Court File No. CV15-10920-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF *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 COMARK INC.

APPLICANT

BOOK OF AUTHORITIES OF THE APPLICANT

(Motion to Assign Agreements
Returnable August 13, 2015)

August 10, 2015

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CCAA Proceedings of Comark Inc., Court File No. CV15-10920-00CL

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TAB 1

2013 ONSC 4663
Ontario Superior Court of Justice [Commercial List]

TBS Acquireco Inc., Re

2013 CarswellOnt 9481, 2013 ONSC 4663, 230 A.C.W.S. (3d) 26

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 to TBS Acquireco Inc., the Bargain! Shop Holdings Inc. and TBS Stores Inc.

D.M. Brown J.

Heard: July 9, 2013
Judgment: July 10, 2013
Docket: CV-13-10018-00CL

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E. Lamek for Monitor
D. Yiokaris, A. Scotchmer, J. Harnum for Certain Terminated Employees

Subject: Insolvency; Civil Practice and Procedure; Contracts; Employment; Property; Public; Torts

Table of Authorities

Cases considered by *D.M. Brown J.*:

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — followed

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

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

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 10954, 2010 QCCS 4915, 72 C.B.R. (5th) 49 (C.S. Que.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

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

s. 11.3(4) [en. 1997, c. 12, s. 124] — referred to

s. 36 — considered

s. 36(1) — considered

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to

s. 21 — considered

MOTION by applicants for approval of transaction; MOTION by former employee of applicants to be appointed representative of terminated employees and for appointment of representative counsel.

D.M. Brown J.:

I. Motions in a CCAA proceeding to approve a sale, assign contracts and appoint representative counsel for terminated employees

1 On February 26, 2013, this Court made an order granting the application of TBS Acquireco Inc. ("TBS") and certain of its direct Canadian subsidiaries, The Bargain! Shop Holdings Inc. ("TBSHI") and TBS Stores Inc. ("TBSI"), for relief under the *Companies' Creditors Arrangement Act* ("*CCAA*") (the "Initial Order"). The Initial Order appointed Ernst & Young Inc. as monitor. The applicants operate a chain of general merchandise retail stores under the names "The Bargain! Shop" and "Red Apple". The stores largely are located in smaller communities across Canada.

2 In previous orders this Court approved a sale and investment solicitation process ("SISP") and the liquidation of a large number of stores the applicants had decided to divest as part of their restructuring under the *CCAA* process.

3 The applicants moved for (i) approval of the transaction with BlackRock Kelso Capital Corporation contemplated pursuant to an agreement of purchase and sale dated as of June 10, 2013 between the applicants, as sellers, and BlackRock Kelso, or its designate, as purchaser (the "Transaction"). As well, the applicants sought approval under section 11.3 of the *CCAA* for the assignment of certain Acquired Store Leases and Designated Contracts.

4 In addition, Ms. Lucy Zita, a former employee of the applicants, moved for an order appointing her as a representative of terminated employees of the applicants, appointing representative counsel and requiring that the legal fees incurred on behalf of such terminated employees to ensure maximum recovery under the *Wage Earner Protection Program Act* be paid out of some of the proceeds of the BlackRock Kelso transaction.

5 Yesterday morning I granted the applicants' motion and I dismissed the motion by the Terminated Employees, with these written Reasons to follow.

II. The BlackRock Transaction

6 Section 36(1) of the *CCAA* governs: see, also, *White Birch Paper Holding Co., Re*, [2010] Q.J. No. 10469 (C.S. Que.), paras. 48-49.

7 Proper notice of this approval motion was given to all interested parties by service of those on the service list, including secured creditors who were likely to be affected by the proposed sale. No interested party opposed the relief sought. The senior secured creditor, Wells Fargo Capital Finance Corporation Canada, supported the applicants' motion.

A. The sale process

8 By order made April 25, 2013, this Court approved the SISP. The approved process permitted a secured lender to make a credit bid.

9 Both the applicants and the monitor filed detailed evidence describing the steps taken during the SISP. In addition to utilizing a standard solicitation/confidentiality agreement/electronic data room due diligence marketing process, the applicants, after consultation with the Monitor, established a special SISP Committee comprised of senior management which assisted the Monitor in administering the SISP without the need for involving the applicants' boards. This structure was put in place because most members of the boards were related, had expressed interest in submitting an offer under the SISP, or otherwise were involved with potential SISP participants.

10 The evidence filed disclosed that the applicants followed the SISP procedures approved by this Court.

11 The Monitor reported that in its view the timelines in the SISP were commercially reasonable and all interested parties had a reasonable opportunity to participate in the SISP and to submit an offer.

12 I conclude that the process leading to the proposed sale was reasonable in the circumstances, the securing of court approval of the SISP enabled creditors to comment on the sale process chosen, and the Monitor supported and actively participated in the process leading to the proposed sale.

B. The BlackRock Transaction

13 By the bid deadline the applicants had received two bids: a financing offer from a Toronto asset-based lender that was subject to further due diligence and negotiation and the BlackRock Kelso going-concern offer. Eric Claus, President of the applicants, deposed the BlackRock Kelso offer "represented the best alternative for the Applicants' business and its numerous stakeholders, including approximately 1,800 employees, landlords for 165 locations and many suppliers across the country." The Monitor reported that the BlackRock Transaction "offered financial terms that were clearly superior to the other bid that was received and the Monitor is satisfied that the consideration to be received for the assets is fair and reasonable in the circumstances".

14 Under the Transaction, a subsidiary of BlackRock Kelso will purchase substantially all of the applicants' assets and is committed to continuing running 165 of the applicants' stores. The purchaser will offer employment to all employees of the applicants, save for those who worked at stores that have been closed or liquidated, and will offer employment to all senior management of the applicants. The purchase price contains several components:

> (i) The payment in cash on closing of the applicants' debt to Wells Fargo of approximately $20 million;
>
> (ii) Settlement of the applicants' debt to BlackRock Kelso of approximately $23 million, save for about $500,000;
>
> (iii) The purchaser's commitment, supported by BlackRock Kelso, to transition funding pursuant to a Funding and Transition Agreement, including a commitment to fund certain Priority Payables ($1.2 million) and CCAA Completion Costs ($1.8 million). The Priority Payables consist largely of unremitted HST and PST and a cash collateralization of the administrative reserve; and,
>
> (iv) The assumption by the purchaser of certain obligations of the applicants to its employees and customers, including ordinary course of business obligations to employees who accept employment with the purchaser, obligations under the Acquired Store Leases and Designated Contracts, and honouring gift cards and certificates and obligations incurred post-filing in connection with open purchase orders and goods in transit (all estimated at approximately $3.6 million).

The BlackRock Agreement of Purchase and Sale contains certain conditions, including the obtaining of all consents necessary for the assignment of Acquired Store Leases and Designated Contracts (largely IT service and equipment rental contracts).

15 The purchase price will not be sufficient to offer any consideration to the applicants' unsecured creditors for amounts owing prior to the commencement of this *CCAA* proceeding.

16 In light of the credit bid component of the BlackRock offer, the Monitor obtained security opinions from its legal counsel concerning the validity, perfection and enforceability of the BlackRock Kelso security. The Monitor reported that "subject to the standard qualifications and assumptions, the security opinions conclude that the BlackRock Kelso security is valid and enforceable, and is properly perfected in each of the Reviewed Provinces where the security is registered against a particular Applicant". The priority of security between BlackRock Kelso and Wells Fargo is subject to an intercreditor agreement.

17 The Monitor reported that in its view "the proposed Transaction will maximize value for all stakeholders of the Applicants, including their creditors, employees, suppliers and other stakeholders as opposed to a liquidation under a bankruptcy, as well as to ensure the continued employment of numerous employees of Applicants".

C. Analysis

18 Based upon my review of the evidence, the BlackRock Transaction should be authorized. The SISP was approved by this Court and was followed. The applicants seek approval of the superior bid. Although the transaction only will offer consideration to secured creditors, it will see the continuation of a substantial portion of the applicants' business, albeit under the ownership of the purchaser, with the preservation of approximately 1,800 jobs and the continuation of 165 store leases: *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 47. I therefore authorize the BlackRock Transaction under *CCAA* s. 36.

III. Assignment of Acquired Store Leases and Designated Contracts

19 The affidavit of Mr. Klaus and the Monitor's report described in detail the efforts made to secure the consents of the landlords to the assignment to the purchaser of the store leases for the locations to be assumed under the BlackRock Transaction (the "Acquired Store Leases") and to secure the consents of the counterparties to several IT servicing and equipment rental contracts, the so-called Designated Contracts. As part of the dealings with the landlords and contract counterparties, the applicants, with the assistance of the Monitor, sought to identify the amount of the cure costs owing in respect of each location or contract. Detailed information packages were sent to each landlord and contract counterparty, and negotiations ensued.

20 As of the date of the hearing, the applicants, through Monitor's counsel, had received 149 consents to the assignment of leases, out of the proposed 165 locations. Agreements on cure costs have been reached, but a few landlords have not delivered consents. However, those landlords did not oppose the assignment of their leases to the purchaser.

21 The Monitor reports that if consents to assign leases were not received before the hearing, it would be "appropriate to order the assignment of the leases of each of the Reconciled Locations to the Purchaser". Schedule "C" to the proposed Approval and Vesting Order identified the cure cost amount for each of what were termed the "Reconciled Locations".

22 As to the Designated Contracts, the applicants have resolved issues with the counterparties to a sufficient extent that those counterparties which have not signed consents do not oppose the relief sought by the applicants. The Monitor recommends that "the Designated Contracts be assigned to the Purchaser by the court at the agreed cure costs amount or, failing which, at the amount of the cure costs reflected in the applicants' books and records." Schedule "D" to the proposed Approval and Vesting Order identified each Designated Contract and the cure cost amount for each.

23 The Monitor approves of the proposed assignment of the Acquired Store Leases and Designated Contracts to the purchaser:

> Absent the assignment to the Purchaser, the applicable leases and Designated Contracts would be disclaimed pursuant to the provisions of the *CCAA* and the inventory at that location would be liquidated, the employees would be terminated and the relevant store would be closed. The Purchaser, a wholly-owned subsidiary of BlackRock Kelso, has the financial resources necessary to carry out the obligations under the Acquired Store Leases, Acquired Option Store Leases and the Designated Contracts. Since the Purchaser will be continuing to carry on the real business operated by the Applicants and

> will be in a stronger financial position than the Applicants given the reduced debt and closing of unprofitable stores, it is, in the Monitor's view, appropriate to assign the Acquired Store Leases and Acquired Option Stores Leases to the Purchaser, together with the Designated Contracts.

24 At the hearing, agreement was reached between the applicants and certain of the landlords on language dealing with the rights of a counterparty to a Lease or Designated Contract to exercise any right or remedy in respect of any non-monetary default under the contract. The agreed upon language now forms paragraph 6 of the Approval and Vesting Order which reads:

> THIS COURT ORDERS that no counterparty to an Acquired Premises Lease, or Designated Contract shall terminate a Scheduled Contract as against the Purchaser as a result of the Applicants' insolvency or the Applicants' CCAA proceedings. In addition, no counterparty shall terminate a Scheduled Contract as against the Purchaser as a result of the Applicants having breached a non-monetary obligations unless such non-monetary breach arises or continues after the Scheduled Contract is assigned to the Purchaser, such non-monetary default is capable of being cured by the Purchaser and the Purchaser has failed to remedy the default after having received notice of such default pursuant to the terms of the applicable Scheduled Contract. For clarification purposes, no counterparty shall rely on a notice of default sent to the Applicants to terminate a Scheduled Contract to terminate the Scheduled Contract as against the Purchaser.

25 Section 11.3 of the *CCAA* governs on this issue. I am satisfied that the applicant has given notice of its request to seek a court-authorized assignment of the Acquired Store Leases and Designated Contracts to every party to such agreements. As noted above, the Monitor approves the proposed assignments. The evidence disclosed that the purchaser would be able to perform the obligations under the contracts, and I think the large number of consents received by the applicants from the landlords attested to their perception of the purchaser's ability on that score, as did the lack of any opposition at the hearing to the sought assignments. In those circumstances, it would be appropriate to assign the rights and obligations to the purchaser under the Acquired Store Leases and Designated Contracts. That would result in the continuation of business in the greatest number of stores and the continued employment of the greatest number of people. Finally, the identification in the Approval and Vesting Order of the cure amounts required to be paid to the counterparties on the assignment of the contracts indicates that all monetary defaults will be remedied on or before closing, save for those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the applicants' failure to perform a non-monetary obligation: *CCAA*, s. 11.3(4). Consequently, I granted the assignment order sought by the applicants.

IV. Appointment of representative counsel

A. The request and the context

26 Lucy Zita had been a long-term employee of the applicants. Her employment was terminated shortly after this *CCAA* proceeding was commenced.

27 Ms. Zita deposed that since the commencement of this proceeding the applicants have closed about 66 Bargain! Shop stores and terminated between 450 and 650 employees. From counsel's submissions I understand that some of the terminated employees may have been working on a part-time basis. Ms. Zita stated that there are substantial severance and termination pay amounts owing to those former employees. She deposed that the terminated employees would be entitled to payments for eligible wages under the *Wage Earner Protection Program Act*, S.C. 2005, c. 47 ("*WEPPA*").

28 Given that eligibility for payments under *WEPPA* arises on the bankruptcy or receivership of an employer, Ms. Zita deposed that "we want to ensure that a bankruptcy or receivership takes place as soon as possible so that we can apply for and receive WEPP payments". According to Ms. Zita, "since most Bargain! Shop employees are lower income people and have to look for another job, it is hard to raise money to hire a lawyer and we do not have any extra cash". She therefore asks to be appointed as the representative of those employees who have claims against the applicants arising out of their employment with them and seeks the appointment of the firm of Koskie Minsky LLP as representative counsel to act in this proceeding. Her motion contemplated that Koskie Minsky would provide legal advice to employees on employment claims, set up a hotline for employees/former employees answered by trained staff, set up an information webinar for the employees, ensure that a timely

bankruptcy occured so that employees could receive their WEPPA payments, calculate and verify severance claim calculations to ensure maximum WEPPA recovery, assist employees in completing WEPPA claims and secure payment of WEPPA claims.

29 Ms. Zita requests that the funds for representative counsel be paid out of the CCAA Completion Costs which form part of the consideration contained in the BlackRock Kelso APA. At the hearing, proposed representative counsel requested that up to $125,000 from the CCAA Completion Costs be authorized for its work.

30 The applicants opposed the motion submitting that no need had been demonstrated for the appointment of a representative and representative counsel to deal with the identified employment issues.

31 Counsel for the Monitor submitted that no cash is left in the applicants' system at the end of each day; all receipts are swept into an account established under one of their borrowing facilities. As a result, the applicant companies have no money to fund a representative counsel and any funding would have to come from part of the purchase price consideration under the BlackRock Kelso APA. Monitor's counsel noted that under the terms of the Funding and Transition Agreement which forms part of the Transaction, funding advances by the purchaser under that agreement, which will include advances to pay CCAA Completion Costs, are to be held in a Funding Account under the control of the Monitor. Sections 4.5 and 4.6 of the Funding and Transition Agreement provide that if any excess funds (as defined in that agreement) remain in the Funding Account either on a weekly basis or at the termination of that agreement, then they are to be returned to the purchaser. Since the Funding and Transition Agreement therefore creates a contractual obligation to use funds advanced by the purchaser for specified purposes, including the CCAA Completion Costs, the Monitor submitted it would not be appropriate for this Court to require that they be used for other purposes.

32 Monitor's counsel also observed that it is contemplated the applicants will be placed in bankruptcy following the completion of the transition of operations to the purchaser, likely sometime in August, and at that time the Trustee will become responsible to deal with *WEPPA* claims as specified in section 21 of the *WEPPA* and its accompanying regulations. The Monitor submitted that there was no need to appoint a representative counsel to perform that work.

B. Analysis

33 A few months after Nortel Networks Corporation filed under the *CCAA*, several motions were brought to appoint representative counsel for pensioners, former employees and current employees of the applicant companies. The monitor in that proceeding supported the appointment of representative counsel in light of the large number of former employees of the applicants because:

> former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals. [1]

34 In that case the Court appointed representative counsel. It did so because it agreed with the following submissions made by one of the proposed representative counsel:

> In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means *to pursue a claim in complex CCAA proceedings or other related insolvency proceedings*. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. *The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.* [2]

35 Representative counsel for former employees and retirees also was appointed in the *Canwest Publishing Inc./Publications Canwest Inc., Re* proceeding. [3] Again, the motion for such an appointment was brought only a few months following the making

of the initial order under the *CCAA* and before the Court was asked to approve any sale or plan. As the Court observed in that case:

> No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large *CCAA* proceedings. Examples include *Nortel Networks Corp., Fraser Papers Inc.*, and *Canwest Global Communications Corp.* (with respect to the television side of the enterprise)...
>
> Factors that have been considered by courts in granting these orders include: the vulnerability and resources of the group sought to be represented; any benefit to the companies under *CCAA* protection; any social benefit to be derived from representation of the group; the facilitation of the administration of the proceedings and efficiency; the avoidance of a multiplicity of legal retainers; the balance of convenience and whether it is fair and just including to the creditors of the Estate; whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and the position of other stakeholders and the Monitor. [4]

36 I accept the principles set out in the *Nortel Networks Corp., Re* and *Canwest Publishing Inc./Publications Canwest Inc., Re* cases, but their application to the specific facts of this case leads to a different result. The present *CCAA* proceeding does not bear the degree of complexity as did those in *Nortel Networks Corp., Re* and *Canwest Publishing Inc./Publications Canwest Inc., Re*. A SISP process was approved by this Court back on April 25, 2013, a fair sales and marketing process was run, and it resulted in only one going-concern offer to purchase. Under that Transaction, no sales proceeds will be available for unsecured creditors. From the evidence filed in this Court, that was the best result achievable under the particular circumstances of these applicant companies. This representation motion has been brought only at the end of that process.

37 While the loss of a job by any person is devastating to that person, the remedies available to a terminated employee are defined in the law. In the present case no money will be available for pre-filing unsecured claims. The Monitor submitted that a bankruptcy will follow upon the completion of the transition of business operations to the purchaser, and *WEPPA* claims can be advanced at that time. Given that *WEPPA* imposes duties on a trustee in respect of such claims, I have difficulty understanding what significant extra "value-added" representative counsel could bring to the employment-related claims process at this very late stage of this proceeding. In addition, counsel for the Monitor indicated that the Monitor had committed to completing the bankruptcy proceeding for about $50,000, a much lower amount than that sought for representative counsel. Finally, the applicant companies have no money to fund representative counsel. To fund representative counsel out of the contractual CCAA Completion Costs portion of the purchase price would result in the purchaser underwriting the legal fees of one class of unsecured creditors. In light of the duties imposed on a trustee to deal with *WEPPA* claims, I do not regard as fair the proposal of the moving party that the Court, in effect, amend the proposed agreement of purchase and sale — following its submission in a court-approved SISP and following its conditional acceptance by the applicants — to use part of the purchase price for such a purpose. Consequently, I dismissed the motion brought by the Terminated Employees.

V. Other matters

38 I approved the Monitor's Eleventh Report.

39 A few hours after the hearing I signed the formal order granting the motion brought by the applicant companies.

Applicants' motion granted; former employee's motion dismissed.

Footnotes

1 *Nortel Networks Corp., Re* [2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List])], 2009 CanLII 26603, para. 7.

2 *Ibid.*, para. 13, emphasis added.

3 *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328 (Ont. S.C.J. [Commercial List]).

4 *Ibid.*, paras. 20 and 21.

TAB 2

2010 CarswellQue 11311
Quebec Superior Court

White Birch Paper Holding Co., Re

2010 CarswellQue 11311, 72 C.B.R. (5th) 63, EYB 2010-181372

In the Matter of the Plan of Arrangement and Compromise of: White Birch Paper Holding Company and White Birch Paper Company and Stadacona General Partner Inc. and Black Spruce Paper Inc. and F.F. Soucy General Partner Inc. and 3120772 Nova Scotia Company and Arrimage de Gros Cacouna Inc. and Papier Masson Ltée (Debtors) and Ernst & Young Inc. (Monitor) and Stadacona Partnership, Limited and F.F. Soucy Limited Partnership and F.F. Soucy, Inc. & Partners, Limited Partnership (Mises en Cause)

Robert Mongeon, J.C.S.

Judgment: September 28, 2010
Docket: C.S. Montréal 500-11-038474-108

Counsel: None given

Subject: Insolvency; Corporate and Commercial

Table of Authorities

Statutes considered:

Bank Act, S.C. 1991, c. 46
Generally — referred to

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

s. 36 — referred to

Forêts, Loi sur les, L.R.Q., c. F-4.1
art. 38 — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
s. 7(3)(c) — considered

Personal Property Security Act, S.N.S. 1995-96, c. 13
Generally — referred to

Trade-marks Act, R.S.C. 1985, c. T-13
Generally — referred to

MOTION by debtor company seeking approval of sale of all its assets.

