COURT FILE NUMBER QB No. 1884 of 2019

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE SASKATOON

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 101098672 SASKATCHEWAN LTD., MORRIS INDUSTRIES LTD., MORRIS SALES AND SERVICE LTD., CONTOUR REALTY INC., and MORRIS INDUSTRIES (USA) INC.

BRIEF OF THE BANK OF MONTREAL

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I. INTRODUCTION

1. This is the Brief of Law of the Bank of Montreal ("**BMO**" or the "**Lender**"), in support of its application (the "**Application**") to lift the stay of proceedings in the within action (the "**CCAA Proceedings**") to permit BMO to file and prosecute an application (the "**Receivership Application**"), pursuant to, among others, section 243 of the *Bankruptcy and Insolvency Act* (the "**BIA**")[1] seeking a receivership order (the "**Receivership Order**") in respect of one or all of the following entities:

   (a) Morris Industries Ltd. ("**Morris Industries**");

   (b) 101098672 Saskatchewan Ltd. ("**672**");

   (c) Morris Sales and Service Ltd. ("**S&S**"); and

   (d) Morris Industries (USA) Inc. ("**Morris USA**"),

   (collectively, the "**Receivership Entities**").

2. Alvarez & Marsal Canada Inc., LIT ("**A&M**" or the "**Monitor**") is the court-appointed monitor in the CCAA Proceedings and, pursuant to a February 18, 2020, Order, had its powers with respect to the Receivership Entities enhanced. A&M is also the proposed receiver for the Receivership Entities.

3. Each of the Receivership Entities is in default of its obligations to BMO and, following BMO's demands, has failed to repay the amounts owing under the Contour Loan Agreement and Guarantees (as those terms are defined below). BMO therefore seeks to lift the Stay (defined below) in order to obtain the Receivership Order in the draft form filed.

II. EVIDENCE RELIED UPON

4. The facts in support of BMO's application are set out in the Reports of the Monitor in the CCAA Proceedings and the affidavits sworn by Sandy Hayer on March 22, 2021 (the "**Hayer Affidavit**") and July 23, 2020 (the "**Bankruptcy Hayer Affidavit**" and collectively, the "**Hayer Affidavits**").[2]

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[1] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, as amended (the "**BIA**") at s. 243 **[Book of Authorities ("Authorities"), Tab 1]**.

[2] Unless otherwise indicated, capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Hayer Affidavits, the Application, the Initial Order granted in these proceedings on January 8, 2020 as amended (the "**Initial Order**"), or the filed reports of the Monitor (each a "**Monitor's Report**").

III. BACKGROUND

A. The Contour Loan

5. BMO extended credit facilities and additional advances to Contour Realty Inc. ("**Contour**") pursuant to a commitment letter dated August 29, 2013 (the "**Contour Loan Agreement**").[3]

6. The Contour Loan Agreement is comprised of the following facilities:

   (a) an $8,000,000 non-revolving, reducing term loan shared on a pro-rata basis between BMO and Farm Credit Canada up to a maximum principal amount of $8,000,000; and

   (b) a treasury risk management facility subject to a limit of $1,000,000.

7. As more particularly described below, as at March 22, 2021, Contour remains indebted to BMO in the amount of $1,669,072.38 plus interest and fees, which continue to accrue in respect of funds borrowed under the Contour Loan Agreement (the "**Contour Indebtedness**").[4]

B. Guarantees and Security of the Receivership Entities in Respect of the Contour Indebtedness

8. In addition to any direct indebtedness owing to BMO, each of the Receivership Entities has guaranteed repayment of the Contour Indebtedness to BMO pursuant to Unlimited Liability Guarantees each dated August 23, 2013 (collectively, the "**Guarantees**").[5]

9. To secure all indebtedness at any time owing to BMO, including the Guarantees, each of the Receivership Entities granted security to BMO in the form of General Security Agreements (collectively, the "**GSAs**"), including but not limited to the following:

   (a) Morris Industries granted GSAs pursuant to Saskatchewan and Manitoba law, respectively, dated June 5, 2007;

   (b) S&S granted GSAs pursuant to Saskatchewan and Manitoba law, respectively, dated June 5, 2007, and a further GSA pursuant to Saskatchewan law on August 23, 2013;

   (c) 672 granted a GSA pursuant to Saskatchewan law on August 23, 2013; and

[3] The First Affidavit of Kevin Adair, sworn January 3, 2020 at Exhibit "M".
[4] Hayer Affidavit, at Exhibit "A".
[5] Hayer Affidavit, at Exhibit "B".

(d) Morris USA granted a GSA pursuant to Saskatchewan law on June 5, 2007, and a further GSA pursuant to Saskatchewan law on August 29, 2013.[6]

C. Default and Demands Under the Contour Loan Agreement

10. Contour is in default of the Contour Loan Agreement and all amounts owing to BMO under the Contour Loan Agreement are immediately due and payable. Contour's defaults include, but are not limited to:

(a) a failure to make payments to BMO when due;

(b) committing an act of bankruptcy and becoming insolvent; and

(c) cross defaulting with other Contour debt agreements.

11. On or about January 4, 2020, BMO served a demand for repayment of the Contour Indebtedness pursuant to the Guarantees upon each of the Receivership Entities and concurrently therewith served a Notice of Intention to Enforce a Security pursuant to section 244(1) of the BIA (the "**Demands**"). [7]

12. Notwithstanding receipt of the Demands in their capacity as direct borrowers and/or guarantors, each the Receivership Entities has neglected or refused to pay the Contour Indebtedness to BMO.[8]

D. The CCAA Proceedings

13. On or about December 30, 2019, the Receivership Entities initiated the CCAA Proceedings and obtained the Initial Order on January 8, 2020. The Initial Order contains, among other things, a stay of proceedings (a "**Stay**"), which was recently extended by this Honourable Court and remains in place.

14. As of the date of the Application, the Receivership Entities have not presented and, as a result of the sale of all of their assets in the CCAA Proceedings, are no longer capable of presenting a plan of compromise or arrangement to their creditors pursuant to the provisions of the CCAA.

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[6] Hayer Affidavit, at Exhibit "C".
[7] Bankruptcy Hayer Affidavit, at Exhibit "A".
[8] Bankruptcy Hayer Affidavit, at para 9.

E. Sale of the Assets of the Receivership Entities and the Resulting Proceeds Held By the Monitor

15. The assets of the Receivership Entities were marketed pursuant to a Sale and Investment Solicitation Process approved by Order of this Honourable Court on January 16, 2020.

16. On March 2, 2021, the Monitor, on behalf of the Receivership Entities executed an asset purchase agreement (the "**APA**") with a purchaser nominee known as Morris Equipment Ltd. ("**MEL**").[9] On March 5, 2021, this Court granted an Order approving the transaction contemplated by the APA (the "**MEL Transaction**").

17. The purchase price contemplated in the APA is insufficient to repay the Contour Indebtedness. As a result, notwithstanding the closing of the MEL Transaction, BMO will sustain a significant shortfall on recovery from the Receivership Entities of the Contour Indebtedness.[10]

18. The MEL Transaction closed on March 18, 2021 (the "**Closing Date**"). On the Closing Date, funds sufficient to close the MEL Transaction (the "**Closing Funds**") were paid to the Monitor's counsel, MLT Aikins LLP ("**MLTA**") in trust. Between the Closing Date and March 19, 2021, the Monitor distributed a portion of the Closing Funds, including:

    (a) $6,595,635.99 to BMO as repayment of the amount outstanding under the Interim Lender's Charge (as that term is defined in the Amended and Restated Initial Order dated January 16, 2020);

    (b) $130,000.00 to BMO's counsel, Burnet, Duckworth & Palmer LLP ("**BD&P**") with respect to legal fees; and

    (c) $555,098.97 to Contour as payment of a Union Settlement contemplated in a Letter of Understanding dated November 30, 2021, between Morris Industries and Contour.[11]

19. As at March 22, 2021, Closing Funds of $3,263,266.04 remain in the trust account of MLTA.[12] Due to, among other things, the fact that the Monitor has not yet distributed the entirety of the Closing Funds, the security held by BMO pursuant to the GSAs continues to attach to such Closing

[9] Confidential Appendix 2 to the Fifteenth Report of the Monitor.
[10] Hayer Affidavit, at para 14.
[11] Sixteenth Report of the Monitor at paras 28 and 29 and Appendix "A".
[12] Sixteenth Report of the Monitor at Appendix "A".

Funds in respect of the Receivership Entities and the indebtedness owing by the Receivership Entities has not been extinguished.

IV. ISSUES

20. The following issues are before this Honourable Court:

(a) should the Stay be lifted to permit BMO to bring the Receivership Application; and

(b) should A&M be appointed as Receiver over the Receivership Entities?

V. LAW AND ARGUMENT

A. Lifting the Stay

21. There is no statutory test under the CCAA to guide the Court in determining when a stay of proceedings ought to be lifted. The case law discussed below indicates that a stay may be lifted based on "sound reasons consistent with the scheme of the CCAA." BMO respectfully submits that there are sound reasons to lift the Stay, and that this Honourable Court ought to do so.

22. The test for lifting a stay under the CCAA was articulated in *ICR Commercial Real Estate*:

> In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:
>
> (a) the balance of convenience;
>
> (b) the relative prejudice to the parties;
>
> (c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).
>
> The supervising CCAA judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising CCAA judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.[13]

[13] *ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd.*, 2007 SKCA 72 at para 68 ("***ICR Commercial Real Estate***") **[Authorities, Tab 2]**.

23. Further, in *Puratone Corp., Re*, the Manitoba Court of Queen's Bench held that the three above considerations:

> ... are all to be viewed together and in the context of the nature and timing of the CCAA process before the court. The same request may very well receive a different reception in the case of an application for the lifting of a stay early in a CCAA proceeding that contemplates a true restructuring than in the case of an application brought late in a CCAA proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure as intended. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being left to sort through is who is entitled to the money. In my view, a court would be more receptive to lifting the stay in the latter case than in the former.[14] [emphasis added]

24. In an application for an order lifting a stay, the following factors, among others, will support a finding that lifting the stay is appropriate:

(a) The plan is likely to fail;

(i) *BMO submission—there will be no plan in the CCAA Proceedings.*

(b) The applicant shows hardship that is caused by the stay;

(i) *BMO submission—BMO should not be denied the rights granted in its favour by the Receivership Entities, including under the GSAs.*

(c) The applicant would be significantly prejudiced by refusal to lift the stay and there would be no prejudice to the debtor company or the positions of the creditors;

(i) *BMO submission—see submission in (b)(i).*

(d) It is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;

(i) *BMO submission—the receivership will facilitate efficient distributions to creditors of the remaining assets of the Receivership Entities and the completion of certain wind-down tasks by the Receiver.*

(e) After the lapse of a significant time period, the insolvent is no closer to a proposed plan

[14] *Puratone Corp., Re*, 2013 MBQB 171 at para 15 **[Authorities, Tab 3]**.

than at the commencement of the stay;

(i) *BMO submission—this is the case in the CCAA Proceedings.*

(f) It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;

(i) *BMO submission—BMO had the right to seek a receivership order prior to the Stay.*

(g) It is in the interests of justice to do so;[15]

(i) *BMO submission—the receivership makes business sense from a cost and efficiency perspective, given the impending "wind-down" of the Monitor's role in these CCAA proceedings in respect of the Receivership Entities and that there will be no plan presented to the Receivership Entities' creditors. Moreover, as BMO is also concurrently seeking a bankruptcy order in respect of the Receivership Entities and the appointment of A&M as trustee, the appointment of the Receiver will reduce the administrative burden on the Trustee and the inspectors.*

25. The determination of whether this Honourable Court should lift the Stay is a fact-specific exercise of its discretion. In this case, such an analysis favours lifting the Stay to allow BMO to bring the Receivership Application.

B. Balance of Convenience

26. In *Ivaco,* creditors of the insolvent company petitioned for the court to lift the stay in order for the petitioners to bring a bankruptcy application. In considering whether it was appropriate to grant the application while the CCAA proceedings were ongoing, the Court considered the purpose of the stay of proceedings, noting that:

> ...The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

[15] *Canwest Global Communications Corp., Re,* [2009] OJ No 5379 (ONSC) at para 33 **[Authorities, Tab 4]**.

> There is no such reorganization possible under the existing circumstances. Rather the compromise of claims may be adequately effected under the BIA regime (as opposed to the submission of the Superintendent to appoint an interim receiver to operate under the CCAA proceedings). It would seem to me that those claims which have already been resolved under the CCAA proceeding could be "transferred" as resolved claims into a BIA proceeding.[16]

27. The Court also considered a number of factors in determining whether the stay should be lifted and ultimately concluded:

> ...I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed and un-reconsidered order of November 28, 2003), the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.[17]

28. The *Ivaco* case is analogous to the present situation. Contrary to when these CCAA proceedings were initiated, no reorganization is possible as the assets of the Receivership Entities have been liquidated and the Receivership Entities are no longer operating. Accordingly, there is nothing further to be done in regard to the Receivership Entities other than a distribution of the Closing Funds and certain other tasks, including those enumerated at paragraph 3(t) of the draft Receivership Order filed herewith.

29. Considering all of these factors, the balance of convenience favours lifting the Stay to allow BMO to bring the Receivership Application, in accordance with the existing jurisprudence.

C. Relative Prejudice to the Parties

30. BMO will suffer prejudice in the form of delay and increased costs without the appointment of a Receiver to complete the distributions and certain other tasks, including those enumerated at paragraph 3(t) of the draft Receivership Order. There is no prejudice to any other party.

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[16] *Ivaco Inc., Re,* [2005] OJ No 3337 (ONSC) ("***Ivaco***") at para 14 **[Authorities, Tab 5]**.
[17] *Ivaco,* at para 18 **[Authorities, Tab 5]**.

D. The Merits of the Proposed Action

31. BMO is presently entitled to prosecute its legal remedies under the Guarantees and the GSAs, including the right to appoint or apply to this Honourable Court to appoint a receiver and manager over the property, assets and undertaking of all of the Receivership Entities, and BMO wishes to exercise that right at this time.

32. MLTA has delivered an opinion to the Monitor confirming that, subject to customary qualifications, the security granted by the Receivership Entities in respect of the Contour Indebtedness is valid and enforceable.

VI. THE APPOINTMENT OF THE RECEIVER IS JUST AND CONVENIENT

A. The Power to Appoint a Receiver and the Bennett Factors

33. The common law power for superior courts of inherent jurisdiction to appoint a receiver manager over a debtor's property is codified in sections of three statutes operative in Saskatchewan, namely, s. 243(1) of the BIA, s.65 (1) of *The Queen's Bench Act* (the "**QBA**"), and s. 64(4) of *The Personal Property Security Act* (the "**PPSA**").

34. Subject to certain technical requirements discussed below, section 243(1) of the BIA allows for the appointment of a receiver in any circumstance where it is "just or convenient" to do so:

> (1) Subject to subsection (1.1), on application by a secured creditor, **a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so**:
>
> (a) Take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> (b) Exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
> (c) Take any other action that the court considers advisable.

35. Section 65(1) of the QBA allows for the appointment of a receiver on the on similar grounds—i.e., where it is "appropriate or convenient:"

> 65(1) A judge may, on an interlocutory application, grant a mandamus or an injunction or appoint a receiver where it appears to the judge to be appropriate or convenient that the order should be made.

36. Section 64(8) of the PPSA allows for the appointment of a receiver over property subject to a security interest granted by a debtor upon the application of any interested person, absent the express "just or convenient" or "appropriate or convenient" standard:

> (8) On application by an interested person, the court may:
>
> (a) appoint a receiver;

37. In determining whether it is just or convenient to order the appointment of a receiver in other proceedings, courts have had regard to a number of factors. In *Affinity Credit Union 2013 v Vortex Drilling Ltd.*,[18] the Honourable Justice Scherman, relying upon his previous decision in *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.*,[19] highlighted the following applicable considerations in determining if it is just or convenient to appoint a receiver:

> 6. In Carnival the court said the following regarding the just and convenient criteria at para 24 of its reason:
>
> > In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
> >
> > > 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: .... In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; ... It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: ....[20]

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[18] *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228 ("***Vortex Drilling***") **[Authorities, Tab 6]**.
[19] Unreported decision *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.*, (25 February 2016) Saskatoon, QB 1639 of 2015 at para 6.
[20] *Vortex Drilling*, at para 19 **[Authorities, Tab 6]**.

38. In *Vortex Drilling*, the Honourable Justice Scherman proceeded to endorse the well-established, non-exhaustive factors (the "**Bennett Factors**"), as initially identified by Frank Bennett in the oft-cited text *Bennett on Receiverships*, to be considered in the Court's assessment of whether it is appropriate to appoint a receiver, including, but not limited to the following:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> c) the nature of the property;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.[21] [emphasis added]

39. Recently in *Pillar Capital Corp. v Harmon International Industries Inc.*,[22] the Honourable Justice Elson relied on the Bennett Factors and noted that, "while the factors vary in their importance, no one factor is determinative."[23] Accordingly, Justice Elson stressed that the Court must take a broad, contextual approach in its analysis of the Bennett Factors.[24]

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[21] *Vortex Drilling*, at para 19, citing *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63 **[Authorities, Tab 6]**.
[22] *Pillar Capital Corp. v Harmon International Industries Inc.*, 2020 SKQB 19 (**"Pillar Capital"**) **[Authorities, Tab 7]**.
[23] *Pillar Capital*, at para 36 **[Authorities, Tab 7]**.
[24] *Pillar Capital*, at para 36 **[Authorities, Tab 7]**.

B. Having Regard to the Bennett Factors, the Appointment of a Receiver is Appropriate

40. BMO respectfully submits that this Honourable Court ought to exercise its discretion to appoint the Receiver because it is just, convenient and otherwise appropriate to do so.

41. Having regard for the Bennett Factors, BMO submits that the following factors support the Appointment of a Receiver over the Receivership Entities:

(a) the individual members of the Receivership Entities owe the indebtedness to BMO and the Guarantors have guaranteed the Indebtedness and have granted the GSAs;

(b) it is an express term of the Security that, upon default, one of the remedies available to BMO is the appointment of a receiver;

(c) it is an express term of the Guarantees that BMO need not exhaust its recourse against the Contour before realizing against the Guarantors;

(d) BMO has demanded repayment and provided the Receivership Entities notice of its intention to enforce the GSAs. The Receivership Entities have failed to repay the Indebtedness, and subject to the lifting of the Stay, BMO is presently entitled to seek the appointment of the receiver over the property of the Receivership Entities;

(e) the balance of convenience supports the appointment of the Receiver and, A&M, having acted as Monitor with enhanced powers is well-positioned to act as Receiver;

(f) the receivership makes business sense from a cost and efficiency perspective, given the impending "wind-down" of the Monitor's role in these CCAA proceedings in respect of the Receivership Entities and that there will be no plan presented to the Receivership Entities' creditors;

(g) as BMO is also concurrently seeking a bankruptcy order in respect of the Receivership Entities and the appointment of A&M as trustee (in such capacity, the "**Trustee**"), the appointment of the Receiver will reduce the administrative burden on the Trustee and the inspectors; and

(h) the Receiver will be positioned to complete certain tasks, including those enumerated at paragraph 3(t) of the draft Receivership Order, distribute the Receivership Entities'

remaining assets and make distributions to creditors on a more efficient basis as no assets will vest in the Trustee.

VII. CONCLUSION

42. For the reasons set forth above, it is respectfully submitted that this Honourable Court ought to grant BMO's Application in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF March, 2021.

BURNET, DUCKWORTH & PALMER LLP

Per: _____
For: Ryan Algar
Solicitors for the Bank of Montreal

CONTACT INFORMATION AND ADDRESS FOR SERVICE

Name of firm:	**Burnet, Duckworth & Palmer LLP**
Lawyer in charge of file:	David LeGeyt / Ryan Algar
Address of firm:	2400, 525 – 8 Avenue SW Calgary, Alberta T2P 1G1
Telephone number:	(403) 260-0210 / 0126
Facsimile number:	(403) 260-0332
E-mail address:	dlegeyt@bdplaw.com / ralgar@bdplaw.com
File number:	75453-4

Name of firm:	**W Law LLP**
Lawyer in charge of file:	Mike Russell
Address of firm:	Suite 300, 110 – 21st Street East Saskatoon SK S7K 0B6
Telephone number:	(306) 665-9507
Facsimile number:	(306) 652.0332
E-mail address:	mrussell@wlaw.com
File number:	44433-1

BOOK OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act,* RSC 1985, c B-3, as amended.
2.	*ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd.*, 2007 SKCA 72.
3.	*Puratone Corp., Re*, 2013 MBQB 171.
4.	*Canwest Global Communications Corp., Re,* [2009] OJ No 5379 (ONSC).
5.	*Ivaco Inc., Re,* [2005] OJ No 3337 (ONSC).
6.	*Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228.
7.	*Pillar Capital Corp. v Harmon International Industries Inc.*, 2020 SKQB 19.

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1)Court may appoint receiver

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

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

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

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

243(1.1)Restriction on appointment of receiver

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

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

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

243(2)Definition of "receiver"

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

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

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

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)

For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Currency
Federal English Statutes reflect amendments current to March 3, 2021
Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

End of Document

TAB 2

2007 SKCA 72
Saskatchewan Court of Appeal

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.

2007 CarswellSask 324, 2007 SKCA 72, [2007] 9 W.W.R. 79, [2007] S.J. No. 313, 159 A.C.W.S. (3d) 671, 299 Sask. R. 194, 33 C.B.R. (5th) 50, 408 W.A.C. 194

ICR Commercial Real Estate (Regina) Ltd. (Appellant) and Bricore Land Group Ltd., Bricore Investment Group Ltd., 624796 Saskatchewan Ltd. 603767 Saskatchewan Ltd.,(Respondents)

Klebuc C.J.S., Jackson, Smith JJ.A.

Heard: June 7, 2007
Judgment: June 13, 2007
Docket: 1443, 1452

Proceedings: affirming *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157 (Sask. Q.B.); additional reasons at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.); and reversing *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.)

Counsel: Fred C. Zinkhan for Appellant
Jeffrey M. Lee for Respondents
Kim Anderson for Monitor, Ernst & Young

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
  XVII.4 Stay of proceedings

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.2 Initial application
    XIX.2.f Lifting of stay

Civil practice and procedure
XXIV Costs
  XXIV.7 Particular orders as to costs
    XXIV.7.e Costs on solicitor and client basis
      XXIV.7.e.ii Grounds for awarding
        XXIV.7.e.ii.A Unfounded allegations

Debtors and creditors
VII Receivers
  VII.7 Actions involving receiver
    VII.7.b Actions against receiver
      VII.7.b.i Liability

Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.e Practice and procedure
VII.7.e.iii Costs

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish "prima facie case" — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — "Sound reasons" test was better than "prima facie case" test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO's position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish "prima facie case" — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — "Sound reasons" test was better than "prima facie case" test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO's position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Debtors and creditors --- Receivers — Actions by and against receiver — Actions against receiver

Against chief restructuring officer — Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for acts of fraud, gross negligence or wilful misconduct, but order was ambiguous about acts of bad faith — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against CRO personally based on bad faith was dismissed — Supervising judge held that realtor was required to allege fraud, gross negligence or wilful misconduct, and failed to do so — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge did not err in refusing to lift stay to permit action against CRO personally — Supervising judge considered status of CRO as officer of court, noted ambiguity in order, and weighed evidence to certain extent.

Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — Costs
On application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations
Against chief restructuring officer — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client

costs.

Table of Authorities

Cases considered by *Jackson J.A.*:

Air Canada, Re (2004), 47 C.B.R. (4th) 182, 2004 CarswellOnt 643 (Ont. S.C.J. [Commercial List]) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

Caterpillar Financial Services Ltd. v. 360networks corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95 (B.C. C.A.) — referred to

Hadmor Productions Ltd. v. Hamilton (1982), [1983] 1 A.C. 191, [1982] 1 All E.R. 1042 (U.K. H.L.) — referred to

Hashemian v. Wilde (2006), [2007] 2 W.W.R. 52, 40 C.P.C. (6th) 10, 2006 SKCA 126, 2006 CarswellSask 740, 382 W.A.C. 105, 289 Sask. R. 105 (Sask. C.A.) — followed

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

Ivaco Inc., Re (2003), 2003 CarswellOnt 6097, 1 C.B.R. (5th) 204, 6 P.P.S.A.C. (3d) 261 (Ont. S.C.J. [Commercial List]) — considered

Ivaco Inc., Re (2006), 2006 CarswellOnt 8025 (Ont. S.C.J.) — considered

Ma, Re (2001), 143 O.A.C. 52, 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68 (Ont. C.A.) — followed

Martin v. Deutch (1943), [1943] O.R. 683, 1943 CarswellOnt 36, [1943] 4 D.L.R. 600 (Ont. C.A.) — referred to

Mosaic Group Inc., Re (2004), 2004 CarswellOnt 2254, 3 C.B.R. (5th) 40 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, *(*sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, *(*sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

Ptarmigan Airways Ltd. v. Federated Mining Corp. (1973), 1973 CarswellNWT 10, [1973] 3 W.W.R. 723 (N.W.T. S.C.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105, 1990 CarswellBC 384, 2 C.B.R. (3d) 303 (B.C. C.A.) — referred to

Ramsay Plate Glass Co. v. Modern Wood Products Ltd. (1954), 1954 CarswellQue 24, 34 C.B.R. 82 (C.S. Que.) — considered

Siemens v. Bawolin (2002), 2002 SKCA 84, 2002 CarswellSask 448, 46 E.T.R. (2d) 254, [2002] 11 W.W.R. 246, 219 Sask. R. 282, 272 W.A.C. 282 (Sask. C.A.) — followed

Smart v. South Saskatchewan Hospital Centre (1989), 75 Sask. R. 34, 60 D.L.R. (4th) 8, [1989] 5 W.W.R. 289, 1989 CarswellSask 266 (Sask. C.A.) — considered

Smith Brothers Contracting Ltd., Re (1998), 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264, 13 P.P.S.A.C. (2d) 316 (B.C. S.C.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 5024, 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]) — considered

360networks Inc., Re (2003), 45 C.B.R. (4th) 151, 2003 BCSC 1030, 2003 CarswellBC 1636 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12
Generally — referred to

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

s. 11 [rep. & sub. 2005, c. 47, s. 128] — referred to

s. 11(3) — considered

s. 11(4) — considered

s. 11(4)(c) — considered

s. 11(6) — considered

s. 11(6) [en. 1997, c. 12, s. 124] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.11 [en. 2001, c. 9, s. 577] — considered

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

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

s. 12(1) "claim" — considered

s. 13 — referred to

Real Estate Act, S.S. 1995, c. R-1.3
Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules
R. 173 — referred to

Words and phrases considered:

Substantial indemnity costs

[Jackson J.A. (Klebuc C.J.S. and Smith J.A. concurring):] . . . while [the judge, in awarding substantial indemnity costs,] indicated he was not awarding solicitor-and-client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and-client costs is still a punitive order and, as there is no

authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs.

APPEAL by creditor from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39 (Sask. Q.B.) dismissing application to lift stay against debtor under Companies Creditors' Arrangement Act, and from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264, 33 C.B.R. (5th) 46 (Sask. Q.B.) ordering costs against creditor.

***Jackson J.A.*:**

I. Introduction

1 This appeal concerns a claim arising on a "post-filing" basis after a restructuring order had been made under the *Companies' Creditors Arrangement Act*[1] (the "*CCAA*"). The restructuring failed. The principal assets of the companies have been sold and the net proceeds are being held for distribution. The post-filing claim is asserted against: (i) the companies, which are subject to the *CCAA* order; and (ii) against the companies' Chief Restructuring Officer.

2 The post-filing claimant is ICR Commercial Real Estate (Regina) Ltd. ("ICR"). ICR claims a real estate commission with respect to the sale of a building belonging to Bricore Land Group Ltd. Bricore Land and four related companies (collectively "Bricore") are all subject to an initial order ("Initial Order") granted by Koch J. on January 4, 2006 pursuant to s. 11(3) of the *CCAA*. The Chief Restructuring Officer, Maurice Duval (the "CRO"), was appointed by Koch J. on May 23, 2006 (the "CRO Order"). Koch J. has been the supervising *CCAA* judge since the Initial Order.

3 The Initial Order and the CRO Order impose the usual stay of proceedings against Bricore and prohibit the commencement of new actions against Bricore and the CRO, without leave of the Court.

4 ICR applied to Koch J. for directions and, in the alternative, for leave to commence actions against Bricore and the CRO. By fiats dated April 9, 2007 and April 25, 2007, Koch J. held that the Initial Order and the CRO Order prohibiting the commencement of actions apply to ICR and that leave of the Court is required. He refused leave and also awarded substantial indemnity costs against ICR.

5 On May 23, 2007, ICR applied in Court of Appeal chambers for leave to appeal, pursuant to s. 13 of the *CCAA*, and received leave to appeal the same day. The appeal was heard on June 7, 2007 and dismissed in relation to the lifting of the stay application and allowed in relation to the costs order on June 13, 2007, with reasons to follow. These are those reasons.

II. Issues

6 The issues are:

> 1. Does the stay of proceedings imposed by the supervising *CCAA* judge J. under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?
>
> 2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?
>
> 3. If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?
>
> 4. Did the supervising *CCAA* judge make a reviewable error in refusing leave to commence an action against the

evidence.

63 In the case at bar, having determined that it was appropriate to assess ICR's claim in some way, did Koch J. err either in his statement of the appropriate test or in its application?

64 Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in *Ivaco Inc., Re*,[58] but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.[59]

65 Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the *CCAA* proceeding.

66 Given the broad discretion granted to a supervisory judge under the *CCAA*, as well as the knowledge and experience he or she gains from the ongoing dealings with the parties under the proceedings, it would be contrary to the purpose of the *CCAA* for the law under it to develop in a restrictive way. Having regard for this, there ought not to be rigid requirements imposed on how a supervising *CCAA* judge must exercise his or her discretion with respect to lifting the stay.

67 Nonetheless, a broad test articulated along the lines of that in *Ma, Re*[60] may be of assistance. The test from *Ma, Re* is:

> 3 ... As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

While the *Ma, Re* test was developed for use under the *BIA*, a test based on sound reasons, consistent with the scheme of the *CCAA*, to relieve against the stay imposed by ss. 11(3) and (4) of the *CCAA*, may be a better way to express the task of the chambers judge faced with a liquidating *CCAA* than a test based simply on *prima facie* case. It must be kept firmly in mind that the Court is dealing with a claimant that did not avail itself of the remedy of withholding services under s. 11.3. It is also useful to remind oneself that, in a case such as this, the *CCAA* proceeding began as a restructuring exercise with the attendant possibility of creating s. 11.3 claimants. The threshold must be a significant one, but not insurmountable.

68 In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

> (a) the balance of convenience;
>
> (b) the relative prejudice to the parties;
>
> (c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising *CCAA* judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bison Properties Ltd., Re | 2016 BCSC 793, 2016 CarswellBC 1199, [2016] B.C.W.L.D. 3744, [2016] B.C.W.L.D. 3745, [2016] B.C.W.L.D. 3746, 266 A.C.W.S. (3d) 549, 36 C.B.R. (6th) 66 | (B.C. S.C., May 3, 2016)

2013 MBQB 171
Manitoba Court of Queen's Bench

Puratone Corp., Re

2013 CarswellMan 360, 2013 MBQB 171, [2013] M.J. No. 247, 229 A.C.W.S. (3d) 632, 295 Man. R. (2d) 55

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

In the Matter of: A Plan of Compromise or Arrangement of The Puratone Corporation, Pembina Valley Pigs Ltd. and Niverville Swine Breeders Ltd. (the "Applicants")

Dewar J.

Judgment: July 8, 2013
Docket: Winnipeg Centre CI 12-01-79231

Counsel: David Jackson, for Puratone Corporation
J.J. Burnell, for Bank of Montreal
Jeffrey Lee, Sandra Zinchuk, for Farm Credit Canada
Richard Schwartz, Jason Harvey, for ITB Claimants
Ross McFadyen, for Deloitte Touche Inc.
David Kroft, Aaron Challis, for Directors and Officers

Subject: Insolvency; Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Restitution; Torts

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.f Lifting of stay

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay
In September 2012, group of three companies involved in commercial hog production filed application and granted initial order under Companies' Creditors Arrangement Act (CCAA) — Order included usual provision staying commencement or continuation of any proceeding against companies, officers and directors — In November 2012, court approved sale of virtually all of companies' assets to third party — In March 2013, court authorized distribution of majority of proceeds of sale to major secured creditors, each of whom sustained significant shortfall — Monitor retained $6.75 million, including $5 million as general holdback, pending completion of CCAA proceeding — Claimants, group of farmers who had supplied grain to companies in two weeks prior to CCAA filing, and who remained unpaid, requested holdback of $903,250 and sought leave to commence action against companies as well as officers and directors for, among other things, damages for

fraudulent misrepresentation and declaration of constructive trust on basis of unjust enrichment — Claimants alleged companies, officers and directors must have known that CCAA application, made for purpose of liquidation rather than true restructuring, intended at time grain supplied — Major secured creditors objected on basis proposed action had insufficient merit to justify delay in distribution of holdback moneys — Claimants brought motion for order authorizing commencement of action — Motion granted — Section 11.02(3) of CCAA authorized court to lift stay of proceedings where appropriate and applicant acting in good faith and with due diligence — Judicial authority required "sound reasons", considering balance of convenience, prejudice and merits of proposed action — Scrutiny of proposed action and circumstances suggested dismissal of action not foregone conclusion — Proposed action essentially priority dispute between creditors — Since CCAA proceeding almost over, lifting stay would not put any restructuring plan at risk — Balance of convenience favoured claimants — Holdback of $903,250 would not prejudice secured creditors to significant degree if claimants filed undertaking as to damages.

Table of Authorities

Cases considered by *Dewar J.*:

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — followed

International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — considered

People's Department Stores Ltd. (1992) Inc., Re (2004), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise)* 326 N.R. 267 (Eng.), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise)* 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, [2004] 3 S.C.R. 461, 2004 SCC 68, 2004 CarswellQue 2862, 2004 CarswellQue 2863, (sub nom. *Peoples Department Stores Inc. (Trustee of) v. Wise)* 244 D.L.R. (4th) 564, 49 B.L.R. (3d) 165 (S.C.C.) — considered

Statutes considered:

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

s. 11(6) — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

Corporations Act, R.S.M. 1987, c. C225
s. 234 — referred to

Rules considered:

Queen's Bench Rules, Man. Reg. 553/88
Generally — referred to

R. 46.14(1) — considered

R. 46.14(3) — considered

MOTION by claimants to authorize commencement of action.

supporting and participating in a process that was designed to ensure that the secured creditors received the benefit of the feed without having to pay for it.

Analysis

11 A stay of proceedings is normally included in an Initial Order in order to permit an applicant to proceed with its restructuring (including, in some cases, its liquidation) without continually being harassed by creditors who are dissatisfied with the state of their outstanding accounts. The theory behind the stay order is that it will allow the applicant to devote its full time, efforts and resources to presenting and executing a restructuring plan which is in the best interests of the creditors generally, rather than fighting rearguard actions against individual creditors who are trying to collect their individual accounts.

12 A stay of proceedings however can be lifted in the appropriate case, but those cases will be the subject of judicial consideration which normally involves a balancing of stakeholder interests.

13 The CCAA does not set out a specific test identifying the circumstances in which the stay of proceedings should be lifted. Rather, it is in the discretion of the supervising CCAA judge whether a proposed action should be allowed to proceed. Apart from giving the judge the authority to grant the stay, the only guidelines expressed in the CCAA respecting such a stay order are found in section 11.02(3) which says:

(3) The court shall not make the order unless

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

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

14 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72, [2007] 9 W.W.R. 79 (Sask. C.A.), the Saskatchewan Court of the Appeal indicated that there must be "sound reasons", consistent with the scheme of the CCAA, to relieve against the stay. In the search for "sound reasons", the court suggested the following considerations:

a) the balance of convenience;

b) the relative prejudice to the parties; and

c) the merits of the proposed action.

It also indicated that, "The supervising CCAA judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6)".

15 In my respectful view, these considerations are all to be viewed together and in the context of the nature and timing of the CCAA process before the court. The same request may very well receive a different reception in the case of an application for the lifting of a stay early in a CCAA proceeding that contemplates a true restructuring than in the case of an application brought late in a CCAA proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure as intended. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being left to sort through is who is entitled to the money. In my view, a court would be more receptive to lifting the stay in the latter case than in the former.

The stay respecting claims against Puratone

16 The motion of the ITB Claimants was opposed by Bank of Montréal and FCC. They essentially argued that the ITB

TAB 4

2009 CarswellOnt 7882
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7882, [2009] O.J. No. 5379, 183 A.C.W.S. (3d) 634, 61 C.B.R. (5th) 200

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

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

Pepall J.

Heard: December 8, 2009
Judgment: December 15, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Alex Cobb, Shawn Irving for CMI Entities
Alan Mark, Alan Merskey for Special Committee of the Board of Directors of Canwest
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
K. McElcheran, G. Gray for GS Parties
Hugh O'Reilly, Amanda Darrach for Canwest Retirees and the Canadian Media Guild
Hilary Clarke for Senior Secured Lenders to LP Entities
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.ii Contractual rights

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.f Lifting of stay

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights
Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent

entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Substance and subject matter of moving parties' motion were encompassed by stay — Substance of moving parties' motion was "proceeding" that was subject to stay under initial order which prohibited commencement of all proceedings against or in respect of insolvent entities or affecting business or property of insolvent entities — Relief sought would involve exercise of any right or remedy affecting business or property of insolvent entities which was stayed under initial order.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay
Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares from 441 Inc. to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Stay of proceedings not lifted — Balance of convenience, assessment of relative prejudice and relevant merits favoured position of insolvent entities — There was good arguable case that shareholders agreement, which would inform reasonable expectations of parties, permitted transfer and dissolution of 441 Inc. — Moving parties were in no worse position than any other stakeholder who was precluded from relying on rights that arose upon insolvency default — If stay were lifted, prejudice to insolvent entities would be great and proceedings contemplated by moving parties would be extraordinarily disruptive — Litigating subject matter of motion would undermine objective of protecting insolvent entities while they attempted to restructure — It was premature to address issue of whether insolvent entities could disclaim agreement — Issues surrounding any attempt at disclaimer should be canvassed on basis mandated in s. 32 of Act — Discretion to lift stay on basis of lack of good faith not exercised.

Table of Authorities

Cases considered by *Pepall J.*:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

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

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, *(*sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, *(*sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

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

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 92 A.R. 81, 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta

1241, 359 A.R. 71 (Alta. Q.B.) — considered

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

Statutes considered:

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

s. 8 — referred to

s. 11 — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 32 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 106 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 25.11(b) — referred to

R. 25.11(c) — referred to

MOTION by moving party to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement; MOTION by insolvent entities for order that motion by moving party was stayed; CROSS-MOTION by moving party for leave to proceed with its motion.

***Pepall J.*:**

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership

interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

> (i) GS would acquire at its own expense and at its own risk, the slower growth businesses;
>
> (ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;
>
> (iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
>
> (iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the

GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

> (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
>
> (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
>
> (c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
>
> (d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
>
> (e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Canadian Airlines Corp., Re*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

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

against the company; and

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

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

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

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

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

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Stelco Inc., Re*[3] and the key element of the CCAA process: *Canadian Airlines Corp., Re*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Lehndorff General Partner Ltd., Re*[5] , the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the

appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re*[14]and Professor McLaren has added three more since then. They are:

> 1. When the plan is likely to fail.
>
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
>
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
>
> 4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
>
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
>
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
>
> 7. There is a real risk that a creditor's loan will become unsecured during the stay period.
>
> 8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
>
> 9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

> (i) undo the transfer of the CW Investments Co. shares from 441 to CMI or
>
> (ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

- Article 6.1 contains a restriction on the transfer of shares.

- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.

- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.

- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd., Re*[17] *:*

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*[19] , one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts.

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

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

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

Insolvent entities' motion granted; motion and cross-motion of moving party dismissed.

Footnotes

1 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

2 (B.C. C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

5 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

9 R.S.O. 1990, c.C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para.37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

TAB 5

COURT FILE NO.: 03-CL-5145
DATE: 20050718

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"	*Andrew J. Hatnay*, Ontario Agent for the Quebec Pension Committee of Ivaco Inc. *Fred Myers* and *Susan Rowland*, for the Superintendent of Financial Services *Geoff R. Hall*, for QIT-Fer et Titane Inc. *Jeffrey S. Leon*, *Sheryl E. Seigel* and *Richard B. Swