to the integrity of the sales process. In any event, the Court could not sanction a proposed plan of compromise that was the result of an unfair process.

14 QIT professes that if the CRO takes part in the negotiations between the bidders and QIT that this will necessarily inhibit the sales process. QIT claims this will be so because bidders will be reluctant to provide confidential information to QIT, and vice-versa, while recognizing that the CRO may then use that information to enhance an alternative stand-alone restructuring plan and consequentially advise against acceptance of the bidder's proposal.

Disposition

15 There are certain fundamentals to a CCAA proceeding relevant to a determination of the issue at hand. First, there cannot be a sales process whereby one unsecured creditor secures a secret benefit or advantage over the other unsecured creditors. Such a result would be the equivalent of providing a preference for that creditor. Fairness to all the creditors is a prerequisite to a satisfactory sales process. Second, the sales process must be seen to be fair. That is, there must be transparency.

16 Third, the sales process is to be determined by the Court after considering the advice of the Monitor and the position of the Applicants and their creditors. The sales process is not dictated by a supplier *qua* supplier. It may be the supplier does not wish to participate in the sales process given the nature of the process. That is for the supplier to determine in its own self-interest. In the situation at hand, QIT conceivably might say that it would rather lose its supplier relationship with IRM or a successor, to its apparent significant economic detriment, than proceed in the sales process.

17 The CRO's attendance and participation in the sales process is critical because he is the independent party who must understand all the various bids and weigh each against the possibility of a stand-alone restructuring. He must ultimately make recommendations that engender confidence as being advanced on the best information and advice possible. The CRO is an active part of the negotiations in the sales process. He is not involved as a relatively passive observer in the manner of the Monitor.

18 The sales process has been determined by the Applicants with the approval of the Court. The CRO represents the Applicants in that process. The intended sales process is one of trilateral negotiations. If QIT, IRM or any bidder wishes to discontinue such negotiations at any time that is, of course, that party's right. It is in the obvious self-interest of IRM, QIT, and any bidder to maintain the existing QIT to IRM (or successor) supply relationship. It would seem to be a win — win — win situation to come to a tripartite agreement. While no one can be ordered to enter into any new agreement every participant is required to engage in a sales process that is fair and is seen to be fair. The CRO is involved with the purpose of achieving the best result for the Applicants and a result which will be approved by the requisite number of creditors.

19 Turning to the instant situation, there are a number of Applicants with different unsecured creditors for different Applicants. It is necessary that any negotiated sale (or restructuring) take into account such complexities so that fairness is achieved for all the creditors (and is seen to be achieved.)

20 QIT proposed that the CRO would be excluded from the negotiations unless his presence was requested by either a bidder or by QIT. I disagree. In my view, the CRO has the right to attend and participate throughout the entirety of the negotiations in

the sales process. In the event that a discrete issue arises in the context of a particular bidder's negotiations with QIT, such that there is disagreement as to whether the Monitor or CRO should be absent, then the further direction of the Court can be sought in the context of that specific issue. This will allow for QIT's expressed concerns for bidders in the negotiation process to be taken into account, should this be necessary. It is noted incidentally that no bidder has come forward in the hearing at hand to support QIT in respect of its expressed concerns about the sales process.

21 Absent some compelling, exceptional factor to the contrary (not seen here), in my view, the Court should accept an applicant's proposed sales process under the CCAA, when it has been recommended by the Monitor and is supported by the disinterested major creditors. The Court has the discretion to stipulate a variation to such a proposed sales process plan. However, the exercising of such discretion would seem appropriate in only very exceptional circumstances.

22 An Order will issue in the form attached hereto as Annex "A". There are no costs granted to any party.

Order accordingly.

ANNEX — "A"

Court File No. 03-CL-5145

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE CUMMING

WEDNESDAY, THE 9th DAY OF JUNE, 2004

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 IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

ORDER

THIS MOTION, made by the Applicants for directions with respect to the sales process in respect of discussions involving QIT Fer et Titane Inc. ("QIT"), was heard this day at 393 University, Toronto.

ON READING the Notice of Motion, the Tenth Report of the Monitor, Ernst & Young Inc., the Affidavit of Randall C. Benson, the Affidavit of Gary A. O'Brien, and the Supplementary Affidavit of Randall C. Benson, and on hearing the submissions of counsel for the Applicants, the Monitor, QIT, the Informal Committee of Noteholders, the United Steelworkers of America, the Bank of Nova Scotia, the National Bank of Canada and UBS Securities LLC:

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is abridged so that the motion is properly returnable today, and that any requirement for service of the Notice of Motion and of the Motion Record upon any party not served is dispensed with.

2. THIS COURT ORDERS that the sales process in respect of discussions involving QIT shall be governed by the following procedure:

(a) QIT shall have seven days from the date of this Order to meet with the bidders who have submitted final proposals in the second round of the sales process authorized by order of this court dated March 22, 2004. The Monitor and CRO shall have the right to attend and participate in all such meetings. At the conclusion of the seven day period, QIT shall inform the Monitor of those bidders with whom it is prepared to conduct further negotiations. After considering the views of QIT and the Applicants, the Monitor shall identify to the Applicants and QIT the bidders with whom further negotiations shall occur (the "Bidders"). If either QIT or the Applicants disagree with the Monitor then they may apply to the court for directions.

(b) After the Bidders have been identified, QIT shall disclose relevant portions of the long-term supply agreement dated April 15, 1999 between QIT and Ivaco Rolling Mills Limited Partnership ("IRM") which QIT claims has been terminated and which the Applicants claim has not been terminated (the "Agreement") to the Bidders, under appropriate confidentiality arrangements. QIT and the Monitor shall have discussions to determine what portions of the Agreement are relevant and to determine appropriate confidentiality arrangements. If they cannot agree, they shall seek further directions from the court. Further, if the Applicants do not agree with the determination of QIT and the Monitor as to what portions of the Agreement are relevant, they shall be at liberty to apply to the court for further directions regarding the disclosure of the Agreement. This order shall be without prejudice to the Applicants' position that the Agreement is not confidential and that it may disclose the entire Agreement.

(c) QIT shall then undertake negotiations with the Bidders. The Monitor and CRO shall be entitled to attend and participate in these negotiations so as to be in a position to report to the court on the outcome of them. No other parties shall participate in the negotiations, except that at the request of either QIT or a Bidder technical personnel from the Applicants will be entitled to participate in order to give necessary technical assistance. If the parties cannot agree on the appropriate participation of additional persons they shall seek further directions from the court. At the request of QIT and a Bidder, the Monitor may in its discretion absent itself from parts of negotiations which it considers best to proceed privately. If the Monitor refuses such request, QIT or the Bidder may apply to the court for directions. At the request of QIT or a Bidder, the CRO may in his discretion absent himself from parts of negotiations which he considers best to proceed privately. If the CRO refuses such request, QIT or the Bidder may apply to the court for directions.

(d) The negotiations and meetings referred to shall be conducted under appropriate confidentiality arrangements.

SCHEDULE — "A"

APPLICANTS FILING FOR CCAA

1. Ivaco Inc.
2. Ivaco Rolling Mills Inc.
3. Ifastgroupe Inc.
4. IFC (Fasteners) Inc.
5. Ifastgroupe Realty Inc.
6. Docap (1985) Corporation
7. Florida Sub One Holdings, Inc.
8. 3632610 Canada Inc.

Tab 11

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992

Judgment: January 6, 1993

Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison and Melissa J. Kennedy*, for applicants.

L. Crozier, for Royal Bank of Canada.

R.C. Heintzman, for Bank of Montreal.

J. Hodgson, Susan Lundy and James Hilton, for Canada Trustco Mortgage Corporation.

Jay Schwartz, for Citibank Canada.

Stephen Golick, for Peat Marwick Thorne^{*} Inc., proposed monitor.

John Teolis, for Fuji Bank Canada.

Robert Thorton, for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued

under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

Table of Authorities

Cases considered:

Amirault Fish Co., Re, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — referred to

Associated Investors of Canada Ltd., Re, 67 C.B.R. (N.S.) 237, Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *Re First Investors Corp.*) 46 D.L.R. (4th) 669 (Q.B.), reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — referred to

Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — referred to

Empire-Universal Films Ltd. v. Rank, [1947] O.R. 775 [H.C.] — referred to

Feifer v. Frame Manufacturing Corp., Re, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — referred to

Fine's Flowers Ltd. v. Fine's Flowers (Creditors of) (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — referred to

Gaz Métropolitain v. Wynden Canada Inc. (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — referred to

Inducon Development Corp. Re (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — referred to

International Donut Corp. v. 050863 N.B. Ltd. (1992), 127 N.B.R. (2d) 290, 319 A.P.R. 290 (Q.B.) — considered

Keppoch Development Ltd., Re (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) — referred to

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — referred to

McCordic v. Bosanquet (1974), 5 O.R. (2d) 53 (H.C.) — referred to

Meridian Developments Inc. v. Toronto Dominion Bank, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Q.B.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 1 (Q.B.) — referred to

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.), affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.), leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — referred to

Reference re Companies' Creditors Arrangement Act (Canada), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — referred to

Seven Mile Dam Contractors v. R. (1979), 13 B.C.L.R. 137, 104 D.L.R. (3d) 274 (S.C.), affirmed (1980), 25 B.C.L.R. 183 (C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — referred to

Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — considered

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — referred to

Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon*) 1 O.R. (3d) 321 (Gen. Div.) — referred to

United Maritime Fishermen Co-operative, Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, 224 A.P.R. 253, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.*) 51 D.L.R. (4th) 618 (C.A.) — referred to

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 85

s. 142

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

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

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

Judicature Act, The, R.S.O. 1937, c. 100.

Limited Partnerships Act, R.S.O. 1990, c. L.16 —

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

s. 75

Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

Farley J.:

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

- (a) short service of the notice of application;
- (b) a declaration that the applicants were companies to which the CCAA applies;
- (c) authorization for the applicants to file a consolidated plan of compromise;
- (d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;
- (e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and
- (f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act*, R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited

partnerships registered under Part 2 of the *Partnership Act*, R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately \$370 million, LPC \$45 million and LPC II \$7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately \$543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtana Investments Limited, a minor secured lender also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

- (a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.
- (b) The restructuring of existing project financing commitments.
- (c) New financing, by way of equity or subordinated debt.
- (d) Elimination or reduction of certain overhead.
- (e) Viability of existing businesses of entities in the Lehndorff Group.
- (f) Restructuring of income flows from the limited partnerships.
- (g) Disposition of further real property assets aside from those disposed of earlier in the process.
- (h) Consolidation of entities in the Group; and
- (i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtana Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.); *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.). The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.), at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.), reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.), at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v.*

Comiskey) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.), at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.), at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.); *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.), at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 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. see *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.*, supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)*, supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among 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: see *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at p. 220 (W.W.R.). 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: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.), at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.*, supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act*, R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial

liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.). It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.*, supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 320 where Gibbs J.A. for the court stated:

The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik*, unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.*, unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these.* (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

The Power to Stay

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides as follows:

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

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), [Doc. 24127/88 \(Ont. Gen. Div.\)](#)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure*. The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a *discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period*.

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems*, supra, at pp. 65-66 indicated:

Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, (sub nom. *Lane v. Willis; Lane v. Beach*) [1972] 1 W.L.R. 326 (C.A.).

.....

In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.*) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:

(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership.

The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure*, O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership*, 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.), affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test*, (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of

the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

- * As amended by the court.

Tab 12

2009 CarswellOnt 4467
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4467, [2009] O.J. No. 3169, 179 A.C.W.S. (3d) 265, 55 C.B.R. (5th) 229

**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
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Morawetz J.

Heard: June 29, 2009

Written reasons: July 23, 2009

Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
J. Carfagnini, J. Pasquariello for Monitor, Ernst & Young Inc.
M. Starnino for Superintendent of Financial Services, Administrator of PBGF
S. Philpott for Former Employees
K. Zych for Noteholders
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III
L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.
David Ward for UK Pension Protection Fund
Leanne Williams for Flextronics Inc.
Alex MacFarlane for Official Committee of Unsecured Creditors
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited
A. Kauffman for Export Development Canada
D. Ullman for Verizon Communications Inc.
G. Benchetrit for IBM

Subject: Insolvency; Estates and Trusts

Headnote

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

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise

or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Table of Authorities

Cases considered by *Morawetz J.*:

Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership (2009), 2009 BCCA 319, 2009 CarswellBC 1738 (B.C. C.A.) — followed

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 10918, 7 C.B.R. (5th) 189 (C.S. Que.) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co. (2008), 2008 CarswellOnt 4046, 45 C.B.R. (5th) 87 (Ont. S.C.J.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

PSINET Ltd., Re (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]) — considered

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABQB 236, 2006 CarswellAlta 383, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re*) 393 A.R. 340, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.) — referred to

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

Stelco Inc., Re (2004), 2004 CarswellOnt 4084, 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) — referred to

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — referred to

Winnipeg Motor Express Inc., Re (2008), 2008 CarswellMan 560, 2008 MBQB 297, 49 C.B.R. (5th) 302 (Man. Q.B.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

s. 363 — referred to

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

Generally — referred to

s. 11 — referred to

s. 11(4) — considered

MOTION by company for approval of bidding procedures for sale of business and asset sale agreement.

Morawetz J.:

Introduction

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is \$650 million.

Background

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

- (a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and
- (b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

- (a) the Business operates in a highly competitive environment;
- (b) full value cannot be realized by continuing to operate the Business through a restructuring; and
- (c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

Issues and Discussion

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial, supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra, Re PSINet, supra, Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra, Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging*, *supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging*, *supra*, at paras. 5, 9.

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge*, *Re*, *supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge*, *Re*, *supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited*, *supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited*, *supra*, at para. 3.

39 In *Re Stelco Inc.*, *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc*, *supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc.*, *Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc.*, *Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd.*, *Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a

debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring" ...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole "economic community"?
- (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

- (a) Nortel has been working diligently for many months on a plan to reorganize its business;
- (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
- (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
- (d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;
- (e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
- (f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and
- (g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

Disposition

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

Motion granted.

Tab 13

2009 CarswellOnt 4806
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4806, 179 A.C.W.S. (3d) 801, 57 C.B.R. (5th) 232, 76 C.C.P.B. 307

**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
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Morawetz J.

Heard: June 16, 2009

Judgment: August 18, 2009

Docket: 09-CL-7950

Counsel: Alan Merskey for Nortel Networks Corp. et al

Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Leanne Williams for Flextronics Inc.

J. Pasquariello for Monitor, Ernst & Young Inc.

B. Wadsworth for CAW-Canada

Thomas McRae for Recently Severed Calgary Employees

A. McKinnon for Former Employees

Mary Arzoymandis for Bell Canada

Alex MacFarlane for Unsecured Creditors' Committee

Gavin Finlayson for Noteholders

Tina Lie for Superintendent of Financial Services of Ontario

Steven Graff, Ian Aversa for Current and Former Employees

Subject: Insolvency

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Removal of stay

Action was commenced in United States which involved alleged breach by named defendants of their statutory duties under Employee Retirement Income Security Act, 1974 (ERISA) — ERISA litigation was at discovery stage, which entailed review and production of millions of pages of electronic documents and numerous depositions — Stay was contained in Amended and Restated Initial Order (initial order) — Applicants brought motion for order extending stay — Current and former employees of N Inc. who were participants in long-term investment plan sponsored by N Inc. (moving parties) brought motion for order lifting stay of proceedings — Motion by applicants granted — Motion by moving parties dismissed — D&O stay under initial order did cover D&O defendants in ERISA litigation and it was not appropriate to lift stay at this time — Effect of stay would be merely to postpone ERISA litigation — Allegations against named defendants were not restricted to defendants acting in their capacity as fiduciaries — In expanding scope of litigation to include broad

allegations as against directors, moving parties had brought ERISA litigation within terms of D&O stay — Restructuring was at critical stage and energies and activities of board should be directed towards restructuring — To permit ERISA litigation to continue at that time would result in significant distraction and diversion of resources at time when that could be least afforded — Further postponement of claim for relatively short period of time would not be unduly prejudicial to moving parties.

Table of Authorities

Cases considered by *Morawetz J.*:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc. (2008), 2008 CarswellOnt 1427, (sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.*) 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 2008 ONCA 196, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, (sub nom. *Slater Steel Inc. (Re)*) 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314 (Ont. C.A.) — distinguished

SNV Group Ltd., Re (2001), 95 B.C.L.R. (3d) 116, 2001 BCSC 1644, 2001 CarswellBC 2662 (B.C. S.C.) — referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 11.5 [en. 1997, c. 12, s. 124] — considered

s. 11.5(1) [en. 1997, c. 12, s. 124] — considered

s. 11.5(2) [en. 1997, c. 12, s. 124] — referred to

Employee Retirement Income Security Act, 1974, 29 U.S.C.

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 21 — referred to

MOTION by applicants for order extending stay in action; MOTION by moving parties for order lifting stay of proceedings.

Morawetz J.:

1 This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14 - 15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

Background

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same. Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel, because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50 - 109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order, and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

- (a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;
- (b) the bulk of documentary discovery issues have been worked out;
- (c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and
- (d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. \$30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

Analysis

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Ltd., Re*, [2001] B.C.J. No. 2497 (B.C. S.C.)) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against *Morneau* would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

Disposition

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extent that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

Motion by applicants granted; motion by moving parties dismissed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 14

2011 ONSC 2061
Ontario Superior Court of Justice

Priszm Income Fund, Re

2011 CarswellOnt 2258, 2011 ONSC 2061, [2011] O.J. No. 1491, 200 A.C.W.S. (3d) 626, 75 C.B.R. (5th) 213

**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 Priszm Income Fund,
Priszm Canadian Operating Trust, Priszm Inc. and Kit Finance Inc. (Applicants)

Morawetz J.

Heard: March 31, 2011

Judgment: March 31, 2011

Docket: CV-11-915900CL

Counsel: A.J. Taylor, M. Konyukhova for Priszm Entities
G. Finlayson — Conflict Counsel for the Priszm Entities
M. Wasserman for Proposed Monitor, FTI Consulting Canada Inc.
P. Shea for Prudential Insurance
P. Huff for Directors of Priszm
C. Cosgriffe for Yum! Restaurants International (Canada) LP
D. Ullmann for 2279549 Ontario Inc.

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

P Fund, P Trust, P GP, P LP and K Inc. were collectively referred to as P Entities — P Entities owned and operated 428 quick service restaurants — P LP was franchisee of franchisor, Y LP — Business of P LP was to develop, acquire, make investments in and conduct business in connection with quick service restaurant business — P Entities ceased paying certain obligations to Y LP and could not meet their liabilities as they came due; it became insolvent — P Fund, P Trust, P GP, and K Inc., applicants, sought relief under Companies' Creditors Arrangements Act (CCAA) and also sought to have stay of proceedings of initial order under CCAA extended to P LP — Application granted — Applicants' submission that they were debtor companies to which CCAA applied was accepted — P Entities were in process of coordinating sale process for certain assets, and stay of proceedings was appropriate — While CCAA definition of eligible company does not expressly include partnerships, CCAA courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so — Courts have held that this relief is appropriate where operations of debtor companies are so intertwined with those of partnerships, that not extending stay would significantly impair effectiveness of stay in respect of debtor companies — It was appropriate to extend CCAA protection to P LP.

Table of Authorities

Cases considered by Morawetz J.:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — followed

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.5(1) [en. 1997, c. 12, s. 124] — considered

s. 11.5(2) [en. 1997, c. 12, s. 124] — considered

APPLICATION by affiliated debtor companies for relief under Companies' Creditors Arrangements Act and to have stay of proceedings of initial order extended to limited partnership.

Morawetz J.:

1 Priszm Income Fund ("Priszm Fund"), Priszm Canadian Operating Trust ("Priszm Trust"), Priszm Inc. ("Priszm GP") and KIT Finance Inc. ("KIT Finance") (collectively, the "Applicants") seek relief under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants also seek to have the stay of proceedings and other benefits of an initial order under the CCAA extended to Priszm Limited Partnership ("Priszm LP"). Priszm Fund, Priszm Trust, Priszm GP, Priszm LP and KIT Finance are collectively referred to as the "Priszm Entities".

Background

2 The Priszm Entities own and operate 428 KFC, Taco Bell and Pizza Hut restaurants in seven provinces across Canada. As a result of declining sales and the inability to secure additional or alternate financing, the Priszm Entities cannot meet their liabilities as they come due and are therefore insolvent.

3 The Priszm Entities seek a stay of proceedings under the CCAA to allow them to secure a going concern solution for the business including approximately 6,500 employees and numerous suppliers, landlords and other creditors and to maximize recovery for the Priszm Entities' stakeholders.

4 On the return of the motion, the only party that took issue with the proposed relief was Yum! Restaurants International (Canada) LP (the "Franchisor"). Counsel to the Franchisor indicated that the Franchisor was not opposing the form of order, but explicitly does not consent to the stated intention of the Priszm Entities not to pay franchise royalties to the Franchisor.

5 The background facts with respect to this application are set out in the Affidavit of Deborah J. Papernick, sworn March 31, 2011 (the "Papernick Affidavit"). Further details are also contained in a pre-filing report submitted by FTI Consulting Canada Inc. ("FTI") in its capacity as proposed monitor. FTI has been acting as financial advisor to the Priszm Entities since December 13, 2010.

6 Priszm LP is a franchisee of the Franchisor and is Canada's largest independent quick service restaurant operator. Priszm LP is the largest operator of the KFC concept in Canada, accounting for approximately 60% of all KFC product sales in Canada. In addition, Priszm LP operates a number of multi-branded restaurants that combine a KFC restaurant with either a Taco Bell or a Pizza Hut restaurant.

7 As of March 25, 2011, the Priszm Entities operated 428 restaurants in seven provinces: British Columbia, Alberta, Manitoba, Ontario, Quebec, Nova Scotia and New Brunswick.

8 The business of Priszm LP is to develop, acquire, make investments in and conduct the business and ownership, operation and lease of assets and property in connection with the quick service restaurant business in Canada.

9 Priszm Fund is an income trust indirectly holding approximately 60% of Priszm LP's trust units.

10 Priszm Trust is an unincorporated, limited purpose trust wholly-owned by Priszm Fund created to acquire and hold 60% of the outstanding partnership units of Priszm LP, as well as approximately 60% of Priszm GP's units, for Priszm Fund.

11 Priszm GP is a corporation which acts as general partner of Priszm LP.

12 KIT Finance is a corporation created to act as borrower for the Prudential Loan, described below.

13 The principal and head offices of Priszm Fund, Priszm LP and Priszm GP are located in Vaughan, Ontario.

14 As at March 31, 2011, the Priszm Entities had short-term and long-term indebtedness totalling: \$98.8 million pursuant to the following instruments:

(a) Note purchase and private shelf agreement dated January 12, 2006 ("Note Purchase Agreement") between KIT Finance, Priszm GP and Prudential Investment Management ("Prudential") - \$67.3 million;

(b) Subordinated Debentures issued by Priszm Fund due June 30, 2012 - \$30 million - \$31.5 million.

15 The indebtedness under the Note Purchase Agreement (the "Prudential Loan") is guaranteed by and secured by substantially all of the assets of Priszm GP, KIT Finance and Priszm LP and by limited recourse guarantees and pledge agreements granted by Priszm Fund and Priszm Trust.

16 In addition, the Priszm Entities have approximately \$39.1 million of accrued and unpaid liabilities.

17 As a result of slower than forecast sales, on September 5, 2010, Priszm Fund breached the Prudential Financial covenant and remains in non-compliance. As a result, the Prudential Loan became callable.

18 Priszm Fund has also failed to make an interest payment of \$975,000 due on December 31, 2010 in respect to the Subordinated Debentures.

19 The Priszm Entities have also ceased paying certain obligations to the Franchisor as they come due.

Findings

20 I am satisfied that Priszm GP and KIT Finance are "companies" within the definition of the CCAA. I am also satisfied that Priszm Fund and Priszm Trust fall within the definition of "income trust" under the CCAA and are "companies" to which the CCAA applies.

21 I am also satisfied that the Priszm Entities are insolvent. In arriving at this determination, I have considered the definition of "insolvent" in the context of the CCAA as set out in *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]), leave to appeal refused, 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal to S.C.C. refused 2004 CarswellOnt 5200 (S.C.C.). In *Stelco*, Farley J. applied an expanded definition of insolvent in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying the definition of "insolvent person" within the meaning of s. 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") to include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

22 In this case, the Priszm Entities are unable to meet their obligations to creditors and have ceased paying certain obligations as they become due.

23 Further, the Priszm Entities are affiliated debtor companies with total claims against in excess of \$100 million.

24 I accept the submission put forth by counsel to the Applicants to the effect that the Applicants are "debtor companies" to which the CCAA applies.

25 At the present time, the Priszm Entities are in the process of coordinating a sale process for certain assets. In these circumstances, I have been persuaded that a stay of proceedings is appropriate. In arriving at this determination, I have considered *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]).

26 The CCAA definition of an eligible company does not expressly include partnerships. However, CCAA courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehndorff, supra*, and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]).

27 The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.

28 Having reviewed the affidavit of Ms. Papernick, I have been persuaded that it is appropriate to extend CCAA protection to Priszm LP.

29 The Priszm Entities are also seeking an order: (a) declaring certain of their suppliers to be critical suppliers within the meaning of the CCAA; (b) requiring such suppliers to continue to supply on terms and conditions consistent with existing arrangements and past practice as amended by the initial order; (c) granting a charge over the Property as security for payment for goods and services supplied after the date of the Initial Order.

30 Section 11.4 of the CCAA provides the court jurisdiction to declare a person to be a critical supplier. The CCAA does not contain a definition of "critical supplier" but pursuant to 11.4(1), the court must be satisfied that the person sought to be

declared a critical supplier "is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operations".

31 Counsel submits that the Priszm Entities' business is virtually entirely reliant on their ability to prepare, cook and sell their products and that given the perishable nature of their products, the Priszm Entities maintain very little inventory and rely on an uninterrupted flow of deliveries and continued availability of various products. In addition, the Priszm Entities are highly dependent on continued and timely provision of waste disposal and information technology services and various utilities.

32 With the assistance of the proposed monitor, the Priszm Entities have identified a number of suppliers which are critical to their ongoing operation and have organized these suppliers into five categories:

- (a) chicken suppliers;
- (b) other food and restaurant consumables;
- (c) utility service providers;
- (d) suppliers of waste disposal services;
- (e) providers of appliance repair and information technology services.

33 A complete list of the suppliers considered critical by the Priszm Entities (the "Critical Suppliers") is attached at Schedule "A" to the proposed Initial Order.

34 Having reviewed the record, I have been satisfied that any interruption of supply by the Critical Suppliers could have an immediate material adverse impact on the Priszm Entities business, operations and cash flow such that it is, in my view, appropriate to declare the Critical Suppliers as "critical suppliers" pursuant to the CCAA.

35 Further, I accept the submission of counsel to the Priszm Entities that it is appropriate to grant a Critical Suppliers' Charge to rank behind the Administrative Charge.

36 The Priszm Entities also seek approval of the DIP Facility in the amount up to \$3 million to be secured by the DIP Lenders' Charge.

37 Subsection 11.2(4) of the CCAA sets out the factors to be considered by the court in deciding whether to grant a DIP Financing Charge. These factors include:

- (a) the period during which the company is expected to be subject to proceedings under the CCAA;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report.

38 Counsel submits that the following factors support the granting of the DIP Lenders' Charge:

- (a) the Priszm Entities expect to continue daily operations during the proceedings;

- (b) management will be overseen by the monitor who will oversee spending under the DIP Financing;
- (c) while it is not anticipated that the Priszm Entities will require any additional financing prior to June 30, 2011, actual funding requirements may vary;
- (d) the ability to borrow funds from a court-approved DIP Facility will be crucial to retain the confidence of stakeholders;
- (e) secured creditors have either been given notice of the DIP Lenders' Charge or are not affected by it;
- (f) the DIP Lenders' Charge does not secure an obligation that existed before the granting of the Initial Order; and
- (g) the proposed monitor is supportive of the DIP Facility and the DIP Lenders' Charge.

39 Based on the foregoing, I am of the view that it is appropriate to approve the DIP Facility and grant the DIP Lenders' Charge.

40 The trustees and directors of the Priszm Entities have stated their intention to resign. In order to ensure ongoing corporate governance, the Priszm Entities seek an order appointing 2279549 Ontario Inc. as the CRO. They have also requested that the Chief Restructuring Officer be afforded the protections outlined in the draft Initial Order.

41 The Applicants are seeking an Administration Charge over the property in the amount of \$1.5 million to secure the fees of the proposed monitor, its counsel, counsel to the Priszm Entities and the CRO. It is proposed that this charge will rank in priority to all other security interests in the Priszm assets, other than any "secured creditor", as defined in the CCAA, who has not received notice of the application for CCAA protection.

42 The authority to provide such a charge is set out in s. 11.5(2) of the CCAA.

43 The Priszm Entities submit that the following factors support the granting of the Administration Charge:

- (a) the Priszm Entities operate an extensive business;
- (b) the beneficiaries will provide essential legal and financial advice and leadership;
- (c) there is no anticipated unwarranted duplication of roles;
- (d) secured creditors likely to be affected by the charge were provided with notice and do not object to the Administration Charge; and
- (e) the proposed monitor, in its pre-filing report, supports the Administration Charge.

44 I am satisfied that this is an appropriate case in which to grant the Administration Charge in the form requested.

45 I am also satisfied that it is appropriate to grant a Directors' Charge in the amount of \$9.8 million to protect directors and officers and the CRO from certain potential liabilities. In arriving at this determination, I have considered the provisions of s. 11.5(1) of the CCAA which addresses the issue of directors' and officers' charges. I have also considered that the Priszm Entities maintain directors' and officers' liability insurance ("D&O Insurance"). The current policy provides a total of \$31 million in coverage. It is expected that the D&O Insurance will provide coverage sufficient to protect the directors and officers and the draft Initial Order provides that the Directors' Charge shall only apply to the extent that the D&O Insurance is not adequate.

46 For the foregoing reasons, I am satisfied that it is appropriate to grant the CCAA Initial Order in the form requested.

47 Paragraph 14 of the form of order provides for a stay of proceedings up to and including April 29, 2011. Paragraph 59 provides for the standard comeback provision.

48 The Initial Order was signed 9:30 a.m. Eastern Daylight Time on March 31, 2011.

Application granted.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 15

1999 CarswellOnt 625
Ontario Court of Justice, General Division [Commercial List]

Royal Oak Mines Inc., Re

1999 CarswellOnt 625, [1999] O.J. No. 709, 6 C.B.R. (4th) 314, 96 O.T.C. 272

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

In the Matter of the Courts of Justice Act, R.S.O., 1990, C. C-43, as amended

In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines Inc., and others

Blair J.

Judgment: March 10, 1999

Docket: 99-CL-003278

Counsel: *David E. Baird, Q.C.*, and *Mario J. Forte*, for Applicants.

Peter H. Griffin, for Trilon Financial Corporation and Northgate Exploration Limited.

Ronald N. Robertson, Q.C., for Unofficial Senior Subordinated Noteholders' Committee.

Sean Dunphy, for Bankers Trust and Macquarrie Limited.

Hilary Clarke, for Bank of Nova Scotia.

Subject: Insolvency; Corporate and Commercial

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by court — Miscellaneous issues

Debtor company applied for initial order pursuant to Companies' Creditors Arrangement Act — Relief sought included debtor-in-possession financing super-priority, stay of proceedings, and permission to conduct certain operations and take certain restructuring steps — Relief sought also included power to borrow and charge property, to impose charge as liability protection in favour of directors, to not pay creditors, permission to file plan of arrangement, appointment of monitor and inclusion of general terms, including come back clauses — Debtor was supported by two senior secured lenders and by unofficial creditors' committee of senior secured subordinated noteholders — Group of hedge lenders opposed scope and extent of relief as being broad and overreaching — Other creditors received short notice or no notice of application — Application granted — Initial order approved but in more limited scope than requested — Relief sought extended beyond bounds of procedural fairness — Language of order not to read like trust indenture but to be clear, simple and readily understandable — Initial order to contain declaration that applicant had standing to apply, authorization to file plan of compromise, appointment of monitor and its duties and to contain comeback clause — Initial order to put in place stay provisions and operating, financing and restructuring terms reasonably necessary for continued operation of debtor during brief but realistic sorting-out period on urgent basis — Proliferation of advisory committees and extension of broad protection to directors are better left for orders other than initial order — Comeback clauses not to be used to provide answer to overreaching initial orders — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), (4).

Table of Authorities

Cases considered by *Blair J.*:

Bank of America Canada v. Willann Investments Ltd. (February 6, 1991), Doc. B22/91 (Ont. Gen. Div.) — referred to

Canadian Asbestos Services Ltd. v. Bank of Montreal, 16 C.B.R. (3d) 114, [1992] G.S.T.C. 15, 11 O.R. (3d) 353, 93 D.T.C. 5001, 5 C.L.R. (2d) 54, [1993] 1 C.T.C. 48, 5 T.C.T. 4328 (Ont. Gen. Div.) — referred to

Canadian Asbestos Services Ltd. v. Bank of Montreal, 13 O.R. (3d) 291, 10 C.L.R. (2d) 204, [1993] G.S.T.C. 23, 1 G.T.C. 6169 (Ont. Gen. Div.) — referred to

Dylex Ltd., Re (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — referred to

Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — considered

s. 3(1) — referred to

s. 11 [rep. & sub. 1997, c. 12, s. 124] — considered

s. 11(3) [rep. & sub. 1997, c. 12, s. 124] — considered

s. 11(3)(a)-11(3)(c) [en. 1997, c. 12, s. 124] — considered

s. 11(4) [en. 1997, c. 12, s. 124] — considered

APPLICATION by debtor company for initial order pursuant to s. 11 of *Companies' Creditors Arrangement Act*.

Blair J.:

1 These reasons are an expanded version of an endorsement made at the time of the granting of an Initial Order in favour of the Applicants under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, on February 15, 1999. At the time, I indicated that I would release additional reasons with respect to certain of the issues raised on the Initial Application at a later date. In doing so, I propose to incorporate significant portions of the earlier handwritten endorsement.

2 Royal Oak Mines Inc. ("Royal Oak"), and a series of related corporations, applied for the protection of the Court afforded by the Companies' Creditors Arrangement Act (the "CCAA") while they endeavour to negotiate a restructuring of their debt with their creditors. Royal Oak is a publicly traded mining company of considerable import in the mining industry. It currently operates four gold and copper mines (two in the Timmins area of Ontario, one in Yellowknife in the North West Territories, and one (the Kemess mine) in the interior of British Columbia). The Company employs approximately 960 people (about 300 in Ontario, 280 in the North West Territories, 348 in British Columbia, 27 at its corporate headquarters in Seattle, and 5 in the Province of Newfoundland).

3 Royal Oak is supported in this CCAA Application by Trilon Financial Corporation and Northgate Exploration Limited, the senior secured lenders who are owed approximately \$180 million, and by the unofficial creditors' committee of the Senior Secured Subordinated Noteholders who are owed about \$264 million. A group of three other lenders, known in the jargon of the industry as the "Hedge Lenders", and who have advanced approximately \$50 million to Royal Oak, stands between the former two groups, in terms of priority. The three Hedge Lenders — Bankers Trust, Macquarrie Limited of Australia, and Bank of Nova Scotia — did not strenuously oppose the granting of an Initial CCAA Order in principle; however, they questioned the scope and extent of some of the relief sought, arguing that it was unnecessarily broad and "overreaching", particularly where they had only been given short notice of the Application and where some creditors had been given none.

4 There are construction lien claimants in the Province of British Columbia, they point out, who have lien claims against the Kemess Mine totalling about \$18 million, and whose claims are admittedly prior to those of *any* other secured creditor in relation to that asset. Yet the lien claimants were not given notice of these proceedings. In addition, Export Development Corporation has a claim for about \$19.5 million and had not been given notice.

5 Falling world prices for gold and copper, environmental concerns with their attendant costs, and construction and start-up costs relating to the Kemess Mine in particular, have led to Royal Oak's current financial crunch. It is insolvent. I was quite satisfied on the evidence in Ms. Witte's affidavit, and on the other materials filed, that the Applicants met the statutory requirements for the granting of an Initial Order under section 11 of the CCAA, and that it was appropriate and just in the circumstances for the Court to grant the protection sought on an Initial Order basis, while the Applicants attempt to restructure their affairs and to elicit the approval and support of their creditors to such a restructuring. Accordingly, an Initial Order was granted on February 15, 1999. There have been certain adjustments and variations made to that Order since then.

6 In view of some of the important concerns raised by Mr. Dunphy and Ms. Clarke on behalf of the Hedge Lenders about the details and reach of the Order sought, however, I indicated that the Court was not prepared to approve it in its entirety at this stage. The Initial Order as granted was therefore somewhat more limited in scope than that requested. Somewhat more expanded reasons than those set out in the handwritten endorsement made at the time were to follow. These are those reasons.

Initial CCAA Orders

7 Section 11 of the CCAA is the provision of the Act embodying the broad and flexible statutory power invested in the court to "grant its protection" to an applicant by imposing a stay of proceedings against the applicant company, subject to terms, while the company attempts to negotiate a restructuring of its debt with its creditors. It is well established that the provisions of the Act are remedial in nature, and that they should be given a broad and liberal interpretation in order to facilitate compromises and arrangements between companies and their creditors, and to keep companies in business where that end can reasonably be achieved: see, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.), per Doherty J.A.; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31; "Reorganizations Under the Companies' Creditors Arrangement Act", Stanley E. Edwards, (1947) 25 Can. Bar Rev. 587 at p. 593 referred to with approval by Thackray J. in *Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.) at p. 173.

8 In the utilization of the CCAA for this broad purpose a practice has developed whereby the application is "pre-packaged" to a significant extent before relief is sought from the Court. That is, the debtor company seeks to obtain the consent and support of its major creditors to a CCAA process, and to its major terms and conditions, before the application is launched. This has been my experience in the course of supervising more than a few such proceedings. The practice is a healthy and effective one in my view, and is to be commended and encouraged. Nonetheless, it has led in some ways to the problem which is the subject of these reasons.

9 The problem centers around the growing complexity of the Initial Orders sought under s. 11(3) of the Act, and the increasing tendency to attempt to incorporate into such orders provisions to meet every eventuality that might conceivably arise during the course of the CCAA process. Included in this latter category is the matter of debtor-in-possession ("DIP") financing, calling — as it frequently does — for a "super priority" position over all other secured lending then in place.

10 Initial Orders under the CCAA are almost invariably sought on short notice to many of the creditors and, not infrequently, without any notice to others. I note as well that the Court is also asked in most cases to respond on short notice and with little advance opportunity to examine the materials filed in support of the application. This is because the materials, for very practical reasons, are not usually ready for filing until just before the filing is made. I make these observations not to be critical in any way, but simply to point out the realities of the context in which the application for the Initial Order is usually determined.

11 This case falls into both the "short notice" and "no notice" categories. The Hedge Lenders, at least, received only very short notice of the Application on February 15th. Neither the Kemess Lien Claimants in British Columbia nor Export Development Corporation were given any notice. Yet the Court was asked to grant super priority funding, which would rank ahead of even the Lien Claimants (who have admitted priority over everyone), without their knowledge or consent, and which would rank ahead of the Hedge Lenders who had not yet had a reasonable opportunity to consider their position or (given an American holiday) for their counsel to obtain meaningful instructions. The Initial Order which was originally sought in the proceeding consisted of 58 paragraphs of highly complex and sophisticated language. It was 28 pages in length. In addition, it had an 11 page Term Sheet annexed as a Schedule to it. It dealt with,

- (a) the stay of proceedings (7 paragraphs, 4 ¹/₂; pages);
- (b) permitted operations by the Applicants during the CCAA period (4 paragraphs, 3 ¹/₂; pages);
- (c) restructuring steps permitted (8 paragraphs, 3 pages);
- (d) the power to borrow and the charging of property (15 paragraphs, 5 pages);
- (e) a charge to be imposed as a liability protection in favour of directors (2 elaborate paragraphs, spanning 4 pages);
- (f) non-payment of creditors (one paragraph, ¹/₃ page);
- (g) permission to file a plan of arrangement (2 paragraphs, ¹/₃ pages);
- (h) appointment and duties of the Monitor (9 paragraphs, 5 pages); and,
- (i) general terms, including the "come back" clauses (6 paragraphs, 1 ¹/₂; pages).

12 What is at issue here is not the principle of the Court granting relief of the foregoing nature in CCAA proceedings. That principle is well enough imbedded in the broad jurisdiction referred to earlier in these reasons. In particular, it is not the tenet of DIP financing itself, or super priority financing, which were being questioned. There is sufficient authority for present purposes to justify the granting of such relief in principle: see, *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 11 O.R. (3d) 353 (Ont. Gen. Div.), (Chadwick J.) at pp. 359-361, supplemental reasons and leave to appeal granted (1993), 13 O.R. (3d) 291 (Ont. Gen. Div.); *Bank of America Canada v. Willann Investments Ltd.* (February 6, 1991), Doc. B22/91 (Ont. Gen. Div.), (Austin J); *Dylex Ltd., Re* (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.), (Houlden J.A.). It was the granting of such relief on the broad terms sought here, and the wisdom of that growing practice — without the benefit of interested persons having the opportunity to review such terms and, if so advised, to comment favourably or neutrally or unfavourably, on them — which was called into question.

13 There is justification in the call for caution, in my view. The scope and the parameters of the relief to be granted at the Initial Order stage — in conjunction with the dynamics of no notice, short notice, and the initial statutory stay period provided for in subsection 11(3) of the Act — require some consideration.

14 I have alluded to the highly complex and sophisticated nature of the Initial Order which was originally sought in this proceeding. The statutory source from which this emanation grew, however, is relatively simple and straightforward. Subsection 11(3) of the CCAA — which is the foundation of the Court's "protective" jurisdiction — states:

11(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

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

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

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

15 Conceptually, then, the applicant is provided with the protections of a stay, a restraining order and a prohibition order for a period "not exceeding 30 days" in order to give it time to muster support for and justify the relief granted in the Initial Order, all interested persons by then having received reasonable notice and having had a reasonable opportunity to consider their respective positions. The difficulties created by *ex parte* and short notice proceedings are thereby attenuated.

16 Subsection 11(4) of the Act provides for the making of additional orders in the CCAA process. The Court is granted identical powers to those set out in paragraphs (a) through (c) of subsection 11(3), except that there is no limit on the time period during which a subsection 11(4) order may remain in effect. The only other difference between the two subsections is that in respect of an Initial order under subsection 11(3) the onus on the applicant is to show that it is appropriate in the circumstances for the order to issue, whereas in respect of an order under subsection 11(4) there is an additional requirement to show that the applicant "has acted, and is acting, in good faith and with due diligence" in the CCAA process.

17 The Initial Order sought in this case was not unlike those sought -- and, indeed, those which have been granted -- in numerous other CCAA applications. While the relief granted is always a matter for the exercise of judicial discretion, based upon the statutory and inherent jurisdiction of the Court, it seems to me that considerable relief now sought at the Initial Order stage extends beyond what can appropriately be accommodated within the bounds of procedural fairness. It was at least partially for that reason that I declined to grant the Initial Order relief sought at the outset of this proceeding.

18 Upon reflection, it seems to me that the following considerations might usefully be kept in mind by those preparing for an Initial Order application, and by the Court in granting such an order.

19 First, recognition must be given to the reality that CCAA applications for the most part involve substantial corporations with large indebtedness and often complex debtor-creditor structures. Indeed, the threshold for applying for relief under the CCAA is a debt burden of at least \$5 million¹. Thus, I do not mean to suggest by anything said in these reasons that either the process itself or the corporate/commercial/financial issues which must be addressed and resolved, are simple or easily articulated. Therein lies a challenge, however.

20 CCAA orders will of necessity involve a certain complexity. Nevertheless, at least a nod in the direction of plainer language would be helpful to those having to review the draft on short notice, or to react to the order in quick fashion after it has been made on no notice. It would also be helpful to the Court, which — as I have noted — is not infrequently asked to give its approval and grant the order with very little advance opportunity for review or consideration. The language of orders should be clear and as simple and readily understandable to creditors and others affected by them as possible in the circumstances. They should not read like trust indentures. These comments are relevant to all orders, but to Initial CCAA Orders in particular.

21 The Initial Order will, of course, contain the necessary declaration that the applicant is a company to which the CCAA applies, the authorization to file a plan of compromise and arrangement, the appointment of the monitor and its duties, and such things as the "comeback" clause. In other respects, however, what the Initial Order should seek to accomplish, in my view, is to put in place the necessary stay provisions and such further operating, financing and restructuring terms as are reasonably necessary for the continued operation of the debtor company during a brief but realistic period of time, on an urgency basis. During such a period, the ongoing operations of the company will be assured, while at the same time the major affected stakeholders are able to consider their respective positions and prepare to respond.

22 Having sought only the reasonably essential minimum relief required for purposes of the Initial Order, the applicant then has the discretion as to when to ask for more extensive relief. It may well be helpful, though, if the nature of the more extensive relief to be sought is signalled in the Initial application, so that interested and affected persons will know what is in the offing in that regard.

23 Subsection 11(3) of the Act does not stipulate that the Initial Order shall be granted for a period of 30 days. It provides that the Court in its discretion may grant an order for a period *not exceeding* 30 days. Each case must be approached on the basis of its own circumstances, and an agreement in advance on the part of all affected secured creditors, at least, may create an entirely different situation. In the absence of such agreement, though, the preferable practice on applications under subsection 11(3) is to keep the Initial Order as simple and straightforward as possible, and the relief sought confined to what is essential for the continued operations of the company during a brief "sorting-out" period of the type referred to above. Further issues can then be addressed, and subsequent orders made, if appropriate, under the rubric of the subsection 11(4) jurisdiction.

24 It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances — as opposed, for instance, to a receivership or bankruptcy — and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

25 For similar reasons, things like the proliferation of advisory committees and the attendant professional costs accompanying them, and the extension of broad protection to directors, are better left for orders other than the Initial order.

26 I conclude these observations with a word about the "comeback clause". The Initial Order as granted in this case contained the usual provision which is known by that description. It states:

THIS COURT ORDERS that, notwithstanding any other provision of this Order, the Applicants may apply at any time to this Court to seek any further relief, *and any interested Person may apply to this Court to vary or rescind this Order or seek other relief* on seven days' notice to the Applicants, the Monitor, the CCAA Lender and to any other Person likely to be affected by the Order sought or on such other notice, if any, as this Court may order. (emphasis added)

27 The Initial Order also contained the usual clause permitting the Applicants or the Monitor to apply for directions in relation to the discharge of the Monitor's powers and duties or in relation to the proper execution of the Initial Order. This right is not afforded to others.

28 The comeback provisions are available to sort out issues as they arise during the course of the restructuring. However, they do not provide an answer to overreaching Initial Orders, in my view. There is an inherent disadvantage to a person having to rely on those provisions. By the time such a motion is brought the CCAA process has often taken on a momentum of its own,

and even if no formal "onus" is placed on the affected person in such a position, there may well be a practical one if the relief sought goes against the established momentum. On major security issues, in particular, which arise at the Initial Order stage, the occasions where a creditor is required to rely upon the comeback clause should be minimized.

29 These reasons are intended to compliment and to elaborate upon those set out in the brief endorsement made at the time the Initial Order was granted on February 15, 1999, in favour of the Royal Oak Applicants, but in a form more limited than that sought.

Application granted.

Footnotes

1 CCAA, subsection 3(1).

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 16

2012 ONSC 2063
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 4117, 2012 ONSC 2063, 213 A.C.W.S. (3d) 831

**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 Sino-Forest Corporation, Applicant

Morawetz J.

Heard: March 30, 2012

Judgment: April 2, 2012

Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Kevin Zych, Derek J. Bell, Jonathan Bell, for Applicant

E.A. Sellers, for Sino Forest Corporation Board of Directors

Derrick Tay, Jennifer Stam, for Proposed Monitor, FTI Consulting Canada Inc.

R. J. Chadwick, B. O'Neill, C. Descours, for Ad Hoc Noteholders

M. Starnino, for Counsel in the Ontario Class Action

P. Griffin, for Ernst & Young

Jim Grout, Hugh Craig, for Ontario Securities Commission

Scott Bomhof, for Credit Suisse, TD and the Underwriter Defendants in the Canadian Class Action

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

Headnote

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

Application for initial order and sale process order under Companies' Creditors Arrangement Act (Can.) — Applicant was publicly-listed major integrated forest plantation operator and forest production company with assets predominantly in PRC — Published report stated that applicant was near total fraud and Ponzi scheme — Investigations launched by securities commissions in both Ontario and Hong Kong — Applicant had not been able to release 2011 Q3 results — Applicant cautioned that its historic financial statements and related audit reports should not be relied upon — Application granted — Administration Charge and Director's Charge in requested amount appropriate and necessary — Continued participation of directors desirable.

Table of Authorities

Cases considered by Morawetz J.:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 45 B.L.R. (4th) 201, 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Morawetz J.:

Overview

- 1 The Applicant, Sino-Forest Corporation ("SFC"), moves for an Initial Order and Sale Process Order under the *Companies' Creditors Arrangement Act* ("CCAA").
- 2 The factual basis for the application is set out in the affidavit of Mr. W. Judson Martin, sworn March 30, 2012. Additional detail has been provided in a pre-filing report provided by the proposed monitor, FTI Consulting Canada Inc. ("FTI").
- 3 Counsel to SFC advise that, after extensive arm's-length negotiations, SFC has entered into a Support Agreement with a substantial number of its Noteholders, which requires SFC to pursue a CCAA plan as well as a Sale Process.
- 4 Counsel to SFC advises that the restructuring transactions contemplated by this proceeding are intended to:
 - (a) separate Sino-Forest's business operations from the problems facing SFC outside the People's Republic of China ("PRC") by transferring the intermediate holding companies that own the "business" and SFC's inter-company claims against its subsidiaries to a newly formed company owned primarily by the Noteholders in compromise of their claims;
 - (b) effect a Sale Process to determine whether anyone will purchase SFC's business operations for an amount of consideration acceptable to SFC and its Noteholders, with potential excess being made available to Junior Constituents;
 - (c) create a structure that will enable litigation claims to be pursued for the benefit of SFC's stakeholders; and

(d) allow Junior Constituents some "upside" in the form of a profit participation if Sino-Forest's business operations acquired by the Noteholders are monetized at a profit within seven years from Plan implementation.

5 The relief sought by SFC in this application includes:

(i) a stay of proceedings against SFC, its current or former directors or officers, any of SFC's property, and in respect of certain of SFC's subsidiaries with respect to the note indentures issued by SFC;

(ii) the granting of a Directors' Charge and Administration Charge on certain of SFC's property;

(iii) the approval of the engagement letter of SFC's financial advisor, Houlihan Lokey;

(iv) the relieving of SFC of any obligation to call and hold an annual meeting of shareholders until further order of this court; and

(v) the approval of sales process procedures.

Facts

6 SFC was formed under the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B-16, and in 2002 filed articles of continuance under the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44 ("CBCA").

7 Since 1995, SFC has been a publicly-listed company on the TSX. SFC's registered office is in Mississauga, Ontario, and its principal executive office is in Hong Kong.

8 A total of 137 entities make up the Sino-Forest Companies: 67 PRC incorporated entities (with 12 branch companies), 58 BVI incorporated entities, 7 Hong Kong incorporated entities, 2 Canadian entities and 3 entities incorporated in other jurisdictions.

9 SFC currently has three employees. Collectively, the Sino-Forest Companies employ a total of approximately 3,553 employees, with approximately 3,460 located in the PRC and approximately 90 located in Hong Kong.

10 Sino-Forest is a publicly-listed major integrated forest plantation operator and forest productions company, with assets predominantly in the PRC. Its principal businesses include the sale of standing timber and wood logs, the ownership and management of forest plantation trees, and the complementary manufacturing of downstream engineered-wood products.

11 Substantially all of Sino-Forest's sales are generated in the PRC.

12 On June 2, 2011, Muddy Waters LLC published a report (the "MW Report") which, according to submissions made by SFC, alleged, among other things, that SFC is a "near total fraud" and a "ponzi scheme".

13 On the same day that the MW Report was released, the board of directors of SFC appointed an independent committee to investigate the allegations set out in the MW Report.

14 In addition, investigations have been launched by the Ontario Securities Commission ("OSC"), the Hong Kong Securities and Futures Commissions ("HKSFC") and the Royal Canadian Mounted Police ("RCMP").

15 On August 26, 2011, the OSC issued a cease trade order with respect to the securities of SFC and with respect to certain senior management personnel. With the consent of SFC, the cease trade order was extended by subsequent orders of the OSC.

16 SFC and certain of its officers, directors and employees, along with SFC's current and former auditors, technical consultants and various underwriters involved in prior equity and debt offerings, have been named as defendants in eight class action lawsuits in Canada. Additionally, a class action was commenced against SFC and other defendants in the State of New York.

17 The affidavit of Mr. Martin also points out that circumstances are such that SFC has not been able to release Q3 2011 results and these circumstances could also impact SFC's historical financial statements and its ability to obtain an audit for its 2011 fiscal year. On January 10, 2012, SFC cautioned that its historic financial statements and related audit reports should not be relied upon.

18 SFC has issued four series of notes (two senior notes and two convertible notes), with a combined principal amount of approximately \$1.8 billion, which remain outstanding and mature at various times between 2013 and 2017. The notes are supported by various guarantees from subsidiaries of SFC, and some are also supported by share pledges from certain of SFC's subsidiaries.

19 Mr. Martin has acknowledged that SFC's failure to file the Q3 results constitutes a default under the note indentures.

20 On January 12, 2012, SFC announced that holders of a majority in principal amount of SFC's senior notes due 2014 and its senior notes due 2017 agreed to waive the default arising from SFC's failure to release the Q3 results on a timely basis.

21 The waiver agreements expire on the earlier of April 30, 2012 and any earlier termination of the waiver agreements in accordance with their terms. In addition, should SFC fail to file its audited financial statements for its fiscal year ended December 31, 2011 by March 30, 2012, the indenture trustees would be in a position to accelerate and enforce the approximately \$1.8 billion in notes.

22 The audited financial statements for the fiscal year that ended on December 31, 2011 have not yet been filed.

23 Mr. Martin also deposes that, although the allegations in the MW Report have not been substantiated, the allegations have had a catastrophic negative impact on Sino-Forest's business activities and there has been a material decline in the market value of SFC's common shares and notes. Further, credit ratings were lowered and ultimately withdrawn.

24 Mr. Martin contends that the various investigations and class action lawsuits have required, and will continue to require, that significant resources be expended by directors, officers and employees of Sino-Forest. This has also affected Sino-Forest's ability to conduct its operations in the normal course of business and the business has effectively been frozen and ground to a halt. In addition, SFC has been unable to secure or renew certain existing onshore banking facilities and has been unable to obtain offshore letters of credit to facilitate its trading business. Further, relationships with the PRC government, local government, and suppliers have become strained, making it increasingly difficult to conduct any business operations.

25 As noted above, following arm's-length negotiations between SFC and the Ad Hoc Noteholders, the parties entered into a Support Agreement which provides that SFC will pursue a CCAA plan on the terms set out in the Support Agreement in order to implement the agreed upon restructuring transaction.

Application of the CCAA

26 SFC is a corporation continued under the CBCA and is a "company" as defined in the CCAA.

27 SFC also takes the position that it is a "debtor company" within the meaning of the CCAA. A "debtor company" includes a company that is insolvent.

28 The issued and outstanding convertible and senior notes of SFC total approximately \$1.8 billion. The waiver agreements with respect to SFC's defaults under the senior notes expire on April 30, 2012. Mr. Martin contends that, but for the Support Agreement, which requires SFC to pursue a CCAA plan, the indenture trustees under the notes would be entitled to accelerate and enforce the rights of the Noteholders as soon as April 30, 2012. As such, SFC contends that it is insolvent as it is "reasonably expected to run out of liquidity within a reasonable proximity of time" and would be unable to meet its obligations as they come due or continue as a going concern. See *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]) at para. 26; leave to appeal to C.A. refused [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. refused [2004] S.C.C.A. No.

336 (S.C.C.); and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Ont. S.C.J. [Commercial List]) at paras. 12 and 32.

29 For the purposes of this application, I accept that SFC is a "debtor company" within the meaning of the CCAA and is insolvent; and, as a CBCA company that is insolvent with debts in excess of \$5 million, SFC meets the statutory requirements for relief under the CCAA.

30 The required financial information, including cash-flow information, has been filed.

31 I am satisfied that it is appropriate to grant SFC relief under the CCAA and to provide for a stay of proceedings. FTI Consulting Canada, Inc., having filed its Consent to act, is appointed Monitor.

The Administration Charge

32 SFC has also requested an Administration Charge. Section 11.52 of the CCAA provides the court with the jurisdiction to grant an Administration Charge in respect of the fees and expenses of FTI and other professionals.

33 I am satisfied that, in the circumstances of this case, an Administration Charge in the requested amount is appropriate. In making this determination I have taken into account the complexity of the business, the proposed role of the beneficiaries of the charge, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge and the position of FTI.

34 In this case, FTI supports the Administration Charge. Further, it is noted that the Administration Charge does not seek a super priority charge ranking ahead of the secured creditors.

The Directors' Charge

35 SFC also requests a Directors' Charge. Section 11.51 of the CCAA provides the court with the jurisdiction to grant a charge in favour of any director to indemnify the director against obligations and liabilities that they may incur as a director of the company after commencement of the CCAA proceedings.

36 Having reviewed the record, I am satisfied that the Directors' Charge in the requested amount is appropriate and necessary. In making this determination, I have taken into account that the continued participation of directors is desirable and, in this particular case, absent the Directors' Charge, the directors have indicated they will not continue in their participation in the restructuring of SFC. I am also satisfied that the insurance policies currently in place contain exclusions and limitations of coverage which could leave SFC's directors without coverage in certain circumstances.

37 In addition, the Directors' Charge is intended to rank behind the Administration Charge. Further, FTI supports the Directors' Charge and the Directors' Charge does not seek a super priority charge ranking ahead of secured creditors.

38 Based on the above, I am satisfied that the Directors' Charge is fair and reasonable in the circumstances.

The Sale Process

39 SFC has also requested approval for the Sale Process.

40 The CCAA is to be given a broad and liberal interpretation to achieve its objectives and to facilitate the restructuring of an insolvent company. It has been held that a sale by a debtor, which preserves its businesses as a going concern, is consistent with these objectives, and the court has the jurisdiction to authorize such a sale under the CCAA in the absence of a plan. See *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]) at paras. 47-48.

41 The following questions may be considered when determining whether to authorize a sale under the CCAA in the absence of a plan (See *Nortel Networks Corp., Re, supra* at para. 49):

- (i) Is the sale transaction warranted at this time?
- (ii) Will the sale benefit the "whole economic community"?
- (iii) Do any of the debtors' creditors have a *bone fide* reason to object to the sale of the business?
- (iv) Is there a better alternative?

42 Counsel submits that as a result of the uncertainty surrounding SFC, it is impossible to know what an interested third party might be willing to pay for the underlying business operations of SFC once they are separated from the problems facing SFC outside the PRC. Counsel further contends that it is only by running the Sale Process that SFC and the court can determine whether there is an interested party that would be willing to purchase SFC's business operations for an amount of consideration that is acceptable to SFC and its Noteholders while also making excess funds available to Junior Constituents.

43 Based on a review of the record, the comments of FTI, and the support levels being provided by the Ad Hoc Noteholders Committee, I am satisfied that the aforementioned factors, when considered in the circumstances of this case, justify the approval of the Sale Process at this point in time.

Ancillary Relief

44 I am also of the view that it is impractical for SFC to call and hold its annual general meeting at this time and, therefore, I am of the view that it is appropriate to grant an order relieving SFC of this obligation.

45 SFC seeks to have FTI authorized, as a formal representative of SFC, to apply for recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including as "foreign main proceedings" in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code. Counsel contends that such an order is necessary to facilitate the restructuring as, among other things, SFC faces class action lawsuits in New York, the notes are governed by New York law, the indenture trustees are located in New York and certain of the SFC subsidiaries may face proceedings in foreign jurisdictions in respect of certain notes issued by SFC. In my view, this relief is appropriate and is granted.

46 SFC also requests an order approving:

- (i) the Financial Advisor Agreement; and
- (ii) Houlihan Lokey's retention by SFC under the terms of the agreement.

47 Both SFC and FTI believe that the quantum and nature of the remuneration provided for in the Financial Advisor Agreement is fair and reasonable and that an order approving the Financial Advisor Agreement is appropriate and essential to a successful restructuring of SFC. This request has the support of parties appearing today and, in my view, is appropriate in the circumstances and is therefore granted.

Disposition

48 Accordingly, the relief requested by SFC is granted and orders shall issue substantially in the form of the Initial Order and the Sale Process Order included the Application Record.

Miscellaneous

49 SFC has confirmed that it is bound by the Support Agreement and intends to comply with it.

50 The come-back hearing is scheduled for Friday, April 13, 2012. The orders granted today contain a come-back clause. The orders were made on extremely short notice and for all practical purposes are to be treated as being made *ex parte*.

51 The scheduling of future hearings in this matter shall be coordinated through counsel to the Monitor and the Commercial List Office.

52 Finally, it would be helpful if counsel could also file materials on a USB key in addition to a paper record.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 17

2009 CarswellOnt 391
Ontario Superior Court of Justice [Commercial List]

Smurfit-Stone Container Canada Inc., Re

2009 CarswellOnt 391, [2009] O.J. No. 349, 174 A.C.W.S. (3d) 933, 50 C.B.R. (5th) 71

**In the Matter of a Plan of Compromise or Arrangement
of Smurfit-Stone Container Canada Inc. and others**

Pepall J.

Judgment: January 27, 2009

Docket: CV-09-7966-00CL

Counsel: Sean F. Dunphy, Alexander D. Rose for Applicants
Robert J. Chadwick, Christopher G. Armstrong for Proposed Monitor
Susan Grundy for DIP Lenders

Subject: Insolvency

Headnote

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

American parent entities of debtor companies commenced Chapter 11 proceedings — Debtor companies were principal Canadian operating entities of American parent companies — Debtor companies brought application for relief under CCAA and requested that terms of initial CCAA order apply to two Canadian partnerships ("CCAA entities") affiliated with applicants — Application granted — Applicants were insolvent, had indebtedness in excess of \$5 million and qualified pursuant to CCAA — Proposed outline for plan included continuing process of selling and realizing value in respect of closed and discontinued operations and coordinating with US entities to achieve balance sheet restructuring — Due to Chapter 11 filing, pre-filing secured credit facility was not available and as such, absent some additional facility CCAA entities would be required to repay amounts owing under pre-filing credit agreement — CCAA entities would also no longer have access to operating credits, would not longer be able to benefit from accounts receivable securitization program, would be unable to operate in ordinary course or satisfy ongoing obligations — Extensive process was undertaken to obtain new debt financing — Proposed monitor was of view that restructuring and continuation of debtor companies and CCAA entities as going concern was best option available — Successful restructuring of CCAA entities appeared to be intertwined with successful restructuring of American entities in Chapter 11 proceeding — In order to continue day-to-day operations and facilitate restructuring, debtor companies required access to significant funding.

Table of Authorities

Cases considered by *Pepall J.*:

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

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

Generally — referred to

APPLICATION by debtor companies for relief under *Companies' Creditor Arrangement Act* and order for extension of terms of initial CCAA order to two affiliated partnerships.

Pepall J.:

1 Smurfit-Stone Container Canada Inc. ("SSC Canada"), Stone Container Finance Company of Canada II, MBI Limited, 3083527 Nova Scotia Company, BC Shipper Supplies Ltd., Specialty Containers Inc., 639647 British Columbia Limited, 605681 N.B. Inc. Canada, and Francobec Company (the "Applicants") seek relief under the CCAA. They also request that the terms of the Initial CCAA order apply to two Canadian partnerships affiliated with the Applicants, namely Smurfit-MBI and SLP Finance General Partnership (the "CCAA Entities"). Each of these CCAA Entities has filed for Chapter 11 protection in the U.S. Deloitte and Touche Inc. has consented to act as Monitor in the CCAA proceedings.

2 On January 26, 2009, Smurfit-Stone Container Corporation ("Smurfit-Stone") and certain of its affiliates including SSC Canada commenced Chapter 11 proceedings in the U.S. Smurfit-Stone is based in St. Louis, Missouri and in Chicago, Illinois. It is a leading North American producer of paperboard products, market pulp, corrugated containers and other specialty packaging products. It is also one of the world's biggest recyclers of paper. It currently holds approximately 18% of the North American container board market. Its operations have been negatively affected by the global economic downturn, the decrease in consumer spending, the manufacturing exodus from North America, a rise in costs, and a general market shift away from paper-based packaging. It has numerous direct and indirect subsidiaries.

3 SSC Canada and Smurfit-MBI, an Ontario limited partnership, are its principal Canadian operating entities. SSC Canada operates mills and plants producing liner board, corrugating medium and food board. Smurfit-MBI is a converting operation that produces corrugated containers using liner board from the mills. Its general partner is MBI Limited which carries on no business other than acting as Smurfit-MBI's general partner and has no assets other than its interest in Smurfit-MBI.

4 3083527 Nova Scotia Company is wholly-owned by SSC Canada. It does not carry on business except that it is one of the two Smurfit-MBI limited partners (the other being SSC Canada). BC Shipper Supplies Ltd. is no longer active. Specialty Containers Inc.'s assets were all sold in 2008. 639647 British Columbia Limited has no operations and holds the shares of BC Shippers Supplies Ltd. and Specialty Containers Inc.

5 SLP Finance General Partnership is owned by two Delaware companies. It does not carry on operations but owns the shares of 605681 N. B. Inc. which was liquidated in 2005 and of Francobec Company, a Nova Scotia company which previously operated a hardwood chipping facility which is now inactive. It has US\$574 million in investment assets.

6 Stone Container Finance Company of Canada II does not carry on business except that it issued notes, the proceeds of which were remitted to SSC Canada. It has assets of US\$62 million and liabilities of US\$207 million. Collectively all of these companies and partnerships are referred to as the CCAA Entities.

7 The CCAA Entities employ approximately 2,600 people across Canada many of whom are unionized.

8 Smurfit-Stone operates as a North American company rather than as a collection of individual business units. The U.S. and Canadian operations are fully integrated. In this regard, they have a centralized cash management system. All high level management decisions are made by a U.S. management team and it will have responsibility for the restructuring plan for the CCAA entities.

9 A secured credit facility covers both the Canadian and American operations. The amount outstanding on this pre-filing secured credit facility as of January 23, 2009 was approximately US\$1 billion of which approximately US\$367 million is attributable to SSC Canada. Security over all material Canadian assets had been provided as part of this facility.

10 The debt of the CCAA Entities also includes Canadian notes of US\$200 million and trade creditor payables of US\$53.4 million. In addition, there is a Canadian accounts receivable securitization programme, the outstanding balance of which is US\$38 million as of January 23, 2009. There are six defined benefit registered pension plans in Canada for which there is an aggregate solvency deficiency of approximately \$132 million as at December 31, 2007.

11 The Applicants are insolvent, have indebtedness in excess of \$5 million and qualify pursuant to the CCAA. The proposed outline for a plan includes continuing the process of selling and realizing value in respect of closed and discontinued operations and coordinating with the US entities to achieve a balance sheet restructuring.

12 As a result of the Chapter 11 filing, the pre-filing secured credit facility is no longer available. In addition, the Chapter 11 filing constitutes an event of termination under the receivables agreement that governs the accounts receivable securitization programme. As such, absent some additional facility, the CCAA Entities would be required to repay amounts owing under the pre-filing credit agreement. In addition, they would no longer be able to benefit from the accounts receivable securitization programme, would have no access to operating credits, would be unable to operate in the ordinary course, and would be unable to satisfy ongoing obligations.

13 Under the DIP facility that is proposed, both SSC Canada and the U.S. company, Smurfit-Stone Container Enterprises, Inc. ("SSCUS") are borrowers; the total commitment is US\$750 million comprised of US\$315 million in revolving facilities available to both SSCUS and SSC Canada, a US\$400 million term loan available to SSCUS; and a US\$35 million term loan available to SSC Canada. The term loan facilities are being used to take out the accounts receivable securitization programme. The loans to SSCUS are guaranteed by SSCC and most of the U.S. debtors and by SSC Canada and the latter provides a charge over its assets for all advances made to SSCUS. There would be rights of subrogation. The loans to SSC Canada are guaranteed by SSCUS and most of its U.S. subsidiaries and secured by a charge over substantially all of the assets of Smurfit-Stone's U.S. entities. The borrowings of SSC Canada are guaranteed by the other CCAA entities.

14 While some of the DIP lenders also participated in the pre-filing secured credit facility, the DIP financing involves new money and is not a refinancing. New lenders are also participating in the DIP facility. The lenders of the pre-filing secured credit facility are unopposed to the order sought.

15 The DIP lenders are unwilling to extend the DIP facility to SSC Canada absent its guarantee of the obligations of SSCUS under the DIP facility. In addition, the business is fully integrated making it impracticable particularly in the current credit environment to secure alternate financing on a stand-alone basis. To continue operations, the DIP facility is required. Estimated cash on hand for the Canadian operating entities at January 23, 2009 was \$704,517 and the accounts payable balance is estimated to be in excess of US\$53 million.

16 The amount borrowed is to be secured by a charge on the Applicants' property following an Administration charge of \$1 million and a Directors' charge of \$8.6 million. Until a final order has been granted by the U.S. court approving continued lending under the DIP facility and until approved by this court, and prior to February 18, 2009, no more than \$100,000 million of the U.S. revolving commitment and \$15 million of the SSC Canada revolving commitment will be available for borrowing. During the initial 30-day stay period, the CCAA Entities anticipate they will require US\$50 million of which US\$31 million of the term loan is to be used to refinance the account receivables securitization programme. This will result in an increase in cash receipts.

17 The proposed Monitor filed a report. It described the extensive process undertaken to obtain new debt financing. It further understands that Smurfit-Stone, having thoroughly canvassed the market, does not have any satisfactory alternative financing arrangements available. The proposed Monitor is of the view that the restructuring and continuation of Smurfit-Stone and the CCAA Entities as a going concern is the best option available given that a going concern restructuring would preserve the value

of Smurfit-Stone and the CCAA Entities whereas a liquidation and wind-down would likely result in a substantial diminution in value that could ultimately reduce creditors' recoveries. Significantly, the liquidation and wind-down of the CCAA Entities could eliminate a significant number of jobs, many of which would be preserved if the CCAA Entities are able to continue as a going concern. The proposed Monitor has also been advised that the CCAA Entities have recently been "net debtors", relying on advances from SSCUS to fund working capital requirements. Based on the information available to it, it is supportive of the DIP facility including SSC Canada's guarantee. In this regard, however, it is unable to provide views of the value of the guarantee or the probability that it will be called upon. Smurfit-Stone has advised the Monitor that SSC Canada's guarantee of SSCUS' obligations is contingent and that the DIP facility was negotiated with a third-party lender on the basis that there would be full recovery of all loans advanced to SSCUS under the DIP facility from the U.S. assets of Smurfit-Stone.

18 The successful restructuring of the CCAA Entities appears to be inextricably intertwined with the successful restructuring of the Smurfit-Stone enterprise in the Chapter 11 proceeding. In order to continue day-to-day operations and to facilitate the company's restructuring, the U.S. debtors and the CCAA Entities require access to significant funding. Given all of these facts, I am prepared to grant the relief requested.

19 As mentioned, the requested order extends the benefits of the protections provided by the order to Smurfit-MBI and SLP Finance General Partnership, both of which are partnerships but not Applicants. The operations of the partnerships are integral and closely interrelated with that of the Applicants and in my view the request is appropriate in the circumstances outlined. See also *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

20 As to the centralized cash management system, the proposed Monitor has reviewed it and will be able to adequately monitor the transfers of cash, including transfers within the system so that transactions applicable to SSC Canada and Smurfit-MBI can be ascertained, traced and properly recorded. The Monitor will review and monitor the system and report to the court from time to time. As of January 23, 2009, SSC Canada was estimated to have US\$121,000 and CDN\$185,000 in cash and Smurfit-MBI was estimated to have US\$97,000 and CDN\$414,000 in cash.

21 The CCAA Entities seek to pay certain pre-filing amounts owed to critical suppliers. The proposed Monitor has been advised that SSC Canada's operations depend on a ready supply of key materials such as wood, chemicals, fuel and energy from third party suppliers and, in addition, SSC Canada's and Smurfit-MBI's operations are reliant on rail and trucking services, custom brokers and third party warehouses. I am satisfied that the request to pay these pre-filing amounts is appropriate.

22 According to Smurfit-Stone, it is very difficult to separate the creditors of the U.S. debtors from the creditors of the CCAA Entities. Smurfit-Stone intends to engage Epiq Bankruptcy Solutions LLC to send notice of the Chapter 11 proceedings to all creditors owed more than \$1,000. The proposed Monitor has suggested that such notice include notice of the CCAA proceedings to the creditors of the CCAA Entities. I am in agreement with this proposed course of action but request that the Monitor report to the court when service has been effected.

23 I also note and rely upon the comeback provision found in paragraph 57 of the order which allows any interested party to apply to the court to vary or amend this order on not less than seven days' notice.

24 There are obviously numerous other provisions in the order that I have not addressed specifically as I believe they are all self-evident. In all of the circumstances I am prepared to grant the order requested. Counsel will re-attend on Wednesday at 10:00 a.m. to address a further recognition order.

Application granted.

Tab 18

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

Stelco Inc., Re

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

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

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

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

Farley J.

Heard: March 5, 2004

Judgment: March 22, 2004

Docket: 04-CL-5306

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

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act

Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further outside funding — S Inc. had negative equity of \$647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

Table of Authorities**Cases considered by Farley J.:**

A Debtor (No. 64 of 1992), Re (1993), [1993] 1 W.L.R. 264 (Eng. Ch. Div.) — considered

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Bank of Montreal v. I.M. Krisp Foods Ltd. (1996), [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33, 148 Sask. R. 135, 134 W.A.C. 135, 6 C.P.C. (4th) 90, 1996 CarswellSask 581 (Sask. C.A.) — considered

Barsi v. Farcas (1923), [1924] 1 W.W.R. 707, 2 C.B.R. 299, 18 Sask. L.R. 158, [1924] 1 D.L.R. 1154, 1923 CarswellSask 227 (Sask. C.A.) — referred to

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

Challmie, Re (1976), 22 C.B.R. (N.S.) 78, 1976 CarswellBC 63 (B.C. S.C.) — considered

Clarkson v. Sterling (1887), 14 O.R. 460 (Ont. C.P.) — considered

Consolidated Seed Exports Ltd., Re (1986), 69 B.C.L.R. 273, 62 C.B.R. (N.S.) 156, 1986 CarswellBC 481 (B.C. S.C.) — considered

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

Davidson v. Douglas (1868), 15 Gr. 347, 1868 CarswellOnt 167 (Ont. Ch.) — considered

Diemaster Tool Inc. v. Skvortsoff (Trustee of) (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.) — referred to

Enterprise Capital Management Inc. v. Semi-Tech Corp. (1999), 1999 CarswellOnt 2213, 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) — considered

Gagnier, Re (1950), 30 C.B.R. 74, 1950 CarswellOnt 101 (Ont. S.C.) — considered

Gardner v. Newton (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Kenwood Hills Development Inc., Re (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bkcty.) — considered

King Petroleum Ltd., Re (1978), 29 C.B.R. (N.S.) 76, 1978 CarswellOnt 197 (Ont. S.C.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd. (1989), 92 N.S.R. (2d) 283, 75 C.B.R. (N.S.) 317, 45 B.L.R. 14, 237 A.P.R. 283, 1989 CarswellNS 27 (N.S. T.D.) — considered

Montreal Trust Co. of Canada v. Timber Lodge Ltd. (1992), 15 C.B.R. (3d) 14, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)*) 101 Nfld. & P.E.I.R. 73, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)*) 321 A.P.R. 73, 1992 CarswellPEI 13 (P.E.I. C.A.) — referred to

MTM Electric Co., Re (1982), 42 C.B.R. (N.S.) 29, 1982 CarswellOnt 170 (Ont. Bkcty.) — considered

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2001), 2001 CarswellOnt 2954, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294 (Ont. S.C.J. [Commercial List]) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2003), 2003 CarswellOnt 5210, 46 C.B.R. (4th) 313, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.*) 180 O.A.C. 158 (Ont. C.A.) — considered

Optical Recording Laboratories Inc., Re (1990), 2 C.B.R. (3d) 64, 75 D.L.R. (4th) 747, 42 O.A.C. 321, (sub nom. *Optical Recording Laboratories Inc. v. Digital Recording Corp.*) 1 O.R. (3d) 131, 1990 CarswellOnt 143 (Ont. C.A.) — referred to

Pacific Mobile Corp., Re (1979), 32 C.B.R. (N.S.) 209, 1979 CarswellQue 76 (C.S. Que.) — referred to

PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 103 D.L.R. (4th) 609, 49 C.P.R. (3d) 456, 64 O.A.C. 274, 15 O.R. (3d) 730, 10 B.L.R. (2d) 109, 1993 CarswellOnt 149 (Ont. C.A.) — considered

PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 49 C.P.R. (3d) ix, 10 B.L.R. (2d) 244 (note), 104 D.L.R. (4th) vii, 68 O.A.C. 21 (note), 164 N.R. 78 (note), 16 O.R. (3d) xvi (S.C.C.) — referred to

R. v. Proulx (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — considered

Standard Trustco Ltd. (Trustee of) v. Standard Trust Co. (1993), 13 O.R. (3d) 7, 21 C.B.R. (3d) 25, 1993 CarswellOnt 219 (Ont. Gen. Div.) — considered

TDM Software Systems Inc., Re (1986), 60 C.B.R. (N.S.) 92, 1986 CarswellOnt 203 (Ont. S.C.) — referred to

Viteway Natural Foods Ltd., Re (1986), 63 C.B.R. (N.S.) 157, 1986 CarswellBC 499 (B.C. S.C.) — referred to

Webb v. Stenton (1883), 11 Q.B.D. 518 (Eng. C.A.) — referred to

633746 *Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72, 73 O.R. (2d) 774, 1990 CarswellOnt 181 (Ont. S.C.) — considered

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3

Generally — referred to

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

Generally — referred to

s. 2(1) "insolvent person" — referred to

s. 2(1) "insolvent person" (a) — considered

s. 2(1) "insolvent person" (b) — considered

s. 2(1) "insolvent person" (c) — considered

s. 43(7) — referred to

s. 121(1) — referred to

s. 121(2) — referred to

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

Generally — referred to

s. 2 "debtor company" — referred to

s. 2 "debtor company" (a) — considered

s. 2 "debtor company" (b) — considered

s. 2 "debtor company" (c) — considered

s. 2 "debtor company" (d) — considered

s. 12 — referred to

s. 12(1) "claim" — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

Words and phrases considered:

debtor company

It seems to me that the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

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

Farley J.:

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

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

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

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

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

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

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

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

"debtor company" means any company that:

(a) is bankrupt or insolvent;

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

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

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

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

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

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

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

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is

insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

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

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

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

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

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

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

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

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

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

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

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

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least \$5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of \$5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

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

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

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

In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .

To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

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

s. 2(1) . . .

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

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

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

Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

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

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

would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

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

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

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

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

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

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

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

The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:

- (a) identification of the debtor's stakeholders and their interests;
- (b) arranging for a process of meaningful communication;
- (c) dealing with immediate relationship issues arising from a CCAA filing;
- (d) sharing information about the issues giving rise to the debtor's need to restructure;
- (e) developing restructuring alternatives; and
- (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to pre-filing liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

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

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

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

with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of \$80 million now to a projected loss of \$192 million and cash has gone from a positive \$209 million to a negative \$114 million.

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

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

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

36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.

37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

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

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

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

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

The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing \$74 million investment. In stating his opinion MacGirr defined solvency as:

- (a) the ability to meet liabilities as they fall due; and
- (b) that assets exceed liabilities.

On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a

company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

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

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

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

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

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

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

24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.

25. The Applicants further argue that the trial judge erred in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

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

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

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

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

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

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

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

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

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

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

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

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

S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

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

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

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

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

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

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

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

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

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

It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.

There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:

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

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

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different

results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

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

In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .

The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

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

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

70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."

71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over \$600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

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

74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be

generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

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

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

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

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

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

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

that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

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

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

Motion dismissed.

APPENDIX

Tab 19

2013 ONSC 5461
Ontario Superior Court of Justice [Commercial List]

Tamerlane Ventures Inc., Re

2013 CarswellOnt 12213, 2013 ONSC 5461, 232 A.C.W.S. (3d) 32, 6 C.B.R. (6th) 328

**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 Tamerlane Ventures Inc. and Pine Point Holding Corp.

Newbould J.

Heard: August 23, 2013
Judgment: August 28, 2013
Docket: CV-13-10228-00CL

Counsel: S. Richard Orzy, Derek J. Bell, Sean H. Zweig for Applicants
Robert J. Chadwick, Logan Willis for Proposed Monitor, Duff & Phelps Canada Restructuring Inc.
Joseph Bellissimo for Renvest Mercantile Bankcorp Inc.

Subject: Insolvency; Contracts; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Terms of order — T Inc. and its subsidiaries were engaged in mining activity in Canada and Peru — T Inc. defaulted on loan from secured lender — Parties negotiated consensual filing under Companies' Creditors Arrangement Act (CCAA), under which secured lender agreed to provide DIP financing and to forbear from exercising its rights — DIP loan was to mature approximately four months after date application at bar was heard — Order drafted by parties contained clause preventing extension of stay beyond maturity date of DIP loan unless secured debt and DIP loan were repaid or secured lender and monitor consented (original sunset clause) — T Inc. and one of its subsidiaries brought application for initial order and stay under s. 11 of CCAA — Application granted — There was no doubt that applicants were insolvent and qualified for filing under CCAA and obtaining stay — It was appropriate that stay extend to T Inc.'s American subsidiary, which had guaranteed secured loans, and to T Inc.'s Peruvian subsidiary, which held valuable mining property — Courts have inherent jurisdiction to impose stays against non-applicant third parties where it is important to reorganization and restructuring process, and where it is just and reasonable to do so — Proposed sale and solicitation process and its terms were appropriate, and it was approved — Proposed charges of \$300,000 for monitor, its counsel and applicants' counsel, \$300,000 for financial advisor and \$45,000 for directors were reasonable and were approved — DIP facility and charge was supported by factors listed in s. 11.2(4) of CCAA — At court's direction, parties modified original sunset clause by adding clause that order was subject in all respects to discretion of court — Original sunset clause removed discretion of court to do what it considered appropriate, and counsel were unable to provide any case in which such order had been made.

Table of Authorities

Cases considered by *Newbould J.*:

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

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — referred to

Cinram International Inc., Re (2012), 91 C.B.R. (5th) 46, 2012 CarswellOnt 8413, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) — considered

Crystallex International Corp., Re (2012), 2012 CarswellOnt 7329, 2012 ONCA 404, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Sino-Forest Corp., Re (2012), 2012 CarswellOnt 4117, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) — considered

SkyLink Aviation Inc., Re (2013), 2013 CarswellOnt 2785, 2013 ONSC 1500 (Ont. S.C.J. [Commercial List]) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

Personal Property Security Act, R.S.O. 1990, c. P.10

s. 63 — considered

APPLICATION by insolvent corporations for initial order and stay under s. 11 of *Companies' Creditors Arrangement Act*.

Newbould J.:

1 The applicants applied on August 23, 2013 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

Tamerlane business

2 At the time of the application, Tamerlane Ventures Inc. ("Tamerlane") was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. ("Tamerlane Pine Point"), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

3 The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

4 The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

5 The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

6 The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

7 As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of \$24,814,433. The assets included consolidated current assets of \$2,007,406, and consolidated non-current assets with a net book value of \$22,807,027. Non-current assets included primarily the investment in the Pine Point property of \$20,729,551 and the Los Pinos property of \$1,314,936.

8 Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of \$12 to \$15 million using a 0.3% copper cut-off grade, or \$17 to \$21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of \$30 to \$56 million based on market comparables, with a value as high as \$229 million considering precedent transactions.

Secured and unsecured debt

9 Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. ("Global Resource Fund" or "secured lender") made as of December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD \$10,000,000. The secured indebtedness under the credit agreement is guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

10 The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

11 The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD \$850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

Events leading to filing

12 Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

13 It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for \$1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

14 As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

15 Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a \$1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was \$11,631,948.90.

16 On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

17 On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was \$12,100,254.26.

18 Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

Discussion

19 There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. I am satisfied from the record, including the report from the proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made.

20 The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

21 Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) and Pepall J. (as she then was) in *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]). Recently Morawetz J. has made such orders in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]), *Sino-Forest Corp., Re*, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) and *SkyLink Aviation Inc., Re*, 2013 ONSC 1500 (Ont. S.C.J. [Commercial List]). I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

22 Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or all of the applicants' assets. The proposed Monitor supports the SISP and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

23 The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of \$300,000, a financial advisor charge of \$300,000, a directors' charge of \$45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

DIP facility and charge

24 The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these CCAA proceedings. The applicants will require additional borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

25 The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net \$1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

26 Section 11.2(4) of the CCAA lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the CCAA process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the CCAA proceedings. That involves the sunset clause, to which I now turn.

Sunset clause

27 During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

28 The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

29 Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these CCAA proceedings is conditional on these terms.

30 Section 11 of the CCAA authorizes a court to make any order "that it considers appropriate in the circumstances." In considering what may be appropriate, Deschamps J. stated in *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.):

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.

31 There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

71. It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.

32 The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

33 It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 (Ont. S.C.J.) and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

34 What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

Application granted.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 20

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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

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

Morawetz R.S.J.

Heard: January 15, 2015

Judgment: January 16, 2015

Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Jay Swartz for Target Corporation

Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Subject: Insolvency; Property

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — Stay extended to certain limited partnerships, which were related to or carried on operations integral to applicants' business — Stay of proceedings extended to rights of third party tenants against landlords that arose out of insolvency — Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.

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

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — It was appropriate to grant broad relief to ensure status quo was maintained — Applicants were all insolvent — Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances — Creation of employee trust to cover payments to employees was approved — Key employee retention program (KERP) and charge as security for KERP payments were

approved — Appointment of Employee Representative Counsel was approved — DIP Lenders' Charge and DIP Facility were approved — Administration charge and Directors' and Officers' charge approved.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

Prizm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, [2004] O.T.C. 284, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — followed

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

U.S. Steel Canada Inc., Re (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — considered

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

Generally — referred to

s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 36 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

Words and phrases considered:

insolvent

"Insolvent" is not expressly defined in the [*Companies' Creditors Arrangement Act* (CCAA)]. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act* . . . or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

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

Morawetz R.S.J.:

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings

and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

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

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

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

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

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

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

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

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

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet

Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

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

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

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

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

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

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

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

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

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

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

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

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

\$1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. \$89 million to Target Corporation under a Demand Promissory Note.

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

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

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

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

- a) Does this court have jurisdiction to grant the CCAA relief requested?
 - a) Should the stay be extended to the Partnerships?
 - b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
 - c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
 - d) Should the Court approve protections for employees?
 - e) Is it appropriate to allow payment of certain pre-filing amounts?
 - f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
 - g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?
 - h) Should the court exercise its discretion to approve the Court-ordered charges?

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

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

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

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

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

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

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

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

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

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

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

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

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

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores.

The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

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

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

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Prizm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./ Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a

common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

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

- (i) the vulnerability and resources of the groups sought to be represented;
- (ii) the social benefit to be derived from the representation of the groups;
- (iii) the avoidance of multiplicity of legal retainers; and
- (iv) the balance of convenience and whether it is fair and just to creditors of the estate.

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

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

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

- a) Logistics and supply chain providers;
- b) Providers of credit, debt and gift card processing related services; and
- c) Other suppliers up to a maximum aggregate amount of \$10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

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

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

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

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

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

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

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

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

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

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

- a. The size and complexity of the business being restructured;
- b. The proposed role of the beneficiaries of the charge;
- c. Whether there is an unwarranted duplication of roles;
- d. Whether the quantum of the proposed Charge appears to be fair and reasonable;
- e. The position of the secured creditors likely to be affected by the Charge; and
- f. The position of the Monitor.

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

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

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

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

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

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

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

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

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

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

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

Application granted.

Tab 21

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyait que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC,

à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyait que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite

à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la préséance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny*) 2009 G.T.C. 2036 (Eng.), (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*) [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re*) 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville)*) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — distinguished

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance*) 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance*) 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Gauntlet Energy Corp., Re (2003), 30 Alta. L.R. (4th) 192, 2003 ABQB 894, 2003 CarswellAlta 1735, [2003] G.S.T.C. 193, 49 C.B.R. (4th) 213, [2004] 10 W.W.R. 180, 352 A.R. 28 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Komunik Corp., Re (2010), 2010 CarswellQue 686, 2010 QCCA 183 (C.A. Que.) — referred to

Komunik Corp., Re (2009), 2009 QCCS 6332, 2009 CarswellQue 13962 (C.S. Que.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — considered

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re*) 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue)*) 30 N.R. 24, (sub nom. *Bourgeault, Re*) 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of)*) [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v. Royal Bank*) 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by Fish J.:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by Abella J. (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville)*) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, (sub nom. *Tele-Mobile Co. v. Ontario*) 372 N.R. 157, 55 C.R. (6th) 1, (sub nom. *Ontario v. Tele-Mobile Co.*) 229 C.C.C. (3d) 417, (sub nom. *Tele-Mobile Co. v. Ontario*) 235 O.A.C. 369, (sub nom. *Tele-Mobile Co. v. Ontario*) [2008] 1 S.C.R. 305, (sub nom. *R. v. Tele-Mobile Company (Telus Mobility)*) 92 O.R. (3d) 478 (note), (sub nom. *Ontario v. Tele-Mobile Co.*) 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by Deschamps J.:

Bank Act, S.C. 1991, c. 46
Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

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

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

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

Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23 — considered

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

Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

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

s. 2(1)"enactment" — considered

s. 44(f) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

APPEAL by creditor from judgment reported at [2009 CarswellBC 1195](#), [2009 BCCA 205](#), [\[2009\] G.S.T.C. 79](#), [98 B.C.L.R. \(4th\) 242](#), [\[2009\] 12 W.W.R. 684](#), [270 B.C.A.C. 167](#), [454 W.A.C. 167](#), [2009 G.T.C. 2020 \(Eng.\)](#) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

Deschamps J.:

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). In that respect, two questions are raised. The first requires reconciliation of provisions of the CCAA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("ETA"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the CCAA and not the ETA that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the CCAA in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The ETA creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The ETA provides that the deemed trust operates despite any other enactment of Canada except the BIA. However, the CCAA also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the CCAA. Accordingly, under the CCAA the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced CCAA proceedings the leading line of jurisprudence held that the ETA took precedence over the CCAA such that the Crown enjoyed priority for GST claims under the CCAA, even though it would have lost that same priority under the BIA. The CCAA underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the CCAA proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the BIA. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the BIA (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysse J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a

purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more

limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the CCAA, the House of Commons committee studying the BIA's predecessor bill, C-22, seemed to accept expert testimony that the BIA's new reorganization scheme would shortly supplant the CCAA, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the CCAA enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the BIA. The "flexibility of the CCAA [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the CCAA has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the CCAA and the BIA allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the CCAA and the BIA relates to priorities. Because the CCAA is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the BIA in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over

the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and

intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92

O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the CCAA's purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]), 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA. Without exhaustively cataloguing the various measures taken under the authority of the CCAA, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of CCAA authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), *aff'g* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The CCAA has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalf & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the CCAA's supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during CCAA proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during CCAA proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the CCAA and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during CCAA proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the CCAA will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the CCAA and the recent history of the legislation, I accept that in most instances the issuance of an order during CCAA proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the CCAA empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (CCAA, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the CCAA. Thus in s. 11 of the CCAA as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of CCAA authority developed by the jurisprudence.

69 The CCAA also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (CCAA, ss. 11(3), (4) and (6)).

70 The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992),

9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.

72 The preceding discussion assists in determining whether the court had authority under the CCAA to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the CCAA to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the CCAA and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the ETA gave the court no option but to permit enforcement of the GST deemed trust when lifting the CCAA stay to permit the debtor to make an assignment under the BIA. Whether the ETA has a mandatory effect in the context of a CCAA proceeding has already been discussed. I will now address the question of whether the order was authorized by the CCAA.

74 It is beyond dispute that the CCAA imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the CCAA. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the CCAA was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the BIA instead of the CCAA, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the BIA, the deemed trust for GST ceases to have effect. Thus, after reorganization under the CCAA failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the BIA. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the CCAA and the BIA proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the CCAA. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the CCAA's objectives to the extent that it allowed a bridge between the CCAA and BIA proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the CCAA. That section provides that the CCAA "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the BIA. Section 20 clearly indicates the intention of Parliament for the CCAA to operate *in tandem* with other insolvency legislation, such as the BIA.

77 The CCAA creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the CCAA and the BIA as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the BIA and the CCAA, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust."

Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

Fish J. (concurring):

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) creates a deemed trust:

227 (4) Trust for moneys deducted — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Extension of trust — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly confirmed in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first created and then confirmed the continued operation of the Crown's *ITA* deemed trust under both the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the CCAA expressly. Their specific reference to the BIA has no bearing on their interaction with the CCAA. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during CCAA proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the CCAA. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

Abella J. (dissenting):

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("EIA"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the CCAA is circumscribed accordingly.

115 Section 11¹ of the CCAA stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

222 (3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the CCAA's general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during CCAA proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This

chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37.(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(f) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the *CCAA*, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the *CCAA*.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);

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

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

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

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

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

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

- (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
- (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

- (i) the expiration of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or arrangement,
- (iv) the default by the company on any term of a compromise or arrangement, or
- (v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

- (a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
 - (i) subsection 224(1.2) of the *Income Tax Act*,
 - (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

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

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

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

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

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

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

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

(3) Burden of proof on application — The court shall not make the order unless

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

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

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

- (i) the expiry of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or an arrangement,
- (iv) the default by the company on any term of a compromise or an arrangement, or
- (v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

- (a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
 - (i) subsection 224(1.2) of the *Income Tax Act*,
 - (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

Tab 22

PARLIAMENT of CANADA

[Site Map](#) | [A to Z Index](#) | [Contact Us](#) | [Français](#) Search[Home](#) [Parliamentary Business](#) [Senators and Members](#) [About Parliament](#) [Visitor Information](#) [Employment](#)[Share this page](#)

REPORT OF THE COMMITTEE**THURSDAY, November 24, 2005****The Standing Senate Committee on Banking Trade and Commerce**

has the honour to present its

SEVENTEENTH REPORT

Your Committee, to which was referred Bill C-55, An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, has, in obedience to the Order of Reference of Wednesday, November 23, 2005, examined the said Bill and now reports the same without amendment but with observations, which are appended to this report.

Respectfully submitted,

Jerahmiel S. Grafstein
Chair

APPENDIX**Bill C-55, An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts****Unanimous observations of the Standing Senate Committee on Banking, Trade and Commerce**

The Committee wishes to indicate our disappointment with the process by which the Bill arrived in the Senate. We recognize the extraordinary circumstances that exist with the impending dissolution of Parliament, but believe we had an inadequate opportunity to review comprehensively such an important piece of framework legislation.

Notwithstanding the foregoing, the Committee has decided to report Bill C-55 without amendment and without having conducted the customary comprehensive study and review. We do so not because we approve of the legislation in its entirety, as drafted, but rather because of three key factors.

First, the Committee unanimously supports and approves of the long-overdue wage earner protection provisions of the Bill and does not wish to delay, or in any way deny – or appear to deny – access to enhanced legislated protection for this vulnerable group of creditors.

Second, the witnesses heard by the Committee, including the Minister of Labour and Housing and the Parliamentary Secretary to the Minister of Industry, gave unqualified assurance to the Committee, to be confirmed in writing forthwith, that Bill C-55 would not be proclaimed into force prior to 30 June 2006 at the earliest.

Third, the Committee expects that between now and the proclamation of Bill C-55, we will receive a timely Order of Reference that will enable us to undertake the thorough review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* that would have occurred with respect to Bill C-55 had it been referred to us on a more timely basis.

In connection with the Committee's study in 2006, we look forward to receiving, from Industry Canada officials, the legislative and regulatory changes they undertook to provide to improve Bill C-55 and Canada's insolvency regime more generally. All stakeholders should have an opportunity to share with us their views on key aspects of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* as well as other insolvency legislation. Unfortunately, too few witnesses were heard and there was insufficient study at Committee in the House of Commons during its examination of Bill C-55 which may, in part, explain why obviously needed amendments were not introduced before the Bill was sent to the Senate.

The Committee has in-depth knowledge of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*. In 2002 and 2003 we reviewed these Acts and, in November 2003, tabled our report *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. In that report, we comprehensively examined and made recommendations respecting the full range of consumer and commercial insolvency issues as well as on administrative and procedural issues.

While the Committee wholeheartedly supports the principle of the wage earner protection regime, even in that instance we have questions. In our view, workers should be compensated in the timeliest manner possible, and we are not certain that the Bill's provisions meet the test of timeliness. For example, we wonder why the administrator is not able to pay the workers immediately, rather than waiting for workers to be paid out of the Wage Earner Protection Program.

Moreover, the Bill contains a number of provisions unrelated to wage earner protection that we believe fall well short of what the Committee wishes to see. In particular, we believe further study is needed in a number of areas to ensure the effectiveness of Canada's insolvency legislation, including:

- the protection, during insolvency and corporate restructuring, of eligible financial contracts in derivatives and other structured transactions
- cross-border insolvencies
- debtor-in-possession financing
- transfers at undervalue and preferences

- executory contracts
- governance
- insolvency of other vehicles, including income trusts
- discharge from bankruptcy, including for students.

These areas, among others, need thorough study and review by the Committee in order to ensure that new insolvency framework legislation goes forward in the proper form.

The Committee notes that we have some experience with delayed proclamation of legislation. A similar approach was adopted in December 1997, when the Minister of Finance delayed the coming into force of the governance and investment provisions of the *Canada Pension Plan Investment Board Act* until April 1998 in order that we could study them. The Minister also agreed to refer the draft regulations governing the Investment Board to us for review and comment. We believe that this approach was successful then, and will be successful when we have the opportunity to study and review, in a comprehensive manner, the subject matter of Canada's new insolvency framework legislation in 2006.

The Committee continues to believe that the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* constitute critical framework legislation that affect, in a very fundamental manner, the Canadian economy and all Canadians who participate in it. The Committee understands that the appropriate government legislative initiatives will be taken to ensure the foregoing.



[Home](#) | [Important Notices](#)

**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 BEN MOSS JEWELLERS WESTERN CANADA LTD.**

Court File No:

Applicant

Ontario

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**BOOK OF AUTHORITIES OF
THE APPLICANT**

OSLER, HOSKIN & HARCOURT LLP

P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Marc Wasserman (LSUC#44066M)

Tel: 416.862.4908

Email: mwasserman@osler.com

Michael De Lellis (LSUC#: 48038U)

Tel: 416.862.5997

Fax: 416.862.6666

Karen Sachar (LSUC#: 59944E)

Tel: 416.862.5949

Fax: 416.862.6666

Counsel for the Applicant