***Robert Mongeon, J.C.S.*:**

Approval and Vesting Order

CONSIDERING the Debtors' "*Motion to Approve the Sale of Substantially All the WB Group's Assets*" (the "*Motion*") in respect of a sale transaction contemplated by an asset sale agreement (the "*Sale Agreement*") dated August 10, 2010 and amended on August 23, August 31, 2010 and September 23, 2010, amongst White Birch Paper Company and the other entities identified therein as sellers (collectively, the "*Sellers*"), as sellers, and BD White Birch Investment LLC (the *"Purchaser"*) and such other Person(s) as it may designate (each, a *"Designated Purchaser"*), as purchaser, for the sale of substantially all of the Assets of the Sellers, and all of its terms, conditions, schedules, exhibits and related and ancillary agreements (collectively, the *"Transaction"*), and the Report dated September 23, 2010 (the *"Report"*) of Ernst & Young Inc. in its capacity as the monitor (the *"Monitor"*) of the Debtors and the Mises en Cause;

CONSIDERING the representations made by counsel; and

GIVEN the provisions of the CCAA and, in particular, Section 36 thereof;

WHEREFORE, THE COURT:

1 *GRANTS* the Motion;

2 *DECLARES* sufficient the service and notice of the Motion and hereby dispenses with further service thereof;

3 *ORDERS* that capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Sale Agreement;

4 *ORDERS AND DECLARES* that the Sale Agreement and all of its terms and conditions (including all schedules and exhibits thereto and related and ancillary agreements and all schedules and exhibits thereto) and the Transaction are hereby fully and finally approved. The execution, delivery and performance of the Sale Agreement and the Transaction (with any such amendments as the parties thereto may agree to in accordance with the terms thereof) by the Debtors and the Mises en Cause party thereto is hereby authorized and approved, and the Debtors and the Mises en Cause and the Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets to the Purchaser or a Designated Purchaser;

5 *ORDERS* that the Debtors and the Mises en Cause are authorized and directed to perform their obligations under the Sale Agreement and in respect of the Transaction;

6 *ORDERS AND DECLARES* that, subject to paragraph 16 of this Order, upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the *"Monitor's Certificate"*), all of the Debtors' and

the Mises en Cause's right, title, benefit and interest in and to the Assets shall vest absolutely in the Purchaser or a Designated Purchaser, free and clear of and from any and all right, title, interest, security interests (whether contractual, statutory, or otherwise), hypothecs (legal or contractual), prior claims, mortgages, pledges, deeds of trust, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens (statutory or otherwise), executions, levies, charges, or other financial or monetary claims, options, rights of first offer or first refusal, real property licenses, encumbrances, conditional sale arrangements, leasing agreements or other similar restrictions of any kind, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, legal, possessory or otherwise (collectively, the *"Claims"*), including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Robert Mongeon, J.S.C. dated February 24, 2010 or any other Order of this Honourable Court in these proceedings; (ii) all charges, security interests or claims evidenced by registrations pursuant to the Registre des droits personnels et réels mobiliers (Québec), the Personal Property Security Act (Nova Scotia), the *Bank Act (Canada)* or any other personal property registry system, or recorded with the Canadian Intellectual Property Office pursuant to the Trade-marks Act (Canada); and (iii) all Excluded Liabilities (all of which are collectively referred to as the *"Encumbrances"*, but excluding Permitted Encumbrances (other than those Permitted Encumbrances specified in clause (i) of the definition of Permitted Encumbrances in the Sale Agreement and any other Permitted Encumbrances specifically contemplated to be discharged by this Order)). For greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Assets shall, upon delivery of the Monitor's Certificate, be and are hereby expunged and discharged as against the Assets. Counsel for the Purchaser and any agents appointed by such counsel may, immediately following the Closing of the Transaction, proceed with the discharge of such Claims and Encumbrances including, without limitation, the electronic discharge of any financing statements, UCC registrations, mortgages or other registrations in respect thereof;

7 *ORDERS* that for the purposes of determining the nature and priority of Claims and Encumbrances, the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) shall stand in the place and stead of the Assets, and that from and after the delivery of the Monitor's Certificate, all Claims and Encumbrances (other than the D & O Charge and the Administrative Charge) shall attach to the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) with the same priority as they had with respect to the Assets immediately prior to the sale, as if the Debtors' and the Mises en Cause's right, title and interest in and to the Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

8 *ORDERS* that the Monitor shall administer the Wind-Down Amount in accordance with the provisions of the Sale Agreement including, without limitation, Section 5.18 thereof;

9 *ORDERS* that: (i) all right, title and interest in and to any portion of the Wind-Down Amount that is not used to pay costs associated with winding-down the Sellers' estate in accordance with Section 5.18 of the Sale Agreement shall vest absolutely in the Purchaser as at the Closing Date and shall promptly be distributed to the Purchaser; and (ii) the Wind-Down Amount shall not be considered to be proceeds of sale of the Assets and the Claims and Encumbrances shall not attach to the Wind-Down Amount;

10 *ORDERS* that upon the delivery of the Monitor's Certificate to the Purchaser: (i) the Administration Charge provided for in the Initial Order be and is hereby released, expunged and discharged; and (ii) the D&O Charge provided for in the Initial Order be and is hereby released, expunged and discharged;

11 *ORDERS* the Land Registrar of the Land Registry Office for the Registry Division of Témiscouata, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovable listed in Schedule "B" hereto which are located in Rivière-du-Loup, in the Province of Québec (being hereinafter described as the *"Rivière-du-Loup Property"*); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Rivière-du-Loup Property as described in Schedule "B", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Témiscouata:

(i) a hypothec charging buildings only granted in favour of White Birch Paper Company by F.F. Soucy General Partner Inc./Commandité F.F. Soucy Inc. for an amount of $250,000,000 and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 029;

(ii) a hypothec granted for an amount of $250,000,000 in favour of White Birch Paper Company by F.F. Soucy, Inc. & Partners, Limited Partnership/F.F. Soucy, inc. & associés, Société en commandite and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 030;

(iii) a first hypothec granted for an amount of $550,000,000 and a second hypothec granted pursuant to the same deed for an amount of $250,000,000 granted in favour of Credit Suisse First Boston, Toronto Branch, by White Birch Paper Company and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 031;

(iv) a legal hypothec (construction) granted for an amount of $2,692,455.81 registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, and registered at the office of the Registration Division of Témiscouata on November 18, 2009 under number 16 731 954;

(v) a legal hypothec (construction) granted for an amount of $2,692,455.81 registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, and registered at the office of the Registration Division of Témiscouata on November 27, 2009 under number 16 758 360;

(vi) a hypothec on a universality of immovables granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch, by White Birch Paper Company registered at the office of the Registration Division of Témiscouata on March 4, 2010 under number 16 979 262;

(vii) a hypothec on the universality of immovables granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch, by F.F. Soucy L.P./F.F. Soucy S.E.C. and registered at the office of the Registration Division of Témiscouata on March 4, 2010 under number 16 979 263; and

(viii) a prior notice of the exercise of a sale under judicial authority registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, registered at the office of the Registration Division of Témiscouata on April 21, 2010 under number 17 095 095 and on June 15, 2010 under number 17 281 485, which registrations refer to the legal hypothecs registered under numbers 16 731 954 and 16 758 360 referred to above;

12 *ORDERS* the Land Registrar of the Land Registry Office for the Registry Division of Québec, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovables listed in Schedule "C" hereto which are located in Québec City, in the Province of Québec (being hereinafter described as the *"Quebec City Properties"*); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Québec City Properties as described in Schedule "C", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Quebec:

(i) a hypothec on a universality of immovables granted for an amount of $550,000,000 in favour of Credit Suisse First Boston Toronto Branch by Stadacona L.P./Stadacona S.E.C. and Stadacona General Partner Inc./Commandité Stadacona Inc. pursuant to a deed registered at the office of the Registration Division on April 7, 2005 under number 12 195 317;

(ii) a hypothec on a universality of immovables granted for an amount of $250,000,000 in favour of Credit Suisse First Boston Toronto Branch by Stadacona L.P./Stadacona S.E.C. and Stadacona General Partner Inc./Commandité Stadacona Inc. pursuant to a deed registered at the office of the Registration Division on April 7, 2005 under number 12 195 318;

(iii) a legal hypothec (construction) for an amount of $2,067,704.24 in favour of KSH Solutions Inc. against Stadacona S.E.C. and Commandité Stadacona Inc. and registered at the office of the Registration Division on May 19, 2006 under number 13 298 021;

(iv) a prior notice of the exercise of a sale by judicial authority in favour of OSLO Construction Inc. against Stadacona S.E.C., owner, and Commandité Stadacona Inc., owner, registered on August 2, 2006 under number 13 534 837, this prior notice being in reference to a legal hypothec that was registered at the office of the Registration Division under number 13 126 592 which has been totally discharged;

(v) a prior notice of the exercise of a sale by judicial authority in favour of KSH Solutions Inc. against Stadacona S.E.C. and Commandité Stadacona Inc. registered at the office of the Registration Division on October 20, 2006 under number 13 742 043, this prior notice being in reference of the legal hypothec registered under number 13 298 021 referred to in Section (iii) above;

(vi) a hypothec on a universality of property granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch by Stadacona General Partner Inc./Commandité Stadacona inc. pursuant to a deed registered at the office of the Registration Division on March 4, 2010 under number 16 977 835; and

(vii) a hypothec on a universality of property granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch by Stadacona L.P./Stadacona S.E.C. pursuant to a deed registered at the office of the Registration Division on March 4, 2010 under number 16 977 836;

13 *ORDERS* the Land Registrar of the Land Registry Office for the Registry Division of Papineau, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovables listed in Schedule "D" hereto which are located in Gatineau, in the Province of Québec (being hereinafter described as the *"Gatineau Property"*); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Gatineau Property as described in Schedule "D", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Papineau:

(i) a hypothec in the amount of $550,000,000 by Papier Masson Ltée in favour of Crédit Suisse, Toronto Branch, in its quality of *"fondé de pouvoir"*, registered on January 25, 2006 under number 13 011

629;

(ii) a hypothec in the amount of $250,000,000 by Papier Masson Ltée in favour of Crédit Suisse, Toronto Branch, in its quality of *"fondé de pouvoir"*, registered on January 25, 2006 under number 13 011 630;

(iii) a legal hypothec in the amount of $1,808,000 in favour of Hydro-Québec, registered on September 2, 2009 under number 16 512 303 against the part of the Property known as lot 2 469 374 and located at the civic address 2 Montreal Road West, City of Gatineau;

(iv) a legal hypothec in the amount of $3,205,539.79 in favour of Hydro-Québec, registered on November 20, 2009 under number 16 737 683 against the part of the Property known as lot 2 469 374 and located at the civic address 2 Montreal Road West, City of Gatineau; and

(v) a hypothec in the amount of $200,000,000 by Papier Masson Ltée in favour of Crédit Suisse AG, Toronto Branch, registered on March 4, 2010 under number 16 977 911;

14 *ORDERS* the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a certified copy of this Order and the Monitor's Certificate, to reduce the scope of the hypothecs listed in Schedule "E" hereto in connection

with the Assets and to cancel, release and discharge all of the Encumbrances from the Assets in order to allow the transfer to the Purchaser or a Designated Purchaser (as the case may be) of the Assets free and clear of any and all Encumbrances created by those hypothecs;

15 *ORDERS* the officer responsible for the register of timber supply and forest management agreements according to article 38 of the Forest Act (Quebec), upon presentation of a true copy of this vesting order, to proceed with the cancellation and discharge of all the Encumbrances from the timber supply and forest management agreements of the Sellers, including, without limitation, the following registrations:

(i) a hypothec on the CAAF #00205081602 granted by Stadacona S.E.C. in favour of Credit Suisse First Boston Toronto Branch dated 2005-04-06 and registered on November 18, 2005 under number 002 05 11 18 01;

(ii) a hypothec on the CAAF #00205081602 granted by Stadacona S.E.C. in favour of Credit Suisse First Boston Toronto Branch dated 2005-04-06 and registered on November 18, 2005 under number 002 05 11 18 02.

16 *ORDERS* that, pursuant to section 11.3 of the CCAA, and subject to paragraph 17 of this Order, the Debtors and the Mises en Cause are authorized and directed to assign the Debtors' and the Mises en Cause's respective rights and obligations under the contracts, leases and agreements and other arrangements of which the Purchaser, or a Designated Purchaser takes an assignment on Closing pursuant to and in accordance with the terms of the Sale Agreement (the *"Designated Seller Contracts"*, as defined in and pursuant to the terms of the Sale Agreement) and that such assignments are hereby approved and are valid and binding upon the counterparties to the Designated Seller Contracts (the *"Counterparties"*) notwithstanding any restriction or prohibition on assignment contained in any such Designated Seller Contract; provided, however, that, the effectiveness of the assignment of any such Designated Seller Contract pursuant to this Order and the Sale Agreement shall be conditioned upon payment in full of the Cure Cost, if any, payable in respect of any such Designated Seller Contract (as determined by agreement among the parties or order of this Court);

17 *ORDERS* that the Cure Cost payable in respect of any Designated Seller Contract shall be as agreed between the Purchaser and the Counterparty, failing which the Purchaser or the Counterparty shall be entitled to apply to this Court for an order determining the amount of such Cure Cost and, if such application is made, the assignment of such Designated Seller Contract shall not become effective until (i) such Cure Cost shall have been determined by a final, non-appealable order of this Court and (ii) such Cure Cost shall have been paid in full to the Counterparty; provided, however, that, nothing in this Order shall affect or limit the Purchaser's right under the Sale Agreement to elect in its sole discretion, at any time at least five (5) business days prior to Closing, to exclude any contract, lease, agreement or other arrangement from being a Designated Seller Contract under the terms of the Sale Agreement;

18 *ORDERS* that, from and after the Closing Date, all Persons shall be deemed to have waived all defaults then existing or previously committed by the Debtors or the Mises en Cause under, or caused by the Debtors or the Mises en Cause under, and the non-compliance of the Debtors or the Mises en Cause with, any of the Designated Seller Contracts arising solely by reason of the insolvency of the Debtors or the Mises en Cause or as a result of any actions taken by the Debtors or the Mises en Cause pursuant to the Sale Agreement or in these proceedings, and all notices of default and demands given in connection with any such defaults under, or noncompliance with, any of the Designated Seller Contracts shall be deemed to have been rescinded and shall be of no further force or effect;

19 *ORDERS AND DIRECTS* the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof;

20 *ORDERS* that neither the Purchaser nor any Designated Purchaser nor any affiliate thereof shall assume or be deemed to assume any liabilities or obligations whatsoever of any of the Debtors or the Mises en Cause (other than as expressly assumed in relation to any Designated Seller Contracts assigned pursuant to this Order and under the terms of the Sale Agreement), including without limitation, any liabilities or obligations in respect of, in connection with or in relation to: (i) any Seller Employee Plans (other than a Transferred Employee Plan); (ii) any and all termination, severance or related amounts which

any current or former employee of the Debtors or the Mises en Cause (other than the Transferred Employees who become employees of the Purchaser or a Designated Purchaser on Closing as provided for in the Sale Agreement) could at any time assert against any of the Debtors or the Mises en Cause; or (iii) any and all former, current or future employees of the Debtors or the Mises en Cause (other than the Transferred Employees who become employees of the Purchaser or a Designated Purchaser on Closing as provided for in the Sale Agreement);

21 *ORDERS* that the Purchaser and any Designated Purchasers, and their respective affiliates and officers, directors, employees, delegates, agents and representatives shall, effective immediately upon Closing of the Transaction, be and be deemed to be irrevocably and unconditionally fully and finally released of and from any and all claims, obligations or liabilities whatsoever arising from any event, fact, matter or circumstance occurring or existing on or before the Closing Date in relation to or in connection with the Debtors or the Mises en Cause or their respective present or past businesses, properties or assets, including, without limitation, any and all claims, obligations or liabilities whatsoever, whether known, anticipated or unknown, in relation to or in connection with the Seller Employee Plans (other than any Transferred Employee Plans) and the former, current or future employees of the Debtors and the Mises en Cause (other than any Transferred Employees who become employees of the Purchaser or a Designated Purchasers on Closing in accordance with the terms and conditions of the Sale Agreement) and provided that the foregoing shall not operate to release the Purchaser or any Designated Purchaser from any liabilities or obligations expressly assumed under the terms of the Sale Agreement;

22 *ORDERS* that, notwithstanding:

(i) the pendency of these proceedings;

(ii) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Debtors or the Mises en Cause and any bankruptcy order issued pursuant to any such applications; and

(iii) any assignment in bankruptcy made in respect of any of the Debtors or the Mises en Cause;

the provisions of the Sale Agreement and the Transaction, and the vesting of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets in the Purchaser or a Designated Purchaser pursuant to this Order and all other transactions contemplated thereby shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Debtors or the Mises en Cause and shall not be void or voidable by creditors of any of the Debtors or the Mises en Cause, nor shall they constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other challengeable, voidable or reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation;

23 *ORDERS* that the Sale Agreement and any related or ancillary agreements shall not be repudiated, disclaimed or otherwise compromised in these proceedings;

24 *ORDERS* that, pursuant to clause 7(3)(c) of the Personal Information Protection and Electronic Documents Act (Canada) and any substantially similar legislation, the Debtors and the Mises en Cause are authorized and permitted to disclose and transfer to the Purchaser or any Designated Purchaser all Employee Records. The Purchaser or any Designated Purchaser shall maintain and protect the privacy of any personal information contained in the Employee Records and shall be entitled to collect and use the personal information provided to it for the same purpose(s) as such information was used by the Debtors and the Mises en Cause;

25 *ORDERS* that forthwith upon receipt of the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets, and prior to payment or repayment of any other claims, interests or obligations of or against the Debtors or the Mises en Cause, all outstanding Obligations (as defined in the Interim Financing Credit Agreement (as defined in the Initial Order of this Court dated February 24, 2010)) owed by the Debtors or the Mises en Cause under the Interim Financing

Credit Agreement will be repaid in full and in cash from the proceeds of the sale of the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) pursuant to the Sale Agreement;

26 *ORDERS* that all Persons shall co-operate fully with the Debtors and the Mises en Cause, the Purchaser, any Designated Purchaser, their respective Affiliates and the Monitor and do all such things that are necessary or desirable for purposes of giving effect to and in furtherance of this Order, the Sale Agreement and the Transaction;

27 *THIS COURT HEREBY REQUESTS* the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or elsewhere, including the United States Bankruptcy Court for the Eastern District of Virginia, to give effect to this Order and to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, the Mises en Cause and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order;

28 *ORDERS* that this Order shall have full force and effect in all provinces and territories in Canada;

THE WHOLE *without* COSTS.

Motion granted.

End of Document

TAB 3

2001 CarswellOnt 4109
Ontario Superior Court of Justice [Commercial List]

Playdium Entertainment Corp., Re

2001 CarswellOnt 4109, [2001] O.J. No. 4459, [2001] O.T.C. 828, 109 A.C.W.S. (3d) 683, 31 C.B.R. (4th) 309

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 Playdium Entertainment Corporation et al.

Spence J.

Heard: November 9, 2001
Judgment: November 15, 2001
Docket: 01-CL-4037

Proceedings: additional reasons to (2001), 18 B.L.R. (3d) 298 (Ont. S.C.J.)

Counsel: *Paul G. Macdonald*, for Covington Fund I Inc.
Gary C. Grierson, for Famous Players Inc.
Gavin J. Tighe, *B. Skolnik*, for Toronto-Dominion Bank
David B. Bish, for Playdium Entertainment Corporation

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Spence J.*:

American Eco Corp., Re (October 24, 2000), Doc. 00-CL-3841 (Ont. S.C.J.) — considered

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) — followed

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

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

Smoky River Coal Ltd., Re, 1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11(3) — considered

s. 11(4) — considered

s. 11(4)(a) — referred to

s. 11(4)(b) — referred to

s. 11(4)(c) — considered

ADDITIONAL REASONS to judgment reported at 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J.), disallowing film distribution company's proposed revision to form of order.

***Spence J.*:**

1 These reasons are supplemental to the reasons for decision which I released November 2, 2001. Reference is made to those reasons. The defined terms employed in those reasons are also used below.

2 Covington and TD Bank propose that the order appointing the interim receiver should contain, as regards the assignment of the Material Agreements (including the Techtown Agreement), the provisions set out in Part V, paragraphs 10 through 13, of the draft order now before the court.

3 This draft order is different from the form of order in the motion record but apparently not different in respect of the matter now in issue between Covington, TD Bank and Playdium on the one side and Famous Players on the other. The hearing on October 29 and 30 did not address the specific terms of the order but it did address the intended effect of the assignment of the Techtown Agreement. It was submitted that the assignment was intended to result in New Playdium, as assignee, becoming bound to perform the Playdium obligations under the agreement from and after the transfer date and becoming entitled to obtain performance by Famous Players of its obligations under the agreement from and after that date. Special provision has been made in respect of s.9(e) defaults, as referred to in the reasons for decision of November 2, 2001. The insolvency defaults of Playdium which led to the CCAA order are in effect stayed, which is not an issue.

The Issue

4 Famous Players now submits that the form of order should be revised to provide that the transfer of assets should, in effect, be made subject to "any and all claims of Famous Payers arising from its contractual entitlements under the Techtown Agreement".

5 Famous Players submits that a provision to that effect is necessary because otherwise it will suffer the loss of certain of those claims and that it ought not to be deprived of those claims by the order of the court and that the court has no jurisdiction to make such an order.

The Terms of the Assignment

6 Famous Players will continue to have any rights of action it now has or which may subsequently arise in its favour against Playdium (subject to any subsequent court determination to the contrary), because nothing in the proposed transaction purports to alter those rights. It is not indicated whether Playdium is to have liability in respect of events occurring after the transfer. In any event, the continuing liability of Playdium is of no practical consequence to Famous Players' concerns, given Playdium's insolvency.

7 As against New Playdium, by reason of paragraph 13 of the draft order, Famous Players would be able to exercise a contractual right to terminate as a result of a default that arises or continue to exist after the transfer, except for an insolvency default.

8 Counsel for Covington said that if there is an existing misrepresentation as to the state of the equipment, that would be brought forward, which I take to mean that the rights of Famous Players in that respect would be preserved for purposes of Famous Players being able to assert those rights against New Playdium.

9 It was submitted that the proposed terms in the draft order would assign the benefit of the agreement without the burden. However, on the basis of the material and the submissions for Covington and TD Bank, the intention is that New Playdium would assume the burden of the agreement as of and from the transfer date in respect of the obligations of performance then in effect or arising subsequently.

10 What New Playdium would not assume or be liable for would be any claims that may arise in the future in favour of Famous Players against Playdium in respect of matters which occurred prior to the transfer and do not constitute a continuing default on the part of Playdium at the time of the transfer.

11 An example of such a contingent claim might be a claim for indemnity by Famous Players against Playdium in respect of damages payable by Famous Players for injury suffered resulting from Playdium's equipment in an occurrence prior to the transfer to New Playdium but not asserted by the claimant until a time subsequent to the transfer. It was submitted that such a claim cannot properly be viewed as part of the continuing burden of the agreement as regards New Playdium because the event giving rise to it antedates New Playdium's involvement. It was also submitted that such a claim is nothing other than a contingent unsecured claim of a person who, in respect of the claim, is a creditor or prospective creditor of Playdium and the claim should not be entitled to any different recognition than other unsecured contingent claims of Playdium. These submissions have merit.

12 For Famous Players it was submitted that New Playdium is seeking to take an assignment of the agreement without being subject to the equities. However, it appears that Famous Players' rights of termination are preserved (except for the insolvency default), in respect of defaults under the agreement existing at or subsequently arising after the transfer date.

13 It was not suggested that New Playdium seeks to take an assignment from Playdium of rights against Famous Players in respect of matters that have occurred previously under the agreement and which might be the subject of a claim of set-off or counterclaim. If that were intended, that might well constitute a case of assignment without being subject to the equities. For that reason, it would be appropriate that New Playdium should not be able to assert such rights against Famous Players without being subject to any such claims (i.e. set-offs and counterclaims) of Famous Players relating to such rights. A provision to that effect ought to be included in the order and it should state that the provision is subject to any further order of the court based on CCAA consideration.

Jurisdiction of the Court Under CCAA

14 As for the jurisdiction of the court to order the assignment on the terms proposed, Famous Players submits that the authority of the court must derive from the CCAA and there is no provision in the CCAA sufficient for this purpose. This raises an issue of fundamental importance about the scope of the CCAA.

15 Section 11(4) of CCAA provides as follows:

> 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.

16 Famous Players now submits that s. 11(4) of the CCAA is not sufficient to give the court authority to make an order which has a permanent effect against a third party and that no other provision of the CCAA assists and neither does the inherent jurisdiction of the court.

17 As the parties presumably realize, the submission of Famous Players goes not just to the terms proposed but to the jurisdiction of the court to order the assignment itself, a matter that was dealt with in the reasons of November 2, 2001. Since the order has not yet been taken out, the matter is still before me. Because of the importance of the issue, it is appropriate to consider the further submissions made at the present hearing.

The Case Law

18 The following excerpts from decisions in cases under the CCAA provide assistance in assessing the extent of the jurisdiction of the court.

19 From *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at pages 33 and 34, by Farley J.; with reference to s. 11 of the Act as it was at that time:

> 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 *Meridan Developments Inc. v. Toronto Dominion Bank*, supra, pp. 219 ff.
>
> 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 Metropolitain v. Wynden* and *Qintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 311-312 (B.C.C.A.).

20 From *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at page 315, by Blair J:

> The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex Ltd.*, supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.

21 From the endorsement in *American Eco Corp., Re* (October 24, 2000), Doc. 00-CL-3841 (Ont. S.C.J.), unreported Endorsement of Farley J.:

> The only fly in the ointment as I was advised was that BFC was not agreeable to giving its consent, which consent is not to be unreasonably withheld as to the transfer of the j.v. contract participation from Industra to members of the Lockerbie Group...
>
> Thus it appears to me that in relative terms, the financial aspects of this transfer vis a vis the joint venture is covered off by the asset/equity substance of the consolidated Lockerbie group and the provision of the completion bond. As well from a work performance aspect, one should note that if Lockerbie was not allowed the transfer, then BFC would be looking at an insolvent j.v. venturer Industra — with the result that as opposed to the Industra team being kept together (as assumed by Lockerbie purchasers), the team would be "let go" and BFC would not have this likely package but would have to go after the disintegrated team on a one by one basis.

> But perhaps more telling is the BFC October 12/2000 letter that "Therefore, we would only be prepared to seventy five (75) percent". Thus it appears that there is no financial or operational reason to refuse the assignment — but merely, a bonus which in my view is not related to any true risk — but merely a "bare consideration" bonus. See paragraph 194 of *Welch Foods v. Cadbury Beverages Canada Inc.* I find that BFC would be unreasonable to withhold its consent if the Lockerbie group provided the aforesaid guarantees and bond.
>
> While it is true that the assignment provision is there irrespective of it being in an insolvency setting or not, it would seem to me that in the fact circumstances prevailing of the insolvency that BFC is attempting to confiscate value which should otherwise be attributable to the creditors.

22 Famous Players is not seeking a bonus for its consent. But its only apparent remaining reason for withholding consent, vis a vis the prospect now afforded of a solvent Playdium business under the new owners, is that it has a better prospective deal with Starburst, which is not dissimilar to the Industra situation.

23 From *Smoky River Coal Ltd., Re*, [1999] A.J. No. 676 (Alta. C.A.) at pages 10 and 13 by Hunt J.A.

> 47 The Appellants do not dispute that the rights of non-creditor third parties can be affected by the s. 11 power to order a stay. They agree this is the clear implication of cases such as Norcen, supra, a decision that has been followed widely and cited with approval by many Canadian courts. But they say in no case has a court altered permanently the contractual rights of a non-creditor and doing so is beyond the scope of the CCAA...
>
> 49 ...Although there are no previous decisions on all fours with the present situation, I read the existing jurisprudence as supportive of my interpretation of s. 11(4).
>
> 50 The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empowers the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceedings" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.
>
> 72 ...I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely affects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the CCAA proceedings. I assume that, in setting the details of the CCAA procedure, the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

24 Paragraph 72 of the *Luscar* decision appears to me not to intend a limitation on the scope of the authority of the court as characterized in paragraph 50, but rather as an expression of the need for caution as to the manner in which that jurisdiction is exercised.

25 It appears to me that the approach taken by courts to the CCAA in the decided cases to which I have been referred is consistent, in terms of the views expressed about the proper application of the Act and the decisions taken in the particular cases, with the approval that is sought here for the assignment of the Techtown Agreement.

Analysis

26 Section 11(4) of the CCAA, in subsections (a) (b) and (c), provides only for orders of a negative injunctive effect until otherwise ordered by the court, in respect of proceedings against the company, i.e. in this case, Playdium. However, the order sought is in effect to require Famous Players to be bound by an assignment of their agreement to New Playdium. It is not readily apparent how such an order could be made under s.11(4) (a)(b) or (c) of the CCAA and no other section of the Act has been mentioned as relevant.

27 Section 11(4)(c) warrants further consideration in this regard. Section 11(4) (c) does not require that an order be made only for a limited period, as s.11(4)(a) appears to do. By its terms it would seem to permit an order to prohibit the commencement of any action, suit or proceeding against Playdium on the basis of the Techtown Agreement including the purported assignment of the agreement to New Playdium. Such an order would seem to be legitimate in its formal compliance with s. 11(4) (c) but it would leave the matter of the status of the Techtown Agreement unresolved with respect to all concerned, unless it could go on, through an ancillary order, to give effective approval to the assignment.

28 Consideration must also be given to the words, in the opening part of s. 11(4) which provide that the court may make an order *on such terms as it may impose* (emphasis added).

29 It is instructive to compare s.11(4) of the CCAA with s.11(3). Section 11(3), relating to initial application court orders also provides that the order may be made on such terms as the court may impose, but the provision adds the qualification "effective for such period as the court deems necessary not exceeding thirty days".

30 It is relevant to the analysis of this issue that Famous Players is not a mere "third party" but is, as counsel said, a significant stakeholder. Under the proposed transaction, Famous Players will retain its rights against Playdium in respect of claims relating to the pre-transfer period and will be entitled to assert, in respect of the period from and after transfer, the same rights against New Playdium as it had against Playdium, including rights to terminate for default, except the insolvency default which occasioned and was the subject of the CCAA stay. So it is difficult to see how the circumstances of Famous Players in respect of the Techtown Agreement could be said to have changed to the detriment of Famous Players in any material way.

31 In substance, what will have happened, to put the matter in terms of s.11(4), is that Famous Players will have been prohibited from taking proceedings in respect of the Techtown Agreement except on and subject to the terms of the assignment to New Playdium and to make that order effective terms will have been imposed by the court which provide for the Techtown Agreement to be assigned by the required date to New Playdium on terms that assure to Famous Players the same rights against New Playdium as it had against Playdium for the post-transfer period and leave Famous Players with its rights against Playdium in respect of the pre-transfer period.

32 In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the court should not take such a restrictive view of the s. 11(4) jurisdiction.

33 Famous Players objects that the order is not only permanent but positive, i.e. rather than simply restraining Famous Players, the order places it under new obligations. It would be more precisely correct to say that the order places Famous Players under the same obligations as it had before but in favour of the new owners of the business. Moreover, the new owners are not third parties but rather the persons who have the remaining economic interests in Playdium.

34 In view of the remedial nature of the CCAA, it does not seem that in principle, a change of this kind, which is a change occasioned only by the ownership changes effected by the compromise itself and one that does not involve any materially greater or different obligations, should be regarded as beyond the jurisdiction created by the CCAA. This view is examined further below with respect to the issue of positive obligations.

The Imposition of Positive Obligations

35 The requested approval of the assignment can be analyzed conceptually as follows in terms of s. 11(4)(c). The court prohibits any proceedings by Famous Players against Playdium (and therefore against its assignees) except on the following terms, i.e., that any such proceeding must be consistent with any assignment of the Agreement approved by the court. It is a

further term, or an order to give effect to the stated terms, that the court approves the assignment to New Playdium for this purpose. An order on these terms conforms to the requirements of s. 11(4)(c).

36 Famous Players objects that the order is also to have positive effect: i.e. it imposes obligations on Famous Players as distinct from merely staying proceedings by it. However, the order as analyzed above could not be effective unless the assignment binds all parties, i.e. Famous Players as well as New Playdium and Playdium.

37 Also, if the order could not bind Famous Players in a positive manner, the result would be that Famous Players could assert rights under the Agreement as assigned but would not be subject to the corresponding obligations under it. This would not be fair.

38 So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s.11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute.

39 Reference has been made in CCAA decisions to the inherent jurisdiction of the court in CCAA matters. The following excerpt from the decision of Farley J. in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List])at pp 184 and 185 is instructive:

> Certainly the non-bankruptcy courts of this country have exercised their inherent jurisdiction to bar claims against specified assets and receivers: see *Ultracare Management Inc. v. Gammon*, order of Austin J. dated October 19, 1993; *Liquidators of Wallace Smith Trust Co. Ltd. v. Dundalk Investment Corp. Ltd.*, order of Blair J. dated September 22, 1993. As MacDonald J. said in *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 at p. 93, [1992] 6 W.W.R. 331, 70 B.C.L.R. (2d) 6 (S.C.):
>
> > I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end: see *Winnipeg Supply & Fuel Co. v. Genevieve Mortgage Corp.*, [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160 (Man. C.A.), at p. 657 [W.W.R.].
> >
> > The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by *Halsbury's* (4th ed., vol. 37, para. 14) as:
> >
> > > ...the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so...
> >
> > Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.
>
> In commenting on this decision and discussing the stay provisions of the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36 ("CCAA") and the *U.S. Bankruptcy* Code, Tysoe J. observed in *Re Woodward's Ltd.* (1993), 17 C.B.R. at pp. 247-8, [1993] B.C.J. No. 42:
>
> > Hence it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In *Westar* Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisitive to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.

> In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s.11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

40 It should be noted that orders made under s.11(4)(c) are to be made "until otherwise ordered by the court". A proviso to this effect (e.g. "subject to any further order of the court pursuant to s.11(4) (c) of the CCAA") should be included in any vesting order to be made in favour of New Playdium with respect to the assignment of the Techtown Agreement.

Whether the Order is Appropriate

41 The circumstances that are relevant in the present case are dealt with in the earlier reasons at paragraphs 24 through 33 and in the preceding paragraphs of the present reasons.

Conclusion

42 Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

43 Provided that terms are added to the assignment and to the vesting order to the effect directed above, Famous Players will not be subjected to an inappropriate imposition or to an inappropriate loss of claims, having regard to the purpose and spirit of the regime created by CCAA and my reasons for decision of November 2, 2001.

44 Accordingly, it is appropriate for the assignment to be approved and it is not necessary to add the clause requested by Famous Players to the form of order now before the court.

45 Counsel may consult me about costs.

Order accordingly.

End of Document

TAB 4

2009 BCSC 1169
British Columbia Supreme Court

Hayes Forest Services Ltd., Re

2009 CarswellBC 2286, 2009 BCSC 1169, [2009] B.C.W.L.D. 7080, [2009] B.C.W.L.D. 7082, [2009] B.C.W.L.D. 7252, [2009] B.C.J. No. 1725, 180 A.C.W.S. (2d) 861, 57 C.B.R. (5th) 52

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-3 And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57 And In the Matter of Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd.

Burnyeat J.

Heard: July 8, 10, 24, 2009; August 14, 2009
Judgment: August 27, 2009
Docket: Vancouver S085453

Counsel: S.C. Fitzpatrick for Teal Cedar Products Ltd.
J.I. McLean for Hayes Forest Services Limited, Hayes Holding Services Limited, Hayes Helicopter Services Ltd.
E.J. Milton, Q.C. for Western Forest Products Inc.
J. Cytrynbaum for G.E. Canada Corporation
J. Mistry for Steelworkers Locals 1-80, 1-85
F.R. Dearlove for Canadian Imperial Bank of Commerce

Subject: Natural Resources; Civil Practice and Procedure; Corporate and Commercial; Public; Insolvency; Estates and Trusts

Table of Authorities

Cases considered by *Burnyeat J.*:

Armbro Enterprises Inc., Re (1993), 1993 CarswellOnt 241, 22 C.B.R. (3d) 80 (Ont. Bktcy.) — referred to

Doman Industries Ltd., Re (2003), 2003 BCSC 376, 2003 CarswellBC 538, 14 B.C.L.R. (4th) 153, 41 C.B.R. (4th) 29 (B.C. S.C. [In Chambers]) — referred to

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to

Exxonmobil Canada Energy v. Novagas Canada Ltd. (2002), 2002 CarswellAlta 739, 30 B.L.R. (3d) 262, [2003] 3 W.W.R. 657, 318 A.R. 99, 10 Alta. L.R. (4th) 80, 2002 ABQB 455 (Alta. Q.B.) — considered

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Hayes Forest Services Ltd. v. Teal Cedar Products Ltd. (2008), [2008] 11 W.W.R. 612, 257 B.C.A.C. 105, 432 W.A.C. 105, 2008 CarswellBC 1325, 2008 BCCA 283, 82 B.C.L.R. (4th) 110 (B.C. C.A.) — referred to

Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd. (1997), 1997 CarswellOnt 4328, 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) — considered

Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd. (1987), 46 R.P.R. 34, 13 B.C.L.R. (2d) 367, 1987 CarswellBC 128 (B.C. S.C.) — referred to

Philip's Manufacturing Ltd., Re (1991), 9 C.B.R. (3d) 1, [1992] 1 W.W.R. 651, 60 B.C.L.R. (2d) 311, 1991 CarswellBC 502 (B.C. S.C.) — referred to

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — followed

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1455202 Ontario Inc. v. Welbow Holdings Ltd. (2003), 2003 CarswellOnt 1761, 33 B.L.R. (3d) 163, 9 R.P.R. (4th) 103 (Ont. S.C.J.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — referred to

s. 11(4) — referred to

Forest Act, R.S.B.C. 1996, c. 157
Generally — referred to

s. 160 — referred to

s. 162 — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
R. 3(3.1) [en. B.C. Reg. 191/2000] — pursuant to

R. 10 — pursuant to

R. 12 — pursuant to

R. 13(1) — pursuant to

R. 13(6) — pursuant to

R. 14 — pursuant to

R. 44 — pursuant to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157
Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally — referred to

s. 4(1) — referred to

s. 5 — referred to

ss. 48-51 — referred to

APPLICATION by company under *Companies' Creditors Arrangement Act* for approval of sale of logging contract; APPLICATION to lift stay of proceedings.

***Burnyeat J.*:**

1 Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd. ("Hayes") apply pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), the *Forest Act*, R.S.B.C. 1996, c. 157 and its Regulations, Rules 3(3.1), 10, 12, 13(1), 13(6), 14 and 44 of the *Rules of Court* and the inherent jurisdiction of the Court for Orders approving the sale of that "certain replaceable stump to dump logging contract" ("Contract") between Hayes Forest Services Limited and Teal Cedar Products Ltd. ("Teal") to North View Timber Ltd. ("North View") relating to Timber Forest Licence 46 ("TRL46"). A $50,000.00 deposit has been paid by North View, and a further $277,000.00 would be paid at the time of the closing contemplated by the purchase. The balance of the purchase price of $1,614,266.00 is to be paid at the rate of $3.00 per cubic metre of the timber harvested under the Contract.

2 In opposing that application, Teal applies to lift the stay of proceedings granted under the July 31, 2008 Order so that Teal may commence arbitration proceedings in respect of the issue of whether it is reasonable to withhold its consent to the assignment of the Contract to North View and adjourning the application of Hayes pending the completion of the arbitration proceedings. In the alternative, Teal requests an order adjourning the application pending the production of certain documentation and information concerning the proposed sale to North View. In the further alternative, Teal seeks an order that a sale of the Contract be approved to 0858434 B.C. Ltd. ("858") for a purchase price of $1,400,000.00, with a down payment of $400,000.00, and with the balance of the purchase price to be paid at the rate of $2.00 per cubic metre of timber harvested under the Contract.

3 As part of a July 31, 2008 Order, a Monitor was appointed to report to the Court and the creditors from time to time. In a June 25, 2009 letter to counsel for Hayes, the Monitor states in part regarding the proposed sale to North View:

> In our opinion, the offer represents a reasonable price for this asset in today's market and we believe that the Company has diligently attempted to market this asset over an extended period of time.

> The purchase price is payable based on Northview logging activity under the contract. We believe that this is the only realistic mechanism to conclude a sale at this value. In order to protect its position and ensure future payments are made, the Company will receive a deposit of $327,000 on completion of the sale, and take security over the contract such that in the event Northview defaults on its future obligations the Company will be in a position to enforce that security and retake ownership of the contract.

Background

4 A "replaceable stump to dump" logging contract in respect of Tree Farm Licence 46 dated January 9, 1990 was entered into by Fletcher Challenge Canada Ltd. as the holder of the contract and Pat Carson Bulldozing Ltd. as the contractor. The interests of the original parties have both been acquired by other parties. The interest of Pat Carson Bulldozing Ltd. was acquired by Hayes Forest Services Limited. The interest of Fletcher Challenge Canada Ltd. was acquired by Teal pursuant to a January 19, 2004 Asset Purchase Agreement and a May 6, 2004 Assignment of Agreement. From January 1, 2008 through August 2, 2008, Hayes logged approximately 43,000 cubic meters of timber for Teal under the Contract.

5 These proceedings under the *CCAA* were commenced on July 31, 2008. At the time of the July 31, 2008 "initial Order", there were four ongoing disputes regarding key operating and financial terms of the Contract. In each dispute, the dispute resolution mechanism under the provisions under the *Forest Act* and its Regulations and under the Contract required mediation, arbitration and court proceedings. The applicable "Dispute Resolution" mechanism under the Contract was set out in paragraph 22.01:

> The Company and the Contractor mutually agree that where a dispute arises between them regarding a term, condition or obligation under this Agreement, and the Work under this Agreement is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, then either party may require the dispute to be resolved in accordance with the Dispute Resolution Clause attached as Schedule "D" to this Agreement.

6 Portions of the Schedule "D" referred to in Paragraph 22.01 of the Contract are attached as Appendix "A" to these Reasons for Judgment.

7 In a September 30, 2008 letter, Hayes notified Teal that Hayes was in the process of seeking expressions of interest with respect to the purchase of the Contract as part of the restructuring contemplated under the *CCAA* filing. In an October 10, 2008 response, counsel for Teal advised counsel for Hayes that:

> Teal is certainly prepared to consider any potential assignee of the contract, and will expect the usual information, including financial information, that would normally be produced in that process.

8 The relationship between Hayes and Teal was such that a number of positions were taken by Teal which resulted in applications by Hayes in the *CCAA* proceedings. Hayes took the position that monies were owing by Teal under the Contract. Against what was owing, Teal attempted to set-off "unliquidated claims" it alleged it had under rate disputes arising out of the Contract. An Order was made on August 15, 2008 prohibiting such a set-off.

9 An attempt was made by Teal along with Western Forest Products Ltd. ("Western") to set aside the *CCAA* proceedings on September 4, 2008. That application was unsuccessful.

10 In October, 2008, Teal reduced the contract rate payable to Hayes for work done under the Contract. An order was made compelling payment on the existing contractual rates.

11 Teal sought to lift the stay of proceedings imposed under the July 31, 2008 Order to permit it to proceed with the various ongoing rate disputes under which it claimed Hayes owed it in excess of $2,500,000. Hayes consented to the lifting of the stay of proceedings to permit those claims to proceed. By November, 2008, Teal had not taken any steps to prosecute the arbitrations contemplated under the Contract. Hayes obtained an order establishing a "bar date" by which time Teal was required to have those claims arbitrated. Before the bar date was reached, Teal and Hayes settled all rate disputes between them on the basis that Hayes was not indebted to Teal. That settlement agreement was approved by the Court in February, 2009.

12 In November 2008, Teal made an offer to Hayes to purchase the Contract for $764,112 with $191,028 on closing and the remainder at the rate of $2.00 per cubic meter of timber harvested under the Contract paid quarterly with the first payment to be made on April 1, 2009. The offer had a December 15, 2009 completion date. The offer provided that Teal would be the successor employer for those employees of Hayes engaged under the Contract who were not eligible for compensation under the B.C. Forestry Revitalization Trust. The offer was open for acceptance until December 1, 2008. The offer was not accepted by Hayes.

13 Under the Contract, Teal was to provide a 2009 logging plan to Hayes. The 2009 logging plan was provided to Hayes on December 9, 2008. On January 12, 2009, a representative of Teal advised a representative of Hayes that Teal was "... suspending operations indefinitely with respect to the work allocated to Hayes ..." Since December, 2008, Teal has not assigned work under the Contract to Hayes. Under the Contract, Hayes is entitled to 34.6% of the stump to dump logging work available relating to TFL46.

Possible Transfer of the Contract to North View

14 The *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/93, and paragraph 18 of the Contract governs the question of whether the Contract can be assigned. Section 4(1) of the Regulation provides: "Every replaceable contract must provide that the interests of the contractor are assignable, subject to the consent of the licence holder, and that consent must not be withheld unreasonably." In accordance with that section, paragraph 18 of the Contract provides:

> 18.01 The Contractor may assign any of its rights or interests under this Agreement, provided the Contractor first obtains the consent of the Company. The Company will not unreasonably withhold its consent to any assignment proposed by the Contractor.
>
> 18.02 Any assignment or transfer by the Contractor of this Agreement or of any interest therein ... without the written consent of the Company will be void....

15 In a May 8, 2009 letter to Teal, Hayes requested the consent of Teal to the assignment of the Contract to North View and advised that they contemplated completing the transfer prior to June 15, 2009. The letter also stated:

16 The outstanding payments under the Purchase Agreement will be secured by a security interest granted by the Purchaser (North View) to Hayes in all of the Purchaser's rights, title and interest in and to the Logging Contract and all proceeds thereof or therefrom.

17 In a May 14, 2009 letter, Hayes provided further information to Teal with respect to North View. In a May 15, 2009 letter, Teal sought information concerning North View and forwarded a questionnaire for completion and return. In a May 22, 2009 letter, Hayes provided the questionnaire to Teal. At that stage, it is clear that not all of the questions set out in the questionnaire had been answered in full. In any event, the questionnaire was not answered to the satisfaction of Teal. Despite the fact that all of the questions it had set out had not been answered, Teal wrote to Hayes on May 29, 2009 advising that it would be withholding their consent to the assignment of the Contract because Teal was of the view that the information provided did not justify providing their consent.

18 The matters which remained of concern to Teal were set out in that letter, being that North View:

> 1. is not a going concern;
>
> 2. when it last operated, was a minor business with revenues of about 1 to 2% of what the Contract currently delivers to the contractor and financial statements that suggest it is financially not viable or capable of performing the Contract;
>
> 3. has no experience performing a Coastal stump to dump contract;
>
> 4. has no equipment or crew or substantive projections of the equipment or crew it needs to perform its obligations under the Contract;

> 5. despite the difficult circumstances in the Coastal forest industry, has no business plan demonstrating that it can viably perform the obligations under the Contract, and no apparent financial resources to fund acquisition of equipment or ongoing expenses of operations; and
>
> 6. has no executed assignment of the Contract conditional on our consent being provided.

19 The letter then detailed the nature of the concerns of Teal. Despite the position having been taken, Hayes continued to provide information and Teal continued to request further information. On June 5, 2009, Hayes provided further information regarding North View and on June 8, 2009, Teal requested further information. In a June 12, 2009 letter, Teal advised that it was continuing to withhold its consent setting out detailed reasons regarding why they were continuing to take that position. The following "summary" was provided by Teal regarding the proposed assignment to North View:

> In summary, the evidence continues to indicate North View is not a suitable assignee. It is a small and virtually inactive company, particularly in the context of the operation required under the Contract. It has no experience performing a Coastal stump to dump operation, let alone a significant one; no experience with a union operation; few financial resources; no commitments from financial institutions or others to provide the necessary working capital to begin operations; and no equipment or crew. Moreover, it has no firm plans to address these issues in the context of the five-year replaceable contract it seeks to obtain.
>
> In our view, these and the other concerns we have raised comprise, at any time, reasonable grounds for us to withhold consent.
>
> However, beyond this, you are proposing to assign this important Contract to a company with these shortcomings at a time when the Coast forest industry is, as you acknowledge, in a severe downturn. In these conditions, few licensees, Teal included, can afford to expend scarce resources dealing with weak or failing contractors. Teal has already incurred significant time and expenses addressing the financial difficulties experienced by you as the current contractor. You incurred these difficulties despite your significant resources and experience in Coastal, unionized, stump to dump operations. If a contractor with significant resources and experience has had difficulties, it is most probable an under-resourced and inexperienced contractor such as North View will also face significant difficulties. Teal is no position to bear the costs in time, money and process of another failure of the contractor holding this Contract. It is unreasonable to expect Teal to put itself in that position by consenting to an assignment to a contractor with North View's shortcomings.

Should the Dispute Go to Arbitration?

20 The "Dispute Resolution Clause" set out in the Contract provides for a period of 30 days for the parties to attempt to resolve any dispute arising, the ability of either party to then refer the matter to arbitration, the ability of each party to have two days to complete their submissions and the requirement that the arbitrator shall hand down the arbitral award within seven days of the completion of the submissions. However, each party is entitled to an "examination for discovery" as that term is defined in the Rules of Court, including discovery of documents and discovery of one officer representative of the other party, to a maximum of three days. Once the award of the arbitrator has been received, a party would be at liberty to apply to this Court to have the award set aside. Any party not satisfied with the decision of a Judge of this Court could then apply to the Court of Appeal to overturn the decision reached by a Judge of this Court. These parties have had a history of a number of their disputes going to the Court of Appeal.

21 Teal contacted Mr. Daniel B. Johnston regarding his availability to act as an arbitrator. Although Mr. Johnston is Counsel for the law firm representing Hayes, Mr. Johnston has served as an mediator and arbitrator in disputes between Hayes and Teal pertaining to the Contract in the past and has advised Teal that it is "highly likely" that he would be available for "a few days over the next six weeks to act as the arbitrator...."

22 But for the filing under the *CCAA*, disputes under the Contract would be governed by the Dispute Resolution provisions under the Contract and under ss. 162 and 160 of the *Forest Act* and ss. 5 and 48 - 51 of the Regulation under that *Act*: *Hayes*

Forest Services Ltd. v. Teal Cedar Products Ltd. (2008), 82 B.C.L.R. (4th) 110 (B.C. C.A.). However, the Court under the *CCAA* has the jurisdiction to decide a dispute which arises under the Contract between Hayes and Teal despite the provincial statutory authority and the terms of the Contract: *Smoky River Coal Ltd., Re* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.).

23 In *Luscar*, *supra*, the Court dealt with the issue of whether a judge had the discretion under the *CCAA* to establish a procedure for resolving a dispute between the parties who had previously agreed under a contract to arbitrate their disputes. The question before the Court was whether the dispute should be resolved as part of the "supervisory role of the reorganization" of the company under the *CCAA* or whether the Court should stay the proceedings while the dispute was resolved by an arbitrator. The decision of the Learned Chambers Judge was that the dispute should be resolved as expeditiously as possible by the Court of Queen's Bench under the *CCAA* proceedings.

24 In upholding the ruling of the Learned Chambers Judge, and concluding that the discretion of the Learned Chambers Judge had been exercised properly, Hunt J.A., on behalf of the Court stated:

> The above jurisprudence persuades me that "proceedings" in s. 11 includes the proposed arbitration under the B.C. Arbitration Act. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated bys. 15(5) of the Rules. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision-making process. Thus, the efficacy of CCAA proceedings (many of which are time-sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-CCAA arbitration. For these reasons, having taken into account the nature and purpose of the CCAA, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under s. 11 of the CCAA.
>
> (at para. 33)
>
> The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empower the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceeding" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.
>
> (at para. 50)

25 I agree that the language of s. 11(4) of the *CCAA* is broad enough to allow this Court to substitute a decision in these proceedings for the arbitration process contemplated under the Contract. In this regard, see also the decision in *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) where the Court allowed the arbitration stipulated under a contract to be replaced by a claim of the landlord being dealt with by the Court under the terms of a plan of arrangement.

26 Of similar effect are other decisions where the contracts between landlords and tenants were affected by the power contained under s. 11 of the *CCAA*: *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]); *Philip's Manufacturing Ltd., Re* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.); *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) with additional reasons at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]); *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.); and *Skeena Cellulose Inc., Re* (2003), 13 B.C.L.R. (4th) 236 (B.C. C.A.).

27 *Skeena*, *supra*, dealt with the interaction between logging contracts established under the *Forest Act* and the scheme of judicial stays and creditors' compromises available under the *CCAA*. The Court authorized the termination of contracts similar to the Contract here despite the provisions in the contracts themselves. In this regard, Newbury J.A. on behalf of the Court stated at paragraph 37:

> In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in *Re Dylex Ltd.* (1995) 31 C.B.R. (3d) 106 (Ont. Ct.

(Gen. Div.)), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in *Dylex*, at para. 8; *Re T. Eaton Co.* (1999) 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; *Smoky River Coal*; *supra*, and *ReArmbro Enterprises Inc.* (1993) 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in *Syndicat national de l'amianted'Asbestos inc. v. Jeffrey Mines Ltd*, [2003] Q.J. No. 264, the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

28 In May 31, 2008 Oral Reasons for Judgment (Supreme Court of British Columbia Action No. S080752). In *Backbay Retailing Corporation, and Gray's Apparel Company Ltd.*, the Court approved an assignment of the interests of the Petitioner's interests in leases in certain retail outlets to a third party despite the objection of the landlords and despite the fact that leases provided that the approval or consent of the landlords was required prior to the transfer, assignment or assumption of the leases. The new tenants were not prepared to agree to be liable for past defaults under the leases and required that all of the rights under the leases including those that were expressed to be personal to Petitioners be assigned to them. The petitioners had asserted no common law entitlement to the orders that they sought but, rather, had submitted that the Court has a statutory discretion under the *CCAA* to make the orders sought so long as that is consistent with the objectives of the *CCAA* to facilitate a restructuring. Citing with approval the decision in *Playdium*, *supra*, Hinkson J. concluded that the proposed purchase and sale agreement was in the best interests of the Petitioners, would afford significant benefits to their landlords, and that the refusal of the proposed tenants to assume the liabilities of the immediate predecessors was not a reasonable basis upon which to withhold consent.

29 Hinkson J. also cited with approval the decision of Kent J. in *Gauntlet Energy Corp., Re* (2003), 336 A.R. 302 (Alta. Q.B.): "Interference with contractual rights of creditors and non-creditors is consistent with the objective of the CCAA to allow struggling companies an opportunity to survive whenever reasonably possible." (at para. 58). Hinkson J. also relied on the decision in *Doman Industries Ltd., Re* (2003), 14 B.C.L.R. (4th) 153 (B.C. S.C. [In Chambers]) and *T. Eaton Co., Re*, [1997] O.J. No. 6388 (Ont. Gen. Div.). In July 11, 2008 Oral Reasons for Judgment, Levine J.A. denied leave to appeal the Order of Hinkson J.

30 I have concluded that I should override the arbitration provisions in this Contract to allow a Court determination of the issue of whether Teal is or is not unreasonably withholding its approval for the transfer of the Contract to North View. First, I am satisfied that the determination of this issue is less expeditious and more expensive under the arbitration provisions. The past history between these parties is that the arbitration proceedings have been both lengthy and incredibly costly. In the context of a previous application, counsel for Teal indicated that the cost of an arbitration might approach $250,000.00. Second, an arbitration award is subject to judicial review, further lengthening and complicating the decision-making process. Third, there are time constraints imposed by North View regarding the purchase of this Contract. Those deadlines cannot be met by the arbitration proceedings contemplated under the Contract. Fourth, there is no reason why the question whether the consent has been unreasonable withheld or not cannot be determined by the Court. Although a number of arbitrators are experienced in dealing with the type of issues that would arise in the arbitration of other issues which have arisen between Hayes and Teal, the question of whether consent has been unreasonably or reasonably withheld is an issue which is commonly dealt with by the Court and requires no forestry related expertise. Taking into account all of those factors, I am satisfied that the issue raised by the dispute between the parties should be dealt with by this Court in the *CCAA* proceedings. The application of Teal to lift the stay of proceedings granted on July 31, 2008 is dismissed.

Can the Court Approve the Assignment of the Contract, Even Though It Is Not Unreasonable for Teal to Withhold Its Consent?

31 I am satisfied that the *CCAA* Court can approve an assignment even if I reach the conclusion that it is not unreasonable for Teal to withhold its consent. In *Playdium*, *supra*, Spence J. dealt with a proposal to transfer all of the assets of Playdium to a new corporation as the only viable alternative to a liquidation of the assets of the company. Under that tenancy, an agreement could

not be assigned without the consent of Famous Players, which consent could not be unreasonably withheld. Famous Players had argued that it had not been properly requested to consent and it had not received adequate financial information and assurances regarding management expertise and how their agreement might be brought into good standing. Save for the *CCAA* Order in place, Spence J. concluded that there could be no assignment but that the *CCAA* Order affords "... a context in which the court has the jurisdiction to make the order." Spence J. concluded that he had jurisdiction to compel the assignment of leases over the objections of other parties and held that he had the jurisdiction to approve the assignment of leases even though it would not have been unreasonable for Famous Players to withhold its consent to the assignment. I am prepared to adopt the path taken by Spence J. in *Playdium*, *supra*, if I conclude that it is reasonable for the consent of Teal to be withheld.

Has the Consent of Teal Been Unreasonably Withheld?

32 The determination of the reasonableness of withholding consent is a question of whether a reasonable person would have withheld consent in the circumstances. The determination will be dependent on such factors as the commercial realities of the marketplace, the economic impact of the assignment, and the financial position of the proposed assignee. *Exxonmobil Canada Energy v. Novagas Canada Ltd.*, [2003] 3 W.W.R. 657 (Alta. Q.B.), dealt with the assignment of the management of the interest of Exxonmobil Canada Energy in a gas processing plant. Regarding the argument that the assignment had been unreasonably withheld, Park J. concluded that it was reasonable to have refused the consent to the assignment and, in these regards, made the following statements:

> The reasons for including a consent requirement in the assignment was to allow each party the opportunity of reasonably assessing any future contractual partners. If a proposed assignee did not meet the criteria reasonably required by the other party, the assignment should not proceed. (at para. 54)
>
> On an objective basis it is entirely reasonable to enquire into the financial capability of a proposed business partner in determining whether to accept that party as a business partner. There must be adequate information provided to EMC regarding the strength of the Solex financial covenant. Further, if NCLP and Solex wish to argue (as they did) that EMC would be in a better position with the financial covenant of each of Solex and NCLP, in the absence of Solex being novated into the Agreement, then it would be reasonable for Solex and NCLP to provide adequate information on the strengths of those financial covenants rather than leaving EMC to surmise.
>
> However, it is not the final strength or weakness of Solex's financial covenant which prevents consent. Rather it is the failure of Solex to provide relevant and material financial information which will enable EMC to assess the financial strength of Solex on a go forward basis. The absence of financial information provided by Solex means that EMC has reasonably withheld its consent. EMC in the circumstances cannot satisfy itself as to the financial ability of Solex to meet its prospective obligations as the proposed assignee under the Agreement.
>
> Finally, I note that EMC has not withheld its consent for improper reasons. As I noted previously, the desire of EMC to resolve outstanding issues between itself and NCLP is a separate issue, and is not tied to EMC's desire to receive proper and adequate financial information from Solex as a separate entity. EMC did not withhold its consent in order to secure additional benefits as argued by Solex and NCLP.
>
> (at paras. 58-60)

33 The reasonableness of withholding consent has often been considered in the context of leases. In *1455202 Ontario Inc. v. Welbow Holdings Ltd.* (2003), 9 R.P.R. (4th) 103 (Ont. S.C.J.), Cullity J. concluded that the landlord was justified in its decision based on the lack of information concerning the business experience of the proposed assignee stating:

> In determining whether the Landlord has unreasonably withheld consent, I believe the following propositions are supported by the authorities cited by counsel and are of assistance:
>
> 1. The burden is on the Tenant to satisfy the court that the refusal to consent was unreasonable: *Shields v. Dickler*, [1948] O.W.N. 145 (C.A.),at pages 149-50; *Sundance Investment Corporation Ltd. v. RichfieldProperties Limited et*

al, [1983] 2 W.W.R. 493 (Alta. C.A.), at page 500;cf. *Welch Foods Inc. v. Cadbury Beverages Canada Inc.* (2001), 140 O.A.C. 321 (C.A.), at page 331. In deciding whether the burden has been discharged, the question is not whether the court would have reached the same conclusion as the Landlord or even whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent: *Whiteminster Estates v. HedgesMenswear Ltd.* (1972), 232 Estates Gazette 715 (Ch. D.), at pages715-6; *Zellers Inc. v. Brad-Jay Investments Ltd.*, [2002] O.J. No. 4100 (S.C.J.), at para. 35.

2. In determining the reasonableness of a refusal to consent, it is the information available to - and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material: *Bromley ParkGarden Estates Ltd. v. Moss*, [1982] 2 All E.R. 890 (C.A.), at page 901-2 per Slade L.J. Further, it is not necessary for the Landlord to prove that the conclusions which led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable person in the circumstances: *Pimms, Ltd. v. Tallow Chandlers in the City of London*, [1964] 2 All E.R. 145 (C.A.), at page 151.

3. The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the Tenant to assign and that of the Landlord to withhold consent. The Landlord is not entitled to require amendments to the terms of lease that will provide it with more advantageous terms: *Jo-EmmaRestaurants Ltd. v. A. Merkur & Sons Ltd.* (1989), 7 R.P.R. (2d) 298 (Ont. Div. Ct.); *Re Town Investments Ltd.*, [1954] Ch. 301 (Ch. D.) -but, as a general rule, it may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion: *Federal Business Development Bank v. Starr* (1986), 55 O.R. (2d) 65 (H.C.), at page 72. A refusal will, however, be unreasonable if it was designed to achieve a collateral purpose, or benefit to the Landlord, that was wholly unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease: *Bromley Park Garden EstatesLtd. v. Moss*, above, at page 901 per Dunn L.J.)

4. A probability that the proposed assignee will default in its obligations under the lease may, depending upon the circumstances, be a reasonable ground for withholding consent. A refusal to consent will not necessarily be unreasonable simply because the Landlord will have the same legal rights in the event of default by the assignee as it has against the assignor: *Ashworth Frazer Ltd., v. Gloucester City Council*, [2001] H.L.J. 57.

5. The financial position of the assignee may be a relevant consideration. This was encompassed by the references to the "personality" of an assignee in the older cases see, for example, *Shanley v. Ward* (1913), 29 T.L.R. 714 (C.A.); *Dominion Stores Ltd. v. Bramalea Ltd.*, [1985] O.J.No. 1874 (Dist. Ct.)

6. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including the commercial realities of the market place and the economic impact of an assignment on the Landlord. Decisions in other cases that consent was reasonably, or unreasonably, withheld are not precedents that will dictate the result in the case before the court: *Bickel et al. v. Duke ofWestminster et al.*, [1976] 3 All E.R. 801 (C.A.), at pages 804-5;*Ashworth Frazer Ltd. v. Gloucester City Council*, above, at para. 67;*Dominion Stores Ltd. v. Bramalea Ltd.*, above, at para. 25.

(at para. 9)

34 Of the six general areas of concern raised by Teal, the objection that there was no executed Assignment of Contract is no longer an issue as an executed assignment conditional on the consent of Teal has now been provided.

35 Regarding the concern regarding the lack of equipment or crew, I am satisfied that this should not be an impediment to the assumption of the contractual obligations by North View. Some of the crew that will be required has already been contracted through Horsman Trucking Ltd. ("Horsman"), who has entered into a services subcontract with North View. In general, I accept the evidence of Donald P. Hayes who makes this statement in his July 2, 2009 Affidavit:

At present there is no work available under the Teal Bill 13 Contract and no equipment is currently required. When logging recommences under the Contract, the Purchaser will be able to acquire equipment either directly or be able to subcontract out portions of the work (as is currently done by Hayes) and service the Contract without difficulty.

There is currently a surplus of logging equipment on Vancouver Island. The most recent auction of equipment was held in June, 2009 by Ritchie Bros. in Duncan, BC. The sale prices at that recent Ritchie Bros.' auction were extremely low and any contractor on the Island will have no difficulty acquiring the necessary equipment at some of the lowest historic prices for that equipment.

There is current an abundance of logging equipment from Coastal BC operations that has been returned to various leasing companies. I am aware of certain lessors that are now re-leasing this equipment without the requirement of a down payment by the new lessee. Essentially the new lessee simply makes payments based on the returned value of the equipment. This will make it very easy for any contractor or subcontractor to acquire any equipment needed to service a contract for logging or road building.

36 I am also satisfied that North View sets out a satisfactory explanation regarding equipment in its July 16, 2009 letter to Teal:

I have made inquiries in the market as to the availability of equipment. Hayes has all of the equipment for sale that I would require to start the operations. I confirm that in the event of short notice from Teal that Hayes would rent or rent to purchase suitable equipment as required including a grapple yarder, log loaders, back spar, cat etc.

Finning also has new and used inventory in stock. I am also aware of several contractors who are shut down and will likely have equipment for short term rent or rental purchase.

Pick up trucks are readily available for purchase or lease in the market and Hayes will sell me the industrial box liners required.

Until there is a logging plan and a start date, I have not tried to firm up equipment arrangements. Without the logging plan and a start date, I cannot be sure of the equipment actually required or the timing of that requirement.

37 Regarding the concern that North View is not a going concern, while it is clear that North View is an entity which is not presently operating, my review of the experience of the principals of North View allows me to conclude that the principals have sufficient experience to allow North View to be successful in performing the work that is provided by Teal under the Contract. The principal of North View has over 35 years of logging experience and worked as a subcontractor for Hayes between 2005 and 2008 on the work required under the Contract. As well, North View will have the assistance of the principals of Hayes, and has contracted with an experienced hauler to subcontract the hauling of timber to the dump operations.

38 I also accept the following evidence regarding the proposed operations of North View under the Contract which is set out in the July 24, 2009 Affidavit of Donald P. Hayes:

The contract will be operated as follows:

(a) Falling. The falling work under the contract is currently done by a sub contractor, Gemini, they had done the falling work for years, and will continue to do so for North View Timber Ltd. ("North View");

(b) Yarding. Mr. Horsman is one of the most experienced yarders on the coast and has done this work on this contract for Hayes. He will do this work;

(c) Loading. This work will be contracted out to an experienced loader. The loading takes place in close proximity to the yarding and can be supervised by the yarder, in this case Mr. Horsman;

> (d) Hauling. The hauling will be subcontracted to Horsman Trucking Ltd, a well know and experienced hauler on the Island. I have know them for years and they have a good reputation.

39 I am satisfied that Teal should have no hesitation in concluding that the equipment, crew and expertise to undertake the work required under the Contract will be available to North View. In this regard, I am also mindful of the fact that, if North View fails to perform under the Contract, Hayes will be in a position to take back the Contract and then perform the logging required under the Contract. In the past, Teal was satisfied with the performance of Hayes under the Contract, and should have some solace that Hayes will be in a position to perform under the Contract if North View does not.

40 Regarding the concern of Teal that North View is not financially capable, I note that a $50,000.00 deposit has already been paid, that an agreement has been reached with Horsman to sell to Horsman the hauling subcontract for $400,000.00 so that the further $277,000.00 required at the date of closing will be available, that $100,000.00 will be set aside to meet capital requirements, and that preliminary discussions are underway with B.D.C. and Caterpillar Finance regarding financing once any logging plan proposed by Teal is known. In this regard, I am satisfied that the payments under the Contract must be made by Teal every two weeks, and I take into account the advice received from North View that its expenses need to be paid monthly so that the working capital that would otherwise be required to service this Contract is reduced.

41 Finally, Teal is concerned that North View has no "business plan". I am satisfied that this concern is answered in the July 16, 2009 letter from North View to Teal:

> I have not regularly prepared business plans. My practice is to study the logging plan, when I receive it and then determine the equipment and people that I need. I then closely supervise the production and all purchases to control the cash flow.
>
> I have had Mr. Donald P. Hayes assist me with the preparation of the
>
> Business Plan. Mr. Hayes is a Chartered Accountant and the President of Hayes Forest Services Limited, the current operator of the contract. This is a much more detailed plan than I could produce myself. I have reviewed it with Mr. Hayes and based on my knowledge I confirm that in my opinion the Business Plan reflects the economic conditions in the industry and uses reasonable assumptions concerning rates, costs, financing and working capital needs including the payment of the $3.00 per cubic meter promissory note to Hayes. I further confirm that I believe that the contract is viable at market rates.
>
> This Business Plan has not been independently reviewed but was developed in conjunction with Mr. Hayes who has operated this contract for over 20 years and is extremely knowledgeable in respect of this contract. Once the actual logging plan is provided, it will likely require material changes to the Business Plan.

42 As well, it should be obvious to Teal that it is difficult to put forward a "business plan" when the 2009 and 2010 work allocated under the Contract is not known. While it is clear that North View does not have the present capacity or business plan in place to handle a cut of 125,000 cubic metres, it is also clear that there is no current work under the Contract and this yearly volume has not been required of Hayes for over three years.

43 In the context of leases, the Court must look at all of the circumstances to determine if consent has been reasonably withheld: *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1987), 13 B.C.L.R. (2d) 367 (B.C. S.C.) at para. 51. The *Forest Act* and the *Timber Harvesting Regulations* require similar contracts to be assignable and puts the onus on licence holders such as Teal to justify their refusal to consent to any assignment. Taking into account all of the circumstances surrounding this question, I am satisfied that Teal has not shown that it is reasonable to withhold its consent. At the same time, I am satisfied that Hayes has met the burden of showing that a reasonable person would not have withheld consent.

44 In this regard, I have concluded that at least part of the refusal to provide consent was designed by Teal to achieve a collateral purpose that is wholly unconnected with the bargain between Teal and Hayes. In November 2008, Teal made an offer to purchase the Contract for $764,112.00. From this, I can conclude that Teal believes that there is significant value to it if the Contract cannot be performed by Hayes or if Teal can otherwise obtain the benefits of the Contract in order that they can be

transferred to another operator. Teal has also provided an offer through 858 to purchase the Contract for $1,400,000.00. This is further evidence of the value to Teal of stopping a transfer of the Contract to North View in the hope that the Contract will revert to it by virtue of the inability or unwillingness of Hayes to perform under the Contract.

What Should Be Made of the Offer of 858?

45 The offer of 858 was open for acceptance until August 11, 2009 and was directed to the attention of Hayes Forest Services Ltd. ("Offer"). It was a condition of the Offer that Horsman enter into a replaceable services sub-contract with 858 in the same form as the Horsman contract with North View. As at August 14, 2009, no confirmation had been received from Horsman that they were prepared to accept that stipulation. The purchase price under the Offer is $1,400,000, with $400,000 at the time of closing (being the amount that would be available to 858 under the Horsman contract) and with balance of the purchase price by a promissory note for $1,000,000.

46 In response to the concern raised by Hayes that Teal would be in a position to control the amount of work that would be available to 858 so that 858 would not be in a position to pay the balance due and owing under the Promissory Note quickly or at all, the following provision was inserted after the first draft of the Offer was forwarded to Hayes:

> 2.11 **Amount of Work Dispute.** Teal and the Purchaser agree that if, at any time before the Purchaser pays the Contract Purchase Price in full, the Vendor reasonably believes that Teal has failed to meet its obligation under Paragraph 2.05 of the Teal Contract, the Vendor may give notice (the "**Dispute Notice**") to Teal and the Purchaser specifying in reasonable detail the particulars of the default, in which case a dispute is deemed to exist between the Vendor and Teal under this Agreement, which dispute, despite the reference in Paragraph 2.05 of the Teal Contract to resolving amount of work disputes in accordance with the Contract Regulation (as defined in the Teal Contract), will be resolved as follows:
>
> (a) as soon as reasonably practicable after the notice is given, the Vendor and Teal will:
>
> (i) cause their respective appropriate personnel with decision making authority to meet in an attempt to resolve the dispute through amicable negotiations; and
>
> (ii) provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate those negotiations;
>
> (b) if the dispute is not resolved by such negotiations within 15 days of the Vendor having given the Dispute Notice, either the Vendor or Teal may, within 30 days after the Dispute Notice was given, deliver a Notice (a "Mediation Notice") to the other party requiring the dispute to go to mediation, in which case the Vendor and Teal will attempt to resolve the dispute by structured negotiation with a mediator administered under the Commercial Mediation Rules of the British Columbia International Commercial Arbitration Centre before a mediator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre;
>
> (c) if:
>
> (i) the dispute is not resolved within 14 days after the mediator has been agreed upon or appointed under Section 2.11(b); or
>
> (ii) the mediation is terminated earlier as a result of a written notice by the mediator to the Vendor and Teal that the dispute is not likely to be resolved through mediation, either the Vendor or Teal may, not more than 14 days after the conclusion of the period referred to in Section 2.1 1(c)(i) or the receipt of the notice referred to in Section 2.11(c)(ii), as the case may be, commence arbitration proceedings by giving a notice of arbitration to the other party, in which case the dispute will be referred to and finally resolved by arbitration administered under the British Columbia International Commercial Arbitration Centre's Shorter Rules for Domestic Commercial Arbitration before an arbitrator agreed upon by the Vendor and Teal or, failing agreement, appointed by the

Centre, and the decision of the arbitrator will be final and binding on the Vendor, the Purchaser and Teal, but will not be a precedent in any subsequent arbitration under this Section;

(d) pending resolution or other determination of the dispute under this Section, the Purchaser will continue to perform its obligations under the Teal Contract; and

(e) if, as a result of the resolution or other determination of the dispute under this Section, Teal allocates an additional amount of work to the Purchaser, the Purchaser will perform that additional amount of work in accordance with the terms of the Teal Contract.

47 Some of the objections to the Offer are summarized in the August 10, 2009 letter from counsel for Hayes to counsel for Teal:

As you are aware our client has entered into a contract with North View Logging Ltd. to sell that contract to North View. Having done so Hayes is not in a position to enter into a second contract to sell the same contract.

Apart from that problem, there are a number of other issues that make this offer problematic from Hayes' perspective, these include:

1. The proposed purchase price is substantially less than the North View offer, some $250,000. In addition, to obtain an extension of the closing of the transaction to North View, Hayes has had to agree to a break fee of $50,000 payable to North View if Hayes sells the contract to Teal. A copy of that agreement is enclosed;

2. The rate of payment on the Promissory Note is only $2 per M3 as opposed to the $3 per M3 to be paid by North View;

3. The Purchaser is a shell company incorporated on August 6, 2009 that appears to have no assets. It is proposed that the sale proceeds derived from the Horsman Trucking subcontract be used to fund the cash component of the transaction, with the balance to be paid by the $2 per M3 payable under the Promissory Note. The Purchaser will not have any of its assets invested in this contract and is not at any financial risk. There is no consequence to the Purchaser simply walking away from its obligations and allowing Teal to cancel the underlying Bill 13 contract for non performance;

4. The only security proposed is from what appears to be a shell company and even that is limited to the underlying Bill 13 contract itself. If the Purchaser, a Teal nominee, defaults in performance, Teal will cancel the Bill 13 contract, and the "security" held by Hayes would vanish;

5. Payment under the promissory note is wholly dependent upon Teal allocating the amount of work that the holder of the Bill 13 contract is entitled to. An arm's length purchaser, such as North View, has a strong economic interest in enforcing its rights as against Teal to ensure that it receives the volume of work it is entitled to. The Purchaser proposed by Teal is a Teal nominee and will have no such economic interest. Teal has taken every step it can in the course of the CCAA proceedings to terminate the Bill 13 contract. We see no reason to expect that this attitude will change once both sides of the Bill 13 contract are in the control of Teal;

6. Teal can arbitrarily reduce and or delay the amount payable under the Promissory Note by allocating work that could or should be done by Hayes to other contractors working for Teal on TFL 46. It is doing so now;

7. There is no evidence of the ability of the Purchaser to do the work required under the contract, its finances, equipment or personnel.

48 Many of the objections raised by Hayes regarding the Offer parallel many of the objections raised by Teal regarding the North View offer. While Teal and 858 have common shareholders, none of the information that Teal required of North View is available to Hayes or the Court regarding the Offer of 858. If it is the position of Teal that the Court should approve the offer of

858 because it is reasonable to do so and is in the best interests of the creditors of Hayes to do so, then I conclude that Teal has not met the burden of showing that it is. In the context of whether withholding consent has been reasonable or not, a number of factors apply. If those factors are applied to the application of Teal, it is clear that a reasonable person would withhold consent and it is clear that approval of the offer of 858 would not be ordered. It is difficult for Teal to argue on one hand that a reasonable person would withhold consent for the proposed assignment to North View but, at the same time, the Court should approve the proposed transfer to 858, even though there is even less information available to allow the Court to reasonably assess the future contractual partner recommended by Teal. There is no information regarding the financial capability of 858. There is nothing which would allow the Court to satisfy itself as to the financial ability of 858 to meet its prospective obligations. As well, the Court is not in a position to approve offers where the offer continues to contain conditions precedent that have not been met. In this regard, the approval of Horsman to "transfer" its contract with Hayes to 858 so that 858 receives $400,000.00 remains an unfulfilled condition.

49 There are also significant economic advantages to the creditors of Hayes to accept the North View offer and for the Court to make a finding that the consent of Teal has been unreasonably withheld so that the assignment of the Contract to North View should be approved. First, the offer of North View is $214,266.00 better. Second, the balance of the purchase price is paid off more quickly as the payment will be based on $3.00 per cubic metre, whereas the payment of the balance of the purchase price contemplated by 858 will be based on a payment of $2.00 per cubic metre. Third, if there is default, it is clear that the creditors of Hayes will benefit if there is a reversion of the Contract to Hayes. I cannot conclude that is the case with the Offer. Fourth, it may well be that Hayes will have to pay a $50,000.00 cancellation fee to Horsman if the Offer is approved by the Court.

50 It also should be noted that 858 is bringing none of its own money "to the table". Rather, all of the $400,000.00 that will be due on closing comes from the funds that would be available from Horsman if Horsman is prepared to enter into a similar subcontract with 858. As well, all payments of the $2.00 per cubic metre contemplated under the Offer are wholly dependent upon Teal allocating the amount of work that is contemplated under the Contract. North View has a stronger economic interest to enforce its rights against Teal to ensure that it receives the volume of work it is entitled to under the Contract whereas 858 has no such economic interest. As well, what is proposed under the Offer provides ample opportunity for the arbitration process and appeals therefrom to delay the question of the allocation of work to 858.

51 I am satisfied that Teal has unreasonably withheld its consent for the assignment of the Contract from Hayes to North View. Even if I had not reached that conclusion, I am satisfied that the advantages to the creditors of Hayes far outweigh any disadvantages so that I should exercise the discretion available to me under the *CCAA* to approve the assignment of the Contract despite the consent of Teal being reasonably withheld. The sale to North View Timber Ltd. of the replaceable stump to dump logging contract between Hayes Forest Services Limited and Teal Cedar Products Ltd. is approved. The application by Teal Cedar Products Ltd. to approve a sale of that contract to 858434 BC Ltd. is dismissed.

52 The parties will be at liberty to speak to the question of costs.

Application for approval of sale granted; application to lift stay of proceedings dismissed.

APPENDIX "A"

Schedule "D"

Dispute Resolution Cause Timber Harvesting Contracts

Dispute Resolution

Where the Work performed by the Contractor under an agreement with the Company is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, and where a dispute arises over a term, condition or obligation under the agreement which cannot be resolved amicably between the parties within 30 days of the dispute arising, the Company and the Contractor mutually agree that either party may invoke the following dispute resolution provisions:

(a) The parties may by agreement first attempt to resolve their dispute with the assistance of a single professionally qualified mediator. The mediator shall be chosen by agreement between the parties. In the event that the parties fail to agree on the choice of a mediator, then a mediator shall be chosen by a mutually agreed upon third party unrelated to the parties to this agreement.

(b) In the event that the mediator is unsuccessful in assisting the parties to resolve their dispute within 5 days of the commencement of the mediation, or either party wishes the dispute to proceed directly to arbitration, then either party may require by notice in writing that the. matter be referred to arbitration as provided for by the provisions of the Dispute Resolution Clause.

Where either party to the agreement has commenced an action in a court of competent jurisdiction regarding a term, condition or obligation under the agreement, and the action is in good standing, then the parties to the agreement shall not invoke or continue with the dispute resolution provisions of the agreement until such time as the court action has been finally concluded. Where a court issues a judgement in an action regarding a term, condition or obligation under the agreement and the judgement becomes final, then that judgement shall constitute the final resolution of the dispute between the parties.

Arbitration

The Company and the Contractor mutually agree that where a dispute is to be resolved by arbitration (the "Arbitration Proceeding"), it shall be so resolved by a single arbitrator to be agreed on by the parties. If the parties are unable to agree on the choice of arbitrator then a single arbitrator shall be selected pursuant to the Commercial Arbitration Act, S.B.C. 1996, c. 3 as amended.

The Arbitration Proceeding shall be conducted in Vancouver British Columbia or such other place as the parties may agree in writing. The rules of procedure for the Arbitration Proceeding shall be those provided for in the Commercial Arbitration Act for domestic commercial arbitrations. as amended by the provisions of the Dispute Resolution Clause.

Each party shall only be entitled to two days to complete their submissions to the arbitrator. Each party shall have the right of reply to the submission of the other for one hour only. ....

The arbitrator shall hand down the arbitral award within 7 days of the completion of the submissions and reply of the parties.

Discovery

Each party shall be entitled to the following pre-arbitration "examination for discovery" rights, as that term is defined in the Rules of Court of the Supreme Court of British Columbia:

(a) discovery of all relevant documents pertaining directly to the issue or issues in dispute between the parties;

(b) discovery of one officer or representative of the other party;

(c) each party shall be allowed to discover the officer or representative of the other for no more than one day for each $50,000.00 in dispute to a maximum of three days, and where no amount has been specified, then each party shall only be allowed a maximum of two days of discovery of the officer or representative of the other.

Costs of the Dispute Resolution

Where a provision in the agreement has been referred to mediation or arbitration by the Company or the Contractor, then any funds actually in dispute shall be deposited in an interest bearing trust account. Upon the resolution of the dispute, the funds and interest thereon shall be paid to the Company and the Contractor proportionately as agreed between the parties, or as directed by the arbitration award.

The Company and the Contractor shall pay all costs associated with the provision of mediation or arbitration services forthwith upon an invoice for these services being rendered, equally, except as provided for below.

The Company and the Contractor shall each bear their own costs in resolving the dispute between them, with the following exceptions:

(a) Where one party is found, on a balance of probabilities

(i) not to have pursued its various rights and responsibilities under this agreement in good faith,

(ii) not to have used all reasonable effort to resolve its dispute with the other through mediation with a minimum of delay and expense, or

(iii) not to have used all reasonable effort to resolve its dispute with the other by the Arbitration Proceeding with a minimum of delay and expense,

then the offending party shall pay the disbursements and one half of all other direct expense incurred by the other;

(b) Where both parties are found, on a balance of probabilities, to have acted in bad faith or made less than all reasonable effort to resolve their dispute, then each party shall bear its own direct costs and disbursements and shall share equally all costs associated with the conduct of the mediation and/or the Arbitration Proceeding; and

(c) For the purposes of sub-paragraphs (a) and (b) of this paragraph, the costs associated with the provision of mediation and arbitration services and the Conduct of the Arbitration Proceeding shall be considered a disbursement.

Any award or division of costs referred to herein shall constitute a liquidated debt immediately due and payable by the one party to the other, and shall be satisfied to the extent possible by the indebted party to the other from the funds held in trust and referred to above.

Failure of Arbitration

Where the Contractor and the Company agree in writing, or where the arbitrator is unable to resolve the dispute, then the dispute shall be resubmitted for arbitration in accordance with the provisions of the Dispute Resolution Clause of the agreement.

Where the inability of the arbitrator to resolve the dispute arises out of the misconduct of one of the parties in the dispute or a party affiliated with one of the parties in the dispute, then the dispute shall be deemed to be settled in favour of the other party with that other party entitled to their full costs arising out of the dispute as a liquidated debt.

End of Document

TAB 5

2009 CarswellOnt 8071
Ontario Superior Court of Justice

Nexient Learning Inc., Re

2009 CarswellOnt 8071, [2009] O.J. No. 5507, 183 A.C.W.S. (3d) 636, 62 C.B.R. (5th) 248

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 Nexient Learning Inc. and Nexient Learning Canada Inc.

H.J Wilton-Siegel J.

Heard: November 30, 2009
Judgment: December 23, 2009
Docket: CV-09-8257-00CL

Counsel: George Benchetrit for Nexient Learning Inc., Nexient Learning Canada Inc.
Margaret Sims, Arthi Sambasivan for Global Knowledge Network (Canada) Inc.
Catherine Francis, David T. Ullman, Melissa McCready for ESI International Inc.
Lynne O'Brien for Monitor

Subject: Insolvency

Table of Authorities

Cases considered by *H.J Wilton-Siegel J.*:

Playdium Entertainment Corp., Re (2001), [2001] O.T.C. 828, 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — followed

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.) — followed

Statutes considered:

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

s. 11(4) — referred to

s. 11(4)(c) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01(6) — referred to

MOTION by debtor for order permanently staying licensor's right to terminate license agreement and authorizing assignment of license agreement to proposed assignee.

H.J Wilton-Siegel J.:

1 On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statutue.

Background

The Parties

2 Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

3 Global Knowledge is a corporation incorporated under the laws of Ontario carrying on business across Canada.

4 ESI is a United States corporation having its head office in Arlington, Virginia.

5 Nexient was the largest provider of corporate training and consulting in Canada. It had three business lines, which had roughly equal revenue in 2008: (1) information technology ("IT"); (2) business process improvements ("BPI"); and (3) leadership business solutions. The BPI line of business was principally comprised of three subdivisions — business analysis ("BA"), project management ("PM") and IT Infrastructure Library Training.

6 The curriculum and course materials offered by Nexient in respect of its PM programmes were licenced to Nexient by ESI pursuant to an agreement dated March 29, 2004, as extended by a first amendment dated January 16, 2006 (collectively, the "PM Agreement"). The PM Agreement granted Nexient an exclusive licence to offer the ESI PM course materials in Canada in return for royalty payments. The PM Agreement expires on December 31, 2009.

7 Similarly, the curriculum and course materials offered by Nexient in respect of its BA programmes were licenced to Nexient by ESI pursuant to an agreement dated January 16, 2006 ("BA Agreement"). The BA Agreement was executed in connection with a transaction pursuant to which ESI received the rights to BA materials from a predecessor of Nexient in return for payment of $2.5 million and delivery of the BA Agreement to the Nexient predecessor. The BA Agreement provided for a perpetual, exclusive royalty-free licence to use such BA materials in Canada.

8 ESI is a significant participant in the market for project management, business analysis, sourcing management training and business skills training. It offers classroom, on-site, e-training and professional services. To deliver its services, ESI typically enters into distributorship arrangements with distributors in countries around the world, which it describes as "strategic partnering arrangements". In Canada, ESI considers Nexient to be its "strategic partner". That arrangement is defined by the PM Agreement, the BA Agreement and, according to ESI, oral understandings and a course of dealings between ESI and Nexient that collectively constitute an "umbrella" agreement.

9 Global Knowledge Training LLC, a United States corporation ("Global Knowledge U.S."), is the parent corporation of Global Knowledge. Together with its affiliates, Global Knowledge U.S. is one of ESI's largest competitors.

Relevant Provisions Of The BA Agreement

10 Despite the grant of a perpetual licence in section 2.1, the BA Agreement provides for three "trigger" events giving rise to a right to terminate the contract. Of the three termination events, the following two are relevant:

> 6. Term and Termination

> 6.2 Upon written notice to [Nexient], ESI will have the right to terminate this Agreement in the event of any of the following:
>
> . . . . .
>
> 6.2.2 [Nexient] commits a material breach of any provision of this Agreement and such material breach remains uncured for thirty (30) days after receipt of written notification of such material breach, such written notice to include full particulars of the material breach.
>
> 6.2.3 [Nexient] (i) becomes insolvent, (ii) makes an assignment for the benefit of creditors, (iii) files a voluntary petition in bankruptcy, (iv) an involuntary petition in bankruptcy filed against it is not dismissed within ninety (90) days of filing, or (v) if a receiver is appointed for a substantial portion of its assets.

11 Pursuant to section 8.5, the BA Agreement is not assignable by either party except in the event of a merger, acquisition, reorganization, change of control, or sale of all or substantially all of the assets of a party's business.

12 Section 8.7 of the BA Agreement provides that the agreement is governed by the laws of Virginia in the United States. Section 8.8 provides that the federal and state courts within Virginia have the exclusive jurisdiction over any dispute, controversy or claim arising out of or in connection with the BA Agreement or any breach thereof.

Proceedings under the CCAA

13 On June 29, 2009, Nexient was granted protection under the CCAA by this Court. The initial order made on that day was subsequently amended and restated on two occasions, the latest being August 19, 2009 (as so amended and restated, the "Initial Order").

14 On July 8, 2009, the Court approved a stalking horse sales process involving a third party offeror. The sales process was conducted by the monitor RSM Richter Inc. (the "Monitor"). Both ESI and Global Knowledge participated in that process. In this connection, ESI signed a non-disclosure agreement on July 13, 2009 (the "NDA").

15 By letter dated July 24, 2009 (the "Termination Notice"), ESI purported to terminate the BA Agreement effective immediately on the grounds of breaches of sections 6.2.2 and 6.2.3 of the Agreement (the "Insolvency Defaults"). In respect of section 6.2.2, ESI alleged that the disclosure to potential purchasers of Nexient's assets of the BA Agreement, and of information relating to the BA materials offered by Nexient thereunder, constituted a breach of the confidentiality provisions of the BA Agreement. By the same letter, ESI purported to grant Nexient a temporary licence to continue acting as ESI's distributor in Canada for the BA materials solely to fulfill Nexient's existing obligations. Such licence was expressed to terminate on August 21, 2009.

16 No similar termination notice was sent in respect of the PM Agreement. As noted, the PM Agreement expires on December 31, 2009.

17 It is undisputed that Nexient owes ESI approximately $733,000 on account of royalties for the use of ESI's corporate training materials. ESI says that this amount includes royalties in respect of two BA courses that are not covered by the BA Agreement and are therefore payable in accordance with the "umbrella" agreement that governs the strategic partnership between ESI and Nexient.

18 By letter dated July 28, 2009, counsel for Nexient informed ESI of its client's view that, given the stay of proceedings in the Initial Order, the Termination Notice was of no force or effect.

19 The existence and content of the Termination Notice and the letter of Nexient's legal counsel dated July 28, 2009 were communicated orally to Brian Branson ("Branson"), the chief executive officer of Global Knowledge U.S., by Donna De Winter ("De Winter"), the president of Nexient, some time between July 28 and July 31, 2009. Both documents were sent to Global Knowledge on or about August 25, 2009.

The Sale Transaction

20 Global Knowledge was the successful bidder in the sales process. In connection with the sale transaction, Nexient and Global Knowledge entered into an asset purchase agreement dated August 5, 2009 (the "APA") and a transition and occupation services agreement dated August 17, 2009 (the "Transition Agreement").

21 Under the APA, Global Knowledge agreed to acquire all of Nexient's assets as a going concern pursuant to the terms of the APA (the "Sale Transaction"). As Global Knowledge had not completed its due diligence of Nexient's contracts, the APA provided for a ninety-day period after the closing date (the "Transaction Period") during which, among other things, Global Knowledge could review the contracts to which Nexient was a party and determine whether it wished to take an assignment of any or all of such contracts. The APA also provided that, prior to the closing date, Global Knowledge had the right to designate any or all of the contracts as "Excluded Assets" which would not be assigned at the closing but would instead be dealt with pursuant to the Transition Agreement. At the Closing, Global Knowledge elected to treat all contracts of Nexient (the "Contracts") as "Excluded Assets".

22 Significantly, section 2.7 of APA provided that the purchase price would not be affected by designation of any assets, including any Contracts, as "Excluded Assets":

> **2.7 Purchaser's Rights to Exclude**
>
> Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Assets, including any Contracts, from the Transaction at any time prior to Closing upon written notice to the Vendors, whereupon such Assets shall be Excluded Assets, provided, however, that there shall be no reduction in the Purchase Price as a result of such exclusion. For greater certainty, the Purchaser may, at its option, submit further and/or revised lists of Excluded Assets at any time prior to Closing.

Accordingly, there was no reduction in the purchase price under the Sale Transaction as a result of the exclusion of the BA Agreement from the assets that were sold and assigned to Global Knowledge at the Closing (as defined below).

23 It was a condition of completion of the Sale Transaction in favour of both parties that a vesting order, in form and substance acceptable to Nexient and Global Knowledge acting reasonably, be obtained vesting in Global Knowledge all of Nexient's right, title and interest in the Nexient assets, including the Contracts to be assumed, free and clear of all "Claims" (as defined below). As described below, the Sale Order (defined below) addressed the vesting of all Contracts that Nexient might decide to assume at the end of the Transition Period. It did not, however, include a provision that permanently stayed ESI's rights of termination based on the Insolvency Defaults.

24 Under section 4 of the Transition Agreement, Global Knowledge had the right to review the Contracts and was obligated to notify Nexient of the Contracts it wished to assume not less than seven days prior to the end of the Transition Period. Under section 14(ii), Nexient was obligated to assign to Global Knowledge all of Nexient's right, benefit and interest in such Contracts provided all required consents or waivers in respect of the Contracts to be assigned had been obtained. Upon such assignment, section 6 provided that Global Knowledge would assume all obligations and liabilities of Nexient under such Contracts, whether arising prior to or after Closing. The Transition Agreement further provided that, during the Transition Period, Global Knowledge would perform the Contracts on behalf of Nexient.

25 On or about August 17, 2009, subsequent to submitting Global Knowledge's bid and prior to the hearing of this Court to approve the Sale Transaction, Branson spoke to John Elsey ("Elsey"), the president and chief executive officer of ESI, regarding ESI's right to terminate the BA Agreement. ESI continued to assert that it was entitled to terminate the BA Agreement on the grounds of the Insolvency Defaults. Branson advised Elsey that Global Knowledge had a different interpretation of ESI's right to terminate the BA Agreement. As discussed below, it is unclear whether the parties were addressing the same issue in this and other conversations described below regarding the right of ESI to terminate the Agreement. However, nothing turns on this issue. During that conversation, Branson advised Elsey of the proposed closing date of August 21, 2009 for the Sale Transaction.

26 Branson also spoke to De Winter and Scott Williams of Nexient regarding the enforceability of the Termination Notice (in respect of De Winter, it is unclear whether this is a reference to the telephone conversation referred to above or another conversation). Branson says he was also advised by Nexient's counsel that ESI could not terminate the BA Agreement under Canadian bankruptcy law. In addition, Branson says he also spoke to a representative of the Monitor and its legal counsel. He says their view on the enforceability of the Termination Notice was consistent with the view expressed by De Winter.

27 Following this conversation, Elsey wrote a letter to Branson in which he reiterated that the parties did not agree on the legal effect of the Termination Notice. Elsey went on in that letter to extend the purported interim licence of the BA materials granted in the Termination Notice to September 30, 2009 in view of future discussions concerning possible future collaboration between ESI and Global Knowledge scheduled for the week of September 7, 2009.

Court Approval Of The Sale Transaction

28 The Sale Transaction, together with the APA and the Transition Agreement, was approved by the Court on August 19, 2009 pursuant to the sale approval and vesting order of that date (the "Sale Order"). ESI did not file an appearance in the CCAA proceedings of Nexient. Nexient did not give notice of the Court hearing to ESI. Therefore, ESI did not receive notice of the Court hearing on August 19, 2009 nor did it receive copies of the APA or the Transition Agreement at that time. It did not attend the hearing to approve the Sale Transaction and therefore did not oppose the Order.

29 The Sale Order provided that, upon delivery of the "First Monitor's Certificate" at the time of Closing, the Nexient assets other than the Contracts would vest in Global Knowledge free and clear of any "Claims". Similarly, the Sale Order provided that, upon delivery of the "Second Monitor's Certificate" at the end of the Transition Period, the Contracts to be assigned to Global Knowledge would vest free and clear of any "Claims".

30 "Claims" is defined in the Sale Order to be all security interests, charges or other financial or monetary claims of every nature or kind. "Claims" do not, however, include any rights of termination of the BA Agreement in favour of ESI based on the Insolvency Defaults. Global Knowledge does not dispute this interpretation. Accordingly, it has brought this proceeding to seek an order directed against ESI permanently staying ESI's rights to terminate the BA Agreement on such basis after the proposed assignment to Global Knowledge.

31 The Sale Transaction closed on August 21, 2009 (the "Closing"). Global Knowledge paid the full purchase price for the Nexient assets at that time. At the same time, the Monitor delivered the First Monitor's Certificate thereby transferring the assets to Global Knowledge free of all Claims.

32 At the time of the Sale Order, the stay under the Initial Order was also extended until the end of the Transition Period. The stay and the Transaction Period were further extended until the hearing of this motion and, at such hearing, were further extended until two days after the release of this Endorsement.

33 Nexient does not intend to file a plan of arrangement under the CCAA. As a result of the completion of the Sale Transaction, it no longer has any operations and all employees as of November 1, 2009 were assumed by Global Knowledge on that date. Upon the lifting of the stay at the end of the Transition Period, it is understood that Nexient intends to make an assignment in bankruptcy.

Events Subsequent To The Closing

34 At the time that Global Knowledge and Nexient entered into the APA, Global Knowledge marketed a few BA courses in Canada, although it says its courses approached the subject-matter in a different manner from ESI's BA courses. Global Knowledge did not offer PM courses in Canada. However, it had access to PM materials from Global Knowledge U.S. that it believed it could readily adapt for the Canadian market.

35 According to De Winter, Nexient did not regard Global Knowledge as a competitor in Canada in the BA and PM product lines at that time. By acquiring the Nexient assets including the BA Agreement, however, Global Knowledge became, in effect, a new competitor in the Canadian market for BA and PM products. At the same time, as described below, ESI, which had previously marketed its products through its strategic arrangement with Nexient, also decided to enter the Canadian market in its own right.

36 Although it had not yet determined to reject the PM Agreement, on or about September 4, 2009, Global Knowledge also commenced discussions with McMaster University regarding recognition of its training facilities and eventual accreditation of its proposed PM courses. The BA and PM courses of ESI offered by Nexient were already accredited by McMaster University.

37 Subsequent to August 21, 2009, ESI and Global Knowledge had discussions regarding their possible future relationship. In a telephone conference on September 11, 2009, attended by representatives of ESI, Global Knowledge and Nexient, Global Knowledge indicated that it did not intend to acquire the PM Agreement.

38 As a result, given the anticipated competition with Global Knowledge, ESI concluded that it would need to find a new strategic partner in Canada or begin delivering its products directly in Canada. It chose to pursue the latter option. In response to ESI commencing direct operations in Canada, Global Knowledge and Nexient commenced the motions described below seeking various orders pertaining to the BA Agreement and the NDA including injunctive relief relating to alleged breaches of these agreements.

39 In early November 2009 Global Knowledge formally advised Nexient pursuant to the Transition Agreement that it proposed to take an assignment of the BA Agreement and the NDA but did not propose to take an assignment of the PM Agreement. Its notice was unconditional — that is, it did not make such assignment conditional on receiving the requested relief in this proceeding.

40 ESI opposes the assignment of the BA Agreement to Global Knowledge on the basis sought by Global Knowledge, which would permanently stay the exercise of any termination rights of ESI based on the Insolvency Defaults.

Procedural Matters

Motions Brought By The Parties

41 Nexient commenced this motion on October 30, 2009. The notice of motion seeks a declaration that the BA Agreement and the PM Agreement remain in force and are both assignable to Global Knowledge, and an order restraining ESI from interfering with Nexient's rights under the BA Agreement and PM Agreement and from carrying on BA and PM training programmes in Canada.

42 On November 3, 2009, Global Knowledge served its own notice of motion seeking the same relief. In addition, Global Knowledge seeks a declaration that the NDA is assignable to it, an order restraining ESI from breaching certain covenants in the NDA that Global Knowledge alleges have been breached relating to ESI's commencement of direct operations in Canada since September 21, 2009, and ancillary relief related to such order.

43 ESI responded by a notice of cross-motion dated November 17, 2009 seeking an order staying or dismissing the Nexient and Global Knowledge motions to the extent the relief sought (1) relates to contracts that have not been assigned to Global Knowledge; (2) does not benefit the Nexient estate; and (3) relates to contracts subject to the exclusive jurisdiction of the courts of Virginia in the United States. ESI takes the position that the BA Agreement is not assignable to Global Knowledge, that the relief sought by Nexient and Global Knowledge benefits only Global Knowledge, and that all matters pertaining to the BA Agreement are within the exclusive jurisdiction of courts in Virginia pursuant to the exclusive jurisdiction clause in that agreement. It therefore also seeks an order staying the motions of Nexient and Global Knowledge insofar as they involve the BA Agreement pending a determination by the appropriate court in Virginia of the disputes, controversies or claims pertaining to the BA Agreement asserted by the parties in their respective motions.

Narrowing Of The Issues For The Court On This Hearing

44 As a result of the following three developments before and at the hearing of this motion, the issues for the Court on this motion have been narrowed considerably.

45 First, as mentioned, Global Knowledge has advised Nexient that it does not intend to assume the PM Agreement. Accordingly, neither Nexient nor Global Knowledge now seeks any relief in respect of the PM Agreement.

46 Second, the parties agreed at the hearing that, on the filing of the Second Monitor's Certificate, the NDA would be assigned to Global Knowledge.

47 Third, the motion of Global Knowledge for injunctive relief in respect of alleged interference with Global Knowledge's rights under the BA Agreement, and in respect of alleged breaches of the NDA, was adjourned to December 21, 2009, by which date it is intended that Global Knowledge shall have commenced a separate application for the relief it seeks against ESI apart from the declaration sought on the present motion.

48 I think it is inappropriate for the Global Knowledge motion respecting injunctive relief to be adjudicated in the Nexient CCAA proceedings. Global Knowledge's claim flows from its rights against ESI under the BA Agreement and the NDA. This claim is entirely a matter between ESI and Global Knowledge. It therefore falls outside the Nexient CCAA proceedings, which will effectively terminate upon the lifting of the stay under the Initial Order at the end of the Transition Period. While Global Knowledge will not formally take an assignment of the BA Agreement and the NDA until such time, I accept that Global Knowledge may have a sufficient interest in these agreements at the present time to obtain injunctive relief, in view of Nexient's obligation under the Sale Agreement to assign them to Global Knowledge. However, to obtain such relief, Global Knowledge must first commence its own proceeding against ESI and move for such interim injunctive relief in that proceeding.

49 Similarly, ESI's request for a stay of the Global Knowledge motion is adjourned to the hearing of the motion on December 21, 2009. At that time, ESI is at liberty to bring any motion in the proceeding to be commenced by Global Knowledge it may choose addressing the jurisdictional issues raised in its cross-motion in the present proceeding.

Issues On This Motion

50 Accordingly, the issues that are addressed on this motion are:

1. Is the BA Agreement assignable to Global Knowledge, on its terms or by order of this Court?

2. If it is, is Global Knowledge entitled to an order in connection with such assignment that permanently stays the exercise of any rights that ESI may have to terminate the BA Agreement based on the Insolvency Defaults?

51 The issue of the assignability of the BA Agreement has two elements — the assignability of the agreement as a matter of interpretation of the contract which, as noted, is governed by the laws of the Virginia, and the authority of the Court to authorize an assignment to Global Knowledge if the contract is not assignable on its terms. In view of the determination below regarding the authority of the Court to authorize an assignment, it is unnecessary to consider the assignabilty of the BA Agreement as a matter of contractual interpretation and I therefore decline to do so.

52 I would note, however, that if I had concluded that Global Knowledge was entitled to the requested relief effectively deleting the Insolvency Defaults, I would also have concluded, for the same reasons, that Global Knowledge was entitled to an order authorizing the assignment of the BA Agreement to the extent it was not otherwise assignable under the laws of Virginia.

Applicable Law

Authority Of The Court To Grant The Requested Relief

53 The Court has authority to authorize an assignment of an agreement to which a debtor under CCAA protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the CCAA proceedings: see *Playdium Entertainment Corp., Re*, [2001] O.J. No. 4459 (Ont. S.C.J. [Commercial List]).

54 In *Playdium*, Spence J. grounds that authority in the provisions of section 11(4)(c) of the CCAA and, alternatively, in the inherent jurisdiction of the Court. The reasoning, which I adopt, is set out in paragraphs 32 and 42:

> So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute....
>
> Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

Consideration Of The Applicable Standard In Previous Decisions

55 However, the test that must be satisfied in order to obtain an order authorizing assignment remains unclear after *Playdium*. In that decision, it was clear that the sale of the debtor's assets could not proceed without the requested order. This would seem to suggest that demonstration of that fact was the applicable test.

56 On the other hand, in para. 39, Spence J. quotes with approval a statement of Tysoe J. in *Woodward's Ltd., Re*, [1993] B.C.J. No. 42 (B.C. S.C.) that suggests that it may not be a requirement that the insolvent company would be unable to complete a proposed reorganization without the exercise of the Court's discretion. Tysoe J. framed the test as requiring a demonstration that the exercise of the Court's discretion be "important to the reorganization process". In my opinion, this is the governing test.

57 In addition, in para. 43 of *Playdium*, Spence J. appears to grant the requested relief after determining that the relief did not subject the third party to an inappropriate imposition or an inappropriate loss of claims having regard to the overall purpose of the CCAA of allowing businesses to continue.

58 Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

59 It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

60 This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

61 Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

62 However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

63 There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss. It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.

Analysis and Conclusions

Preliminary Observations

64 Before addressing the issues on this motion, I propose to set out the following observations which inform the conclusions reached below.

65 First, being a perpetual, royalty-free licence, the BA Agreement represents a valuable contract to Nexient except to the extent that ESI is entitled to terminate it. It represents part of the sales proceeds received in an earlier transaction by Nexient for the BA materials developed by a predecessor of Nexient. While there is an issue as to whether the current BA materials are still subject to the BA Agreement, that issue requires a determination of facts that cannot be made in the present proceeding. It must be addressed, if necessary, in another proceeding. For the purposes of this motion, I assume that such materials could be subject to the BA Agreement, which would therefore have significant value in Nexient's hands.

66 Second, Global Knowledge was well aware that ESI's position was that it had the right to terminate the BA Agreement. As a consequence, Global Knowledge was also well aware that ESI would use any means available to it to terminate the BA Agreement after it had been assigned to Global Knowledge if ESI and Global Knowledge were unable to establish a satisfactory working relationship. Global Knowledge did not, however, seek any protections against such action by ESI in either the APA or the Sale Order.

67 In particular, as mentioned, section 4.3 of the Sale Agreement provided that the obligation of the parties to close the Sale Transaction was subject to receipt of a vesting order of this Court satisfactory in form to both parties. However, the Sale Order

that was actually sought by Nexient and Global Knowledge, and was granted by the Court, did not address deletion of any of ESI's termination rights based on the Insolvency Defaults.

68 There is no explanation in the record for the failure of the Sale Order to address this matter notwithstanding the fact that, as a matter of law as set out above, there could have been no misunderstanding as to the legal requirement for terms in the Sale Order imposing a permanent stay if, at the time of the sale approval hearing, Global Knowledge in fact intended to receive a transfer of the BA Agreement on such terms. As both parties were represented by experienced legal counsel, I assume the form of the Sale Order reflected a conscious decision on the part of Global Knowledge not to address this issue explicitly at the time of the hearing.

69 Third, while Nexient and Global Knowledge allege that their intention at the time of the hearing was that the BA Agreement was to be assigned on the basis that ESI's rights to terminate it on the basis of the Insolvency Defaults would be permanently stayed, there is no evidence of such intention in the record apart from Branson's bald statements to this effect in his affidavit, which is insufficient.

70 Moreover, the evidence of Branson exhibits a lack of precision regarding his understanding of the applicable law and Global Knowledge's intentions. In both his affidavit and the transcript of his cross-examination, Branson refers to his understanding that the stay in the Initial Order prevented ESI from terminating its contractual relationship with Nexient without an order of the Court. In his affidavit, he added that he understood that, as a consequence, to the extent that contracts did not contain restrictions on assignment, they could be assigned to the successful bidder and would remain in force and effect after the assignment. This implies that he thought the Initial Order would also prevent ESI from terminating its contractual relationship with Global Knowledge, as the assignee of the Nexient contracts, without a further order of the Court.

71 As *Playdium* demonstrates, there are two different issues involved here. The stay in the Initial Order did prevent ESI from terminating the BA Agreement under Ontario Law as long as the CCAA proceedings are continuing. Indeed, because delivery of the Termination Notice contravened the Initial Order, I think the Termination Notice must be regarded as totally ineffective under Ontario Law with the result that ESI could not rely on it subsequently if ESI became entitled to terminate the BA Agreement after the assignment to Global Knowledge or otherwise.

72 The stay did not, however, by itself have the consequence of staying enforcement of any right of ESI to terminate the BA Agreement based on the Insolvency Defaults after it had been assigned to Global Knowledge. That is, of course, the reason for the present motion. Any such order would constitute, in effect, a re-writing of the BA Agreement to remove ESI's rights. As *Playdium*illustrates, a further order of the Court would be required to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults. Not only did Global Knowledge not seek such an order as mentioned above, it also did not require Nexient to give ESI formal notice of the Court hearing to approve the Sale Transaction.

73 In the absence of such notice, I do not think any order of this Court to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults would have been binding on ESI, even though ESI had not filed an appearance in the CCAA Proceedings and had been orally advised as to the date of the hearing. Nexient and Global Knowledge therefore cannot argue that ESI's failure to oppose the Sale Order at the hearing constituted "lying in the weeds," which disentitles ESI to sympathetic consideration on this motion. Moreover, in addition to the fact that it is not established on the record that either Nexient or Global Knowledge specifically advised ESI of an intention to seek an order permanently staying ESI's termination rights based on the Insolvency Defaults, the Sale Order does not have that effect in any event, as mentioned above. There was, therefore, nothing for ESI to oppose on this issue even if it had appeared at the approval hearing.

74 Fourth, given the structure of the Sale Transaction, there is no impact on the Sale Transaction of an exclusion of the BA Agreement from the Contracts assigned to Global Knowledge. Global Knowledge has already paid the purchase price under the Sale Agreement. The effect of section 2.7 of the APA is that there will no adjustment to the purchase price if, as transpired, Global Knowledge was unable to reach agreement with ESI on acceptable terms for the assignment of the BA Agreement. There is similarly no material impact on Nexient's customers - the BA product will be delivered in Canada by either Global

Knowledge or ESI depending upon the outcome of this litigation. As such, at the present time, the requested relief will have no impact on the CCAA proceedings, or on the distributions realized by Nexient's creditors under these proceedings.

75 Fifth, although there is no contractual connection between the subject matter of the PM Agreement and the BA Agreement, there is a significant operational relationship between the PM and BA product lines. They comprise two of the three product lines of Nexient's BPI division. Both products are licenced by Nexient from ESI. In many instances, both products are marketed to the same customers. In addition, Nexient's facilitators provide educational services in respect of both products. There may also be certain economies of scale associated with offering both products. In her cross-examination, De Winter summarized the situation succinctly in stating that "one product line can't operate without the other".

76 There is also a significant business relationship between ESI and Nexient. Nexient was the Canadian distributor through which ESI marketed and sold its BA and PM products. At the present time, Nexient owes ESI in excess of $733,000 in respect of royalties payable under the PM Agreement. ESI says that this amount also includes royalties for two BA courses that are not governed by the BA Agreement. It also asserts that the BA materials described in the BA Agreement no longer are included in the current BA materials as a result of subsequent revisions. There are, therefore, several issues relating to the provision of the BA materials currently distributed by Nexient that would remain to be resolved if the BA Agreement were transferred to Global Knowledge.

77 Sixth, in his affidavit, Branson gave three reasons for Global Knowledge's decision not to assume the PM Agreement: (1) the PM Agreement terminates on December 31, 2009; (2) Global Knowledge would have to assume the amounts outstanding under the PM Agreement; and (3) Global Knowledge has access to similar course materials for which it would pay lower or no royalties. Although Branson says that the outstanding liability under the PM Agreement was not the principal factor in Global Knowledge's decision, it would appear that it was an important consideration.

78 There is no suggestion that Global Knowledge was unaware of the amount outstanding under the PM Agreement at a time of signing the APA or at the time of Closing. Although Global Knowledge did not decide against taking an assignment of the PM Agreement until later, it appears that, from the time of signing the APA if not earlier, Global Knowledge proceeded on the basis that it was not prepared to assume the PM Agreement unless ESI agreed to significantly different terms, including a reduction in the amount owing under the agreement and a reduction in the royalties payable for the PM materials. If it had intended instead to assume the PM Agreement with its outstanding liability, or to keep open that possibility, Global Knowledge could simply have provided for a reduction in the purchase price in such amount in the event it assumed the PM Agreement.

79 This is significant because, as discussed below, the issue before the Court would have been considerably different, and simpler, if Nexient had proposed to assign, and Global Knowledge had proposed to assume, both the PM Agreement and the BA Agreement as they stand. In such event, the question of whether a purchaser could "cherry pick" contracts of a debtor with the same third party on a sale of the debtor's assets would not have arisen. Moreover, given the expiry date of the PM Agreement and Global Knowledge's need to adapt the PM courses to which it had access, it would have been able to implement essentially the same business plan as it is currently proposing to implement without the need for any Court order provided its interpretation of the conflict provisions in the BA Agreement is correct. In such circumstances, the principal effect of assuming the PM Agreement would have been the assumption of the liability of approximately $733,000 owed to ESI, which Global Knowledge alleges was not the principal factor in its decision to reject the PM Agreement.

80 Seventh, Global Knowledge seeks relief that is related solely to the BA Agreement. It treats the BA Agreement and the PM Agreement as completely unrelated to each other. This treatment is not entirely unjustified in view of the wording of these agreements. Section 6.6.1 of the BA Agreement does not expressly refer to the provision of services or products that compete with PM products delivered under the PM Agreement. Whether this interpretation is affected by the course of dealing or the alleged "umbrella" agreement between the parties is not an issue that can be addressed on this motion.

81 However, given that, on this motion, Global Knowledge and Nexient seek relief that requires the exercise of the Court's discretion under section 11(4) of the CCAA or pursuant to its inherent jurisdiction, I think the contractual arrangements between the parties, while important, are not the only factors to be considered by the Court. Instead, the Court should look to the entirety

of the arrangement between ESI and Nexient and assess (1) the extent of the adverse impact on ESI of the order sought by Nexient and Global Knowledge and (2) whether there are any alternatives to the proposed relief that achieve the same result with less encroachment on ESI's rights.

Analysis and Conclusions

82 The applicants' request for relief is denied for the following three reasons.

83 First, because of the structure of the Sale Transaction, the requested relief will not further the CCAA proceedings and will have no impact on Nexient or its stakeholders. The Sale Transaction has been completed and cannot be unwound. At the present time, the only impact of the proposed relief is to adversely affect ESI's rights to terminate the BA Agreement after the proposed assignment to Global Knowledge.

84 The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. The time to request such relief was either at the time of negotiation of the Sale Agreement or at the time of the Sale Order. Given the terms of the Sale Transaction - in particular, the fact that the purchase price has been paid and is not subject to adjustment in respect of any exclusion of assets - it is impossible to demonstrate that the requested order is important to the reorganization after closing of the Sale Transaction. The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent necessary to further the reorganization process. Accordingly, it also cannot be said that such interference with ESI's contractual rights does not entail an inappropriate imposition upon ESI.

85 Second, there is no evidence that Nexient and Global Knowledge intended at the time of entering into the Sale Transaction, or at the time of the approval hearing, to assign the BA Agreement to Global Knowledge on the basis of a permanent stay preventing ESI from terminating the BA Agreement based on the Insolvency Defaults. There is, therefore, no basis for an order rectifying the Sale Order to include such provisions at the present time. In reaching this conclusion, the following considerations are relevant.

86 The structure of the Sale Transaction contradicts the existence of the alleged intention. At Closing, Global Knowledge elected to treat all Contracts as "Excluded Assets". Consequently, given the structure of the Sale Transaction, Global Knowledge assumed the risk that it might be unable to reach an acceptable accommodation with ESI with whatever consequences that entailed. The evidence before the Court does not explain the thinking behind Global Knowledge's decision to take this calculated risk but the actual reason is irrelevant to the determination of this motion. It is impossible to conclude that the parties intended at the time of Closing to transfer the BA Agreement on the basis of a permanent stay given that Global Knowledge had not yet reached a conclusion as to whether it even wished to take the BA Agreement. The most that can be said is that the parties may have had an intention to transfer the BA Agreement on the basis of a permanent stay *if* Global Knowledge decided later to take an assignment. This does not constitute an intention at the time of the Court approval hearing. It also begs the question of why, even on such a conditional intention, the parties did not seek appropriate conditional relief at the time of the hearing on the Sale Order.

87 More generally, the evidence suggests that, at the time of Closing, Global Knowledge had not decided between two options — to attempt to renegotiate the BA Agreement and the PM Agreement on favorable terms, including the financial arrangements, or to assume the BA Agreement only and seek a Court order permanently staying ESI's rights of termination based on the Insolvency Defaults. Global Knowledge pursued the first option until the September 11, 2009 telephone conference, after which it appears to have decided to pursue the second. On this scenario, Global Knowledge cannot say that, at the time of Closing or of the Court approval hearing, it intended to take an assignment of the BA Agreement on the basis of a permanent stay.

88 In any event, to obtain rectification, Nexient and Global Knowledge must demonstrate that ESI shared the alleged intention, or alleged understanding, or that ESI acquiesced in the alleged intention or understanding. They cannot do so on the evidence before the Court.

89 It is impossible to infer from the relative significance of the BA Agreement to Nexient that all the parties must have understood that Global Knowledge would be receiving an assignment of the BA Agreement free of any risk of termination by ESI. The BA product line represented less than one-third of the total revenues of Nexient. There is no evidence in the record of its relative contribution to profit. The only evidence are unsupported statements in Branson's affidavit to the effect that the BA Agreement was a "highly material contract" in Global Knowledge's consideration of its bid for the Nexient assets. There is nothing in the description of the conversation between Elsey and Branson on or about August 17, 2009 or otherwise in the record to support Branson's statement.

90 Global Knowledge submits that this intention should be inferred from the fact that the Sale Transaction was on a "going-concern" basis. Such an inference might be reasonable if Global Knowledge was, in fact, purchasing all of the Nexient assets on a "going-concern" basis. Its failure to take all of the Contracts, including the PM Agreement, however, excludes such an inference in the present circumstances.

91 Third, Global Knowledge has failed to demonstrate circumstances that would justify the exercise of the Court's discretion to order a permanent stay against ESI in respect of its rights of termination based on the Insolvency Defaults in the BA Agreement given Global Knowledge's decision not to take an assignment of the PM Agreement. In reaching this conclusion, I have taken the following factors into consideration.

92 I acknowledge that there are factors weighing in favour of authorizing an assignment of the BA Agreement on the requested terms of a permanent stay against ESI. As mentioned, the BA Agreement appears to constitute a valuable asset of Nexient. It is in the interests of Nexient's creditors that value be received for such asset by way of an assignment. In addition, the sale price for the Nexient assets, including the BA Agreement, was arrived at in a sales process previously approved by this Court. There is no suggestion that the process lacked integrity, that the price for the assets did not represent fair market value or that it was an improvident sale.

93 However, by taking an assignment of the BA Agreement but not the PM Agreement, ESI is adversely affected in two respects.

94 First, in any negotiations between Global Knowledge and ESI relating to issues under the BA Agreement, including the two issues relating to the BA materials described above and the extent to which, if at all, the conflict provisions of section 6.2.1 of the BA Agreement prevent the marketing of Global Knowledge's PM products, ESI's bargaining position has been weakened by the exclusion of its claim for royalties owing under the PM Agreement.

95 Second, and more generally, ESI will be competitively disadvantaged in the Canadian marketplace if it is unable to deliver both its PM products and its BA products either directly or through a new "strategic partner". As discussed above, the evidence in the record indicates that there is a significant benefit to having a common entity market both BA products and PM products. This was reflected in Nexient's BPI business line and in Global Knowledge's own business plan, both of which involved marketing both product lines together.

96 This raises the issue of whether the Court should refuse to exercise its discretion to order a permanent stay of ESI's rights to terminate the BA Agreement based on the Insolvency Defaults in the circumstances in which Global Knowledge does not intend to take an assignment of the PM Agreement. In my view, such order should not be granted for three reasons.

97 First, as mentioned, in the present circumstances, the purposes of the CCAA will not be furthered by the proposed relief. Given the structure of the Sale Transaction, it is unnecessary to grant the requested relief to complete the Sale Transaction at the agreed sale price. Moreover, the effect of such an order would be to destroy the overall relationship between ESI and Nexient. rather than to continue the BPI business line of Nexient in its form prior to the CCAA proceedings.

98 Second, as mentioned, whether intentional or not, Global Knowledge is seeking to use the CCAA proceedings as a means of competitively disadvantaging ESI in Canada. ESI and Global Knowledge are already competitors in the United States. ESI will be competitively disadvantaged in Canada if it can offer only its PM products and not its BA products and Global

Knowledge will be correspondingly advantaged. The Court's discretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor.

99 ESI bargained for the right to ensure that its BA courses and PM courses were marketed by an entity of its own choosing after an insolvency of Nexient through the inclusion of the insolvency termination provisions in the BA Agreement and PM Agreement. I do not think that the Court's authority should be invoked to remove that right as a result of Nexient's CCAA proceedings in the present circumstances where the PM Agreement is not to be assumed by Global Knowledge. ESI cannot expect to improve its competitive position as a result of the CCAA proceedings. Conversely, the Court's discretion should not be invoked in CCAA proceedings to weaken the competitive position of ESI in favour of a competitor.

100 Third, the discretion of the Court should not be invoked after failed negotiations between the purchaser and the third party respecting the feasibility of an on-going relationship. As mentioned above, Global Knowledge excluded the BA Agreement and the PM Agreement at Closing pending not only a review of the agreements themselves but, more importantly, pending the outcome of negotiations between Global Knowledge and ESI regarding the possibility of a workable relationship. Among other things, such a relationship required a renegotiation of the financial terms of the PM Agreement to the benefit of Global Knowledge that ESI was not prepared to accept. Those negotiations were conducted on the basis that the Sale Order did not include any terms providing for a permanent stay of ESI's termination rights in respect of the BA Agreement. In entering into the APA and closing on an unconditional basis, Global Knowledge accepted the risk that such negotiations would prove unsuccessful. It is not appropriate for the Court to exercise its discretion at this stage to re-write the terms of the BA Agreement to the detriment of ESI in order to adjust the financial benefits of the Sale Transition in favour of Global Knowledge. To do so would be to change the relative bargaining positions of the parties after their negotiations had terminated.

Conclusion

101 Based on the foregoing, I conclude that, while the Court has authority to authorize an assignment of the BA Agreement to Global Knowledge notwithstanding any provision to the contrary in that agreement, it should not exercise its discretion to authorize the proposed assignment on the basis requested by Global Knowledge, which involves the issue of a permanent stay against the exercise of any rights of ESI to terminate the BA Agreement based on the Insolvency Defaults.

Costs

102 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

Motion dismissed.

End of Document

TAB 6

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Table of Authorities

Cases considered by *Iacobucci J.*:

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Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

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N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

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s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46
s. 486(1) — referred to

Rules considered:

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R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance,

and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

> A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?
>
> B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an

appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would

be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese

environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree

with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of

expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

End of Document

TAB 7

2013 ONSC 4756
Ontario Superior Court of Justice

Comstock Canada Ltd., Re

2013 CarswellOnt 9796, 2013 ONSC 4756, 230 A.C.W.S. (3d) 355, 25 C.L.R. (4th) 175, 4 C.B.R. (6th) 47

In Bankruptcy and Insolvency

In the Matter of the Notice of Intention to Make a Proposal of Comstock Canada Ltd.

In the Matter of the Notice of Intention to Make a Proposal of CCL Realty Inc.

In the Matter of the Notice of Intention to Make a Proposal of CCL Equities Inc.

Morawetz J.

Heard: July 9, 2013
Judgment: July 9, 2013 *
Docket: CV-13-10181-00CL, 32-1763935, 32-1763929, 32-1764011

Counsel: A. MacFarlane, F. Lamie, A. McFarlane for Applicants, Comstock Canada Ltd., CCL Realty Inc., and CCL Equities Inc.
H. Chaiton for Bank of Montreal
R.B. Schwill for PricewaterhouseCoopers Inc.
B. Harrison for Board of Directors
K. Plunkett for TESC Inc.
J. Milton for Rio Tinto Alcan Inc.

Subject: Insolvency

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Words and phrases considered:

debtor company

I am satisfied the record establishes that each entity within the . . . Group is a "company" within the meaning of the CCAA [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36], and that each entity of the . . . Group is a debtor company within the meaning of the definition of "debtor company" as they are each insolvent and have each committed an act of bankruptcy in filing their respective NOIs [Notices of Intention to Make a Proposal].

MOTION by group of companies for order continuing its restructuring proceedings, and related relief.

***Morawetz J.*:**

1 This motion was brought by Comstock Canada Ltd. ("Comstock"), CCL Realty Inc. ("CCL Realty") and CCL Equities Inc. ("CCL Equities", and together with Comstock and CCL Realty, the "Comstock Group") for an order, *inter alia*:

(a) continuing Comstock Group's restructuring proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), effective as of July 9, 2013;

(b) granting an initial order (the "Initial Order") under the CCAA in respect of the Comstock Group;

(c) declaring that, upon the continuance under the CCAA, the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") proposal provisions shall have no further application;

(d) approving the cost reimbursement agreement entered into by Comstock and Rio Tinto Alcan Inc. ("Rio Tinto");

(e) approving the Commitment Letter (defined below) and the granting of the DIP Lender's Charge (defined below) and corresponding priority in favour of Bank of Montreal ("BMO"); and

(f) discharging PricewaterhouseCoopers Inc. ("PwC") in its capacity as interim receiver (in such capacity, the "Interim Receiver") of Comstock.

2 At the conclusion of argument, the motion was granted, with reasons to follow. These are those reasons.

Background

3 Established in 1904, Comstock is one of Canada's largest multi-disciplined contractors, currently employing over 1,000 unionized and non-unionized tradespeople and 80 salaried employees across Canada. For over 100 years, Comstock has provided a broad capability in the completion of large-scale electrical and mechanical contracts to the planning, directing and execution of multi-trade, multi-million dollar commercial, industrial, institutional, automotive, nuclear, oil and gas, overhead and underground, and structural steel assignments. Recent projects include work for Enbridge Pipelines Incorporated, Shell Canada Limited, Petro Canada, Imperial Oil, Ontario Power Generation, Bruce Nuclear Power, Ford Motor Company, Chrysler

Canada Inc., Winnipeg Airport Authority Inc. and Cadillac Fairview Corporation. In 2012, Comstock provided services to 130 customers and had several recurring customers.

4 Comstock experienced financial challenges necessitating a restructuring of the company. While Comstock continues to enjoy a strong market reputation, Comstock's business has experienced liquidity challenges, cost overruns and litigation costs that have imperilled the Comstock Group's business.

5 Comstock's counsel submits that any serious disruption to Comstock's ability to provide core services would imperil the viability of various projects and have negative effects cascading throughout the trades, subtrades and local economies of these projects. As a result, Comstock's senior management believes that it is imperative to restructure the Comstock Group as soon as reasonably possible with a focus on avoiding disruption to Comstock's operations.

6 The Comstock Group seeks the Initial Order, at this time, to protect its business and preserve its value while it seeks to complete its restructuring.

7 Comstock is a privately-held corporation incorporated pursuant to the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B.16 ("OBCA"), with headquarters located in Burlington, Ontario and a western office located in Edmonton, Alberta. Comstock maintains additional regional facilities in Ontario, Manitoba, Alberta and British Columbia.

8 Comstock and CCL Realty, a real estate holding company which holds all of the Comstock Group's real property, are the direct and wholly-owned subsidiaries of CCL Equities — a holding company incorporated pursuant to the OBCA with headquarters located in Burlington, Ontario.

9 In 2011, a management buyout was executed in respect of Comstock. Prior to this time, Comstock was a wholly-owned subsidiary of a U.S. publicly-traded company.

Comstock Debt and Lender Security

10 Pursuant to a credit agreement dated July 29, 2011 (the "Credit Agreement") among Comstock, as borrower, CCL Equities Inc., CCL Realty Inc., 3072454 Nova Scotia Company, as guarantors (collectively, the "Guarantors") and BMO, as lender, BMO made available to Comstock a credit facility up to a maximum aggregate amount of $29,200,000 (the "Credit Facility" or the "Loan").

11 Comstock's indebtedness under the Credit Agreement is secured by a general security agreement in favour of BMO; an assignment of insurance policies of Comstock and the Guarantors; an assignment, postponement, and subordination of shareholder loans; guarantees from each of the Guarantors; and mortgages over all of the real property owned by Comstock and CCL Realty (collectively, the "Lender's Security").

12 A number of entities, including CBSC Capital Inc., Transportation Lease Systems Inc., ATCO Structures and Logistics Ltd., Leavitt Machinery General Partnership, Altruck International Truck Centres, Integrated Distribution Systems LP o/a Wajax Equipment, RCAP Leasing Inc., Horizon North Camp & Catering Inc., also have registered a security interest in respect of certain of Comstock's equipment and vehicles.

13 According to Comstock's trade accounts payable records, Comstock owed approximately $47 million of unsecured trade debt to approximately 830 vendors as of June 27, 2013.

14 As of July 9, 2013, Comstock is not in arrears in respect of payroll. Payroll obligations of the previous week had been funded through an Interim Receiver's Borrowing Charge, which was subject of an endorsement reported at *Comstock Canada Ltd., Re*, 2013 ONSC 4700 (Ont. S.C.J.).

15 Comstock had payroll of $1.5 million due on Thursday, July 11, 2013, pertaining to the contracted project in Kitimat, British Columbia. The mechanics enabling this payroll to be met were authorized by the Initial Order.

Comstock's Financial Position

16 Copies of the consolidated and unaudited balance sheet and income statement of the Comstock Group as at December 31, 2012, and all other audited and unaudited financial statements prepared in the year prior to 2013 (collectively, the "Financial Statements"), are attached to the confidential supplement (the "Confidential Supplement") to the Report of PwC in its capacity as proposal trustee and prospective CCAA monitor of the Comstock Group.

17 As at December 31, 2012, the Comstock Group had assets with book value of approximately $112 million, with corresponding liabilities of $103.4 million.

18 Comstock has initiated several ongoing litigation claims against various entities, with a total claim face amount in excess of $120 million. Comstock has been named as defendant in litigation claims, with a face amount in excess of $110 million.

19 The Comstock Group previously enjoyed financial prosperity due to sustained contracts throughout Canada in respect of various significant engagements. However, counsel advises that Comstock's recent declining economic fortunes have resulted in increasingly severe financial losses, liquidity challenges, cost overruns and litigation costs imperilling the Comstock Group's business.

20 On June 27, 2013, counsel advises that Chrysler Canada locked out Comstock from the performance of its contract at facilities in Ontario and, on July 2, 2013, threatened to terminate all existing contracts and purchase orders with Comstock. On July 3, 2013, Chrysler Canada issued a formal notice of contract termination to Comstock.

21 On July 5, 2013, Travellers Insurance Company of Canada provided Comstock with notices of termination, to be effective in 30 days, in respect of certain contracts.

22 During the week of July 1, 2013, TLS Fleet Management notified Comstock that no further purchases would be authorized in respect of vehicle leases, service and maintenance, and management fees, unless Comstock paid outstanding amounts and provided a security deposit.

23 Certain entities have registered lien claims against Comstock in respect of labour and material allegedly supplied in relation to Enbridge Pipelines (Athabasca) Inc. in Calgary.

Restructuring and Refinancing Efforts

24 In February 2013, the Comstock Group engaged Deloitte & Touche Corporate Finance Canada Inc. ("Deloitte") to conduct a market solicitation process with a view to attracting equity investors and/or purchasers of Comstock. Under this market solicitation process, the Comstock Group did not receive any letters of intention.

25 Comstock's Counsel advised that the Comstock Group's management believes that, in view of cost overruns and the Comstock Group's liabilities, a number of potential purchasers would not submit letters of intention absent the protections afforded by a restructuring vehicle such as the CCAA or BIA.

Filing of Notices of Intention to Make a Proposal

26 Comstock's counsel advised that in response to Chrysler Canada's lockout and, as a result of unsuccessful negotiations with a potential bridge financer, Comstock's Board of Directors determined that the Comstock Group had no other readily available options but to file Notices of Intention to Make a Proposal (the "NOI") pursuant to section 50.4(1) of the BIA on June 28, 2013 (the "NOI Proceedings") in order to preserve the *status quo* and prepare for a CCAA restructuring.

27 On July 3, 2013, I issued an order appointing PwC as Interim Receiver for the limited and specific purpose of ensuring Comstock's payroll was funded by July 4, 2013 and granting the Interim Receiver a priority charge, including in priority to construction lien and trust claimants, pursuant to the Interim Receiver's Borrowing Charge under the order.

Anticipated Restructuring

28 Comstock anticipates conducting a sales and investor solicitation process (the "SISP") to be administered by the monitor. Comstock and the monitor have advised that they will report back to court once the SISP has been fully developed.

29 In order to avoid disruption to the ongoing operations of one of Comstock's major customers, Rio Tinto, and to minimize enhanced safety risks that would be incurred in the event of such a disruption, Rio Tinto agreed to a cost reimbursement agreement with Comstock in order to ensure that the project continues in an uninterrupted manner. In addition, Rio Tinto and BMO agreed to a cost sharing mechanic which would see Rio Tinto cover portions of the costs for overhead, infrastructure and administrative costs from which they believe they will benefit in relation to the Rio Tinto contracts and their related projects. The material terms of the cost reimbursement agreement are set out at paragraph 61 of Jeffrey Birkbeck's affidavit.

30 The Comstock Group has secured a commitment for Debtor-In-Possession ("DIP") financing ("DIP Financing") from BMO (in such capacity, the "DIP Lender") in the amount of $7,800,000 under the terms of a DIP Commitment Letter dated July 9, 2013 (the "DIP Loan"), pursuant to which the DIP Financing will provide the Comstock Group with sufficient liquidity to implement its initial restructuring initiatives pursuant to the CCAA and to continue with its core profitable projects during its restructuring.

31 The DIP Financing conditions include a priority charge in favour of BMO in its capacity as DIP Lender, in priority to all other charges save and except the administration charge, and in priority to all present construction lien and trust claims, save and except in relation to those construction liens and trust claims arising in respect of the specific contracts and projects to which the DIP Loan is advanced following the date of such contract-specific and project-specific advances.

32 The proposed DIP Financing contemplates that the DIP Lender will be granted a court-ordered priority charge (the "DIP Lender's Charge"), which is intended to rank in priority to all other charges save and except the administrative charge and will not apply to any holdbacks owing in respect of the Rio Tinto Kitimat, British Columbia project.

33 Comstock's counsel advises that the DIP Financing is essential to the Comstock Group's restructuring and the maintenance of a substantial portion of the Comstock Group's large-scale construction project.

34 The Comstock Group's counsel submits that the Comstock Group will not be able to obtain alternative financing and maintain its operations without DIP Financing and, as such, submits that court approval of the DIP Financing, including the DIP Credit Agreement and the DIP Lender's Charge, is necessary and in the best interests of the Comstock Group and its stakeholders.

35 The 13-week cash flow forecast that was filed projects that, subject to obtaining DIP Financing, Comstock Group will have sufficient cash to fund its projected operating costs during this period. In the absence of the liquidity provided by the proposed DIP Financing, counsel submits that the Comstock Group would be unable to meet its obligations as they come due or continue as a going concern and, accordingly, is insolvent.

Continuation Under the CCAA

36 Continuations of BIA Part III proposal proceedings under the CCAA are governed by section 11.6(a) of the CCAA which provides:

> 11.6 Notwithstanding the Bankruptcy and Insolvency Act,
>
> (a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part.

37 Comstock, CCL Realty and CCL Equities have not filed a proposal under the BIA. I am satisfied that each member of the Comstock Group has satisfied the statutory condition prescribed by section 11.6(a) of the CCAA.

38 I am also satisfied that the evidence filed by the Comstock Group supports a finding that continuation under the CCAA to permit stabilization of Comstock's projects and to enable a going concern sale of Comstock's business and assets is consistent with the purposes of the CCAA. Counsel submits, and I accept, that such stability and continuation of contracts afforded by a continuation under the CCAA would set the conditions for maximizing recovery for the senior secured creditor, preserve employment for many of the 1,000 independent contractors, and maintain the local economies that are highly integrated into the projects which Comstock services. Further, avoidance of the social and economic losses which would result from the liquidation and the maximization of value would be best achieved outside of bankruptcy.

39 I am also satisfied that continuation under the CCAA is consistent with the jurisprudence on this issue. In arriving at this conclusion, I have considered the following cases: *Hemosol Corp., Re* (2007), 34 B.L.R. (4th) 113, 36 C.B.R. (5th) 286 (Ont. S.C.J. [Commercial List]); *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522 (Ont. S.C.J. [Commercial List]) ; *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.); *Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]); and *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

40 Comstock Group has also complied with section 10.2 of the CCAA insofar as the required cash flow statements have been filed.

41 I am satisfied the record establishes that each entity within the Comstock Group is a "company" within the meaning of the CCAA, and that each entity of the Comstock Group is a debtor company within the meaning of the definition of "debtor company" as they are each insolvent and have each committed an act of bankruptcy in filing their respective NOIs.

42 I am also satisfied that the Comstock Group meets the traditional test for insolvency (BIA, section 2) and the expanded test for insolvency based on a looming liquidity condition (see *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 SCC refused, [2004] S.C.C.A. No. 336 (S.C.C.) [*Stelco*]). In arriving at this conclusion in respect of the expanded test for insolvency, I have taken into account that there has been a decline in Comstock's financial performance due to cost overruns and litigation claims; Comstock Group has been unable to meet its covenants under the Credit Agreement and is in default under the Credit Facility; Comstock Group was not able to obtain additional or alternative financing outside of a court-ordered or statutory mandated process; there is no reasonable expectation that Comstock Group, in the near term, will be able to generate sufficient cash flow to support its existing debt obligations; and the cash flow forecast indicates that without additional funding, the Comstock Group will exhaust its available cash resources and will, thus, be unable to meet its obligations as they become due.

43 I am satisfied that it is both necessary and appropriate to grant relief to Comstock under the CCAA. A stay of proceedings is appropriate in order to preserve the *status quo* and enable the Comstock Group to pursue and implement a rationalization of its business.

44 The Comstock Group's counsel submits that certain suppliers to the Comstock Group are critical to its operations and that they must be paid in the ordinary course in order to avoid disruption to its operations during the CCAA proceedings. Failure to pay these suppliers would likely result in them discontinuing critical ongoing services, which could ultimately put customer, supplier or Comstock's own personnel at risk on the job site. Accordingly, Comstock seeks authorization in the Initial Order to pay obligations owing to its suppliers, regardless of whether such obligations arise before or after the commencement of the CCAA proceedings, if in the opinion of Comstock and with the consent of the monitor, the supplier is critical to the business and ongoing operations.

45 I am satisfied that this request is appropriate in the circumstances and it is to be included in the Initial Order.

Priority Charges

46 Comstock Group seeks approval of certain court-ordered charges over its assets relating to its administrative costs, interim financing and the indemnification of its sole director and officer. The Initial Order contemplates that the Administration Charge, the DIP Charge, and the Director's Charge will rank in priority to all other present and future security interests, trusts,

liens, construction liens, trust claims, charges and encumbrances, claims of secured creditors, statutory or otherwise, in favour of any person.

47 The Administration Charge is contemplated to be in the amount of $1 million. The authority to grant such a charge is contained in section 11.52 of the CCAA. 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.

See *Timminco Ltd., Re*, 2012 ONSC 106 (Ont. S.C.J. [Commercial List]).

48 Having reviewed the record and considered the foregoing, I am satisfied that the Administration Charge, with the requested priority ranking, is warranted and necessary and the same is granted in the amount of $1 million.

49 Section 11.52(1) of the CCAA provides that the court may make such an order on notice to the secured creditors who are likely to be affected by the security. Notification of this motion has not been provided to all secured creditors and, accordingly, this issue is to be revisited on the comeback hearing.

50 Comstock Group also seeks approval of the DIP Commitment Letter providing the DIP Loan of up to $7,800,000 to be secured by a charge over the assets of the Comstock Group. The DIP Lender's Charge is to be subordinate in priority to the Administration Charge.

51 The authority to grant a DIP financing charge is contained in section 11.2 of the CCAA. The factors to be considered are set out in section 11.2(4) the CCAA.

52 Counsel submits that the following factors support the granting of the DIP Lender's Charge, many of which incorporate the considerations enumerated in section 11.2(4):

(a) the cash flow forecast indicates Comstock will require additional borrowing;

(b) Comstock cannot obtain alternative new financing without new liquidity and a reduction of its significant indebtedness;

(c) the proposed DIP Lenders have indicated that they will not provide the DIP Loan if the DIP Lender's Charge is not approved;

(d) the DIP Loan is essential to the initiation of the restructuring;

(e) the Comstock business is intended to continue to operate on a going concern basis during the CCAA proceedings under the direction of management with the assistance of advisors and the monitor;

(f) the DIP Credit Agreement and the DIP Lender's Charge are necessary and in the best interests of the Comstock Group and its stakeholders; and

(g) the proposed monitor is supportive of the DIP Loan and the DIP Lender's Charge.

53 I am satisfied, having considered the foregoing factors, that the granting of a super-priority for DIP Financing is both necessary and appropriate in these circumstances.

54 It is also necessary to consider the specific request for the creation of a super-priority in respect of a DIP Charge over construction lien claimants and various trust claimants. This issue was addressed at paragraphs 120-138 of the Comstock factum which reads:

> 120. Granting the Initial Order substantially in the form sought is consistent with the purpose of the CCAA, the leading jurisprudence with respect to priority, and is fair and reasonable to all affected parties under these exigent and urgent circumstances. Over 1,000 jobs are at stake, the progress of major infrastructure projects with national importance is in the balance, the safety of workers is in jeopardy, and the relevant local economies are relying upon the proper application of the CCAA's overriding purpose to effect a constructive solution in order to achieve a position way forward for all stakeholders.
>
> 121. In the event the DIP Charge, and the proposed priority thereof, is not authorized by this Honourable Court in the urgent and precarious circumstances confronting the Comstock Group and its stakeholders, the overriding purpose of the CCAA would be frustrated. The CCAA must always be read in light of the CCAA's overriding purpose — the provision of a constructive solution for all stakeholders and the avoidance of the devastating effects of bankruptcy or creditor initiated termination of business operations.
>
> 122. In the recent Supreme Court decision *Sun Indalex Finance, LLC v. United Steelworkers*, Chief Justice McLachlin addressed the overarching purpose of the CCAA as being the provision of a constructive solution for all stakeholders and the avoidance of the devastating effects of bankruptcy or creditor initiated termination of business operations:
>
> > [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
> >
> > > ...the purpose of the CCAA... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
> >
> > In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
> >
> > > The legislation is remedial in the 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.
> >
> > [Emphasis added]
>
> *Sun Indalex Finance, LLC v. United Steelworkers ("Indalex")* 2013 SCC 7at para. 205.
>
> 123. Parliament has granted the Court powers under the CCAA to preserve the *status quo* in order to enable a company to restructure its affairs and to permit time for a plan of compromise to be prepared, filed, and considered by creditors. Section 11.2 of the CCAA establishes the provision of a super priority for DIP financing as a mechanism for accomplishing this goal.
>
> 124. The Ontario Legislature has created a statutory trust as a mechanism for accomplishing purpose of the *Construction Lien Act* (the "CLA"). In *Baltimore Aircoil of Canada Inc. v. ESD Industries Inc.*, Justice Wilkins summarized the purpose and intent of the trust provisions of the CLA:

> [31] The Construction Lien Act is a specific piece of legislation designed to remedy and rectify problems in the construction industry in Ontario. Section 8 creates trusts in respect of moneys in the hands of described persons under subsections 8(1)(a) and (b).
>
> . . .
>
> [36] The purpose and intent of the trust provisions of the Act is to impose the provisions of a trust on money owing or received, on account of a contract or sub-contract, which is for the benefit of the sub-contractors or other tradespeople who supplied services and materials to a job site. The legislation is clearly remedial in its effect. The legislation is clearly intended to rectify a circumstance in which persons who provide material and services to a job site, might find that money which was due to them in payment, has been used for other purposes.

Baltimore Aircoil of Canada Inc. v. ESD Industries Inc. 2002 CanLII 49492 (ONSC) at paras. 31, 36.

125. The Supreme Court of Canada's 2013 decision in *Indalex* is instructive when the Court is faced with a request for the creation of a super priority in respect of a DIP charge in favour of a DIP lender over a deemed trust.

126. In *Indalex*, the Supreme Court dealt with whether the priority established under s. 11.2 of the CCAA had priority over a deemed trust established provincially under s. 57(3) of the *Pension Benefits Act* RSO 1990, c. P-8. The Court unanimously agreed with the reasons of Deschamps J., who reasoned that:

> "[58] In the instant case, the CCAA judge, in authorizing the DIP charge,... did consider factors that were relevant to the remedial objective of the CCAA and found that Indalex had in fact demonstrated that the CCAA's purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):
>
> > (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring:
> >
> > (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
> >
> > (c) there is no other alternative available to the Applicants for a going concern solution;
> >
> > . . .
> >
> > (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
> >
> > . . .
> >
> > (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing.
>
> [59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members

> to reserve the rights on June 12, 2009, are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate". 2009 CanLII 37906 (ON SC), (2009 CanLII 37906, at paras. 7 and 8).
>
> [60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the PPSA required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Indalex, at paras. 58-60, concurred with by McLachlin, C.J. at para. 242 and Lebel J. at para. 265.

127. The Supreme Court's approach in *Indalex* is both the correct resolution of the priority issue on the grounds of paramountcy in circumstances where, but for the granting of priority over a statutory deemed trust in favour of the DIP lender, the DIP financing would not be advanced and the distressed company and its stakeholders would see the immediate halt to the restructuring. It is also the practical approach and manifestation of the CCAA's overriding purpose placed into reality.

128. The current case before the Court is analogous to *Indalex* in many respects:

(a) Comstock is in need of the additional financing in order to support operations during the period of a going concern restructuring;

(b) No creditor will advance funds to Comstock without the priming of the DIP facility;

(c) there is a benefit to the breathing space that would be afforded by the DIP facility that will permit Comstock to identify a going concern solution;

(d) there is no other alternative available to Comstock for a going concern solution;

(e) the benefit to stakeholders and creditors of the DIP facility outweighs any potential prejudice to unsecured creditors, secured creditors, and potential trust beneficiaries that may arise as a result of the granting of super-priority secured financing against the assets of the Comstock Group;

(f) the balancing of the prejudice weighs in favour of the approval of the DIP Financing;

(g) a deemed trust arises as a result of a provincial statute; and

(h) the federal and provincial laws are inconsistent as they give rise to different, and conflicting, priority.

129. The failure to continue Comstock as a going concern will result in substantial costs to all parties contracting with Comstock. The transition alone will require parties to, *inter alia*: (a) re-bid on proposals; (b) negotiate new union agreements; (c) endure significant business interruption and resumption costs; (d) risk the viability of projects; (e) significantly disrupt local economies and those connected to them; and (f) place the safety at workers at risk.

130. This case is also similar to *Indalex*, as there has not been the opportunity to provide notice to all affected parties. Comstock proposes that substituted service is a reasonable solution to the problem of providing notice in time-constrained circumstances.

131. In *Royal Oaks Mines Inc. Re*, Justice Blair, as he then was, cautioned against the priming of DIP financing where there had not been notice to affected parties. However, Justice Blair allowed that a super priority could be granted as a means to effect "what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period".

Royal Oak Mines Inc., Re 1999 CanLII 14840 at para. 24.

132. In urgent CCAA filings where time compression and logistical constraints result in the limited or non-notification of certain secured creditors on the initial CCAA application, the desire to balance a distressed company's requirement to obtain vital and time-sensitive financing with the protection of other creditors' rights is put to the test. The customary comeback provisions in the Initial order is an appropriate protection afforded to such secured creditors in circumstances where delay of Court intervention would result in the imminent (or in the case of Comstock, immediate) expiry of the company's enterprise.

133. In such circumstances, it is open to secured creditors to seek to review such Court ordering of priorities and parties enjoying such priority in view of their advancement of funds pursuant to such Court-ordered charges may have to ensure such a review and further justify the continued operation of such priority later in the restructuring proceeding. This is a fair and practical result in urgent circumstances. Credit and priority should be given, at least initially, in such exigent circumstances to the "man in the arena" in the commercial conception of the Rooseveltian ethos — the DIP lender who advances funds in the face of limited notice to interested parties with a view to preventing the otherwise certain peril of a company in distress.

134. The inherent tension that arises between the prescribed notice requirements and the rush to the Court house steps in pan-Canadian CCAA applications is further ameliorated in situations where the secured creditors not receiving notice would not likely be affected when considered against the backdrop of the practical realities of restructuring scenarios and the alternatives to permitting the priming charge in favour of a DIP lender. In the current proceeding, the entities who have registered security interests in the Comstock Group appear to be equipment and vehicle lessors. In a shut-down scenario, their interests would be not likely be [sic] affected differently given that the receivables in such a case would not likely be collected to satisfy such interests.

135. Given the existent circumstances confronting Comstock and its stakeholders, and the large number of affected parties, it is necessary that the DIP loan be given the priority sought in order to allow Comstock to meet its urgent needs during the sorting out period.

136. The Proposal Trustee is of the view that the anticipated DIP Facility represents the only alternative available to the Comstock Group to ensure the continuation of operations. Furthermore, the Proposal Trustee is of the view that the costs associated with the DIP Facility, interest expense, permitted fees and expenses, and facility fees are commercially reasonable.

137. The Proposal Trustee is supportive of the Comstock Group's efforts to obtain the DIP financing so as to avoid liquidation and provide time to attempt to implement a restructuring and going concern sale. Without access to financing under the DIP Facility, the Comstock Group will face an immediate liquidity crisis and would have to cease operations.

138. The purpose of the CCAA, the application of paramountcy in relation to the taking of priority of DIP facilities over provincial deemed trusts, and the commercial realities of this case all militate in favour of the proposed priority of the DIP Loan as set out in the proposal Initial Order.

55 This reasoning is applicable in this case and supports the conclusion that the DIP Charge is to have priority over construction lien claims and various trust claims. I accept the statements made at paragraph 128 of counsel's factum set out above. In my view, the Comstock Group is unlikely to survive without DIP Financing supported by the super priority DIP Charge, which is granted.

56 Comstock Group also seeks a charge in the amount of $4.6 million over the assets of the Applicants (the "Director's Charge") to indemnify the sole director of the Comstock Group in respect of liabilities he may incur in his capacity as a director and officer of the Comstock Group. The Director's Charge is to be subordinate to the Administration Charge and the DIP Lender's Charge.

57 The authority to grant such a charge is set out in section 11.51 of the CCAA.

58 I am satisfied that granting the Director's Charge, with the requested priority ranking, is warranted and necessary in the circumstances and is granted in the amount of $4.6 million. Again, I note that section 11.51 requires notice to secured creditors who are likely to be affected by the security or charge. Not all secured creditors have been notified and, accordingly, this issue is to be revisited at the comeback hearing.

Substituted Service

59 Counsel advises that, in view of the extensive number of potentially interested parties, including contractors, subcontractors and tradespeople, the Comstock Group is of the view that notice of the effect of the proposed DIP Charge on one occasion in the The Globe and Mail (National Edition) and the Daily Commercial News, Ontario's only daily construction news newspaper, in a court-approved form, is reasonably likely to bring this application to the attention of contractors and subcontractors that may be affected. I accept this argument and authorize substituted service in the suggested manner.

Sealing of Documents

60 Comstock's counsel requested that the Confidential Supplement be sealed in order to protect against the disclosure of sensitive and confidential financial information to third parties, the disclosure of which, it is submitted, could adversely affect the Comstock Group and its stakeholders. The "Confidential Supplement — Financial Statements" is documented as Exhibit J to the affidavit of Mr. Birkbeck sworn on July 9, 2013; paragraph 26 of the Birkbeck Affidavit refers to Financial Statements that will be provided to the court at the return of the motion, and paragraph 43 of the Birkbeck Affidavit requests that Confidential Exhibit "J" be sealed from the public record in its entirety.

61 In my view, having considered section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 and the governing jurisprudence in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) [*Sierra Club*], I am satisfied that the sealing order should be granted and the confidential material is to be sealed.

Discharge of the Interim Receiver

62 On July 4, 2013, Comstock required $1.5 million in order to meet its payroll and independent contractor obligations. On July 3, 2013, Comstock brought a motion seeking an order authorizing BMO to make an immediate advance on a priority basis in order to permit Comstock to fund its payroll and independent contractor obligations. The motion was granted and on July 3, 2013, an order was issued appointing PwC as Interim Receiver for the limited and specific purpose of ensuring Comstock's payroll was funded by July 4, 2013 and granting the Interim Receiver a priority charge, including in priority to construction lien and trust claimants, pursuant to the Interim Receiver's Borrowing Charge under the order.

63 The Interim Receiver has now discharged its duties in connection with its limited purpose appointment and I am satisfied that it is appropriate and reasonable for the interim receivership proceedings to be terminated and to discharge the Interim Receiver. In making this order, I recognize that the contemplated DIP financing will be used, in part, to repay the Interim Receiver's borrowings to BMO, leaving no further purpose for the interim receivership proceedings. The fees and disbursements of the Interim Receiver and its counsel can roll over in to the Administration Charge and be approved as part of the monitor's fee approvals inside the CCAA proceedings.

Disposition

64 In the result, the motion is granted. Two orders have been signed; namely, the Initial Order under the CCAA, which recognizes a continuation of the restructuring proceedings under the CCAA, and an order discharging PwC in its capacity as Interim Receiver of Comstock.

65 A comeback hearing, as provided for in paragraph 61 of the Initial Order, is scheduled for Friday, July 19, 2013.

Motion granted.

Footnotes

* A corrigendum issued by the court on July 23, 2013 has been incorporated herein.

End of Document

TAB 8

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

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 PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (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

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — 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 (S.C.C.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 4 — considered

s. 5 — 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(4) [en. 1997, c. 12, s. 124] — considered

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

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

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

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

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

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

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act* [1] ("CCAA") proceeding on October 6, 2009. [2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and

Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring

or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

> (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable. [3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest. [4]
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> (b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.
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> (c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.
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> (d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any

distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given

that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re*[6] and *Lehndorff General Partner Ltd., Re*[7].

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
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> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Anvil Range Mining Corp., Re*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will

help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
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> (2) If the court declares the 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.
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> (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 upon the terms of the order.
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> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order. [13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> 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 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
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> (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.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

(a) the size and complexity of the businesses being restructured;

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

(c) whether there is an 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.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re* [15], I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re* [16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act* [17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)* [18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522 (S.C.C.).

19 Supra, note 7 at para. 52.

End of Document

IN THE MATTER OF *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 COMARK INC.

APPLICANT

Court File No. CV15-10920-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE APPLICANT
(Motion to Assign Agreements
Returnable August 13, 2015)

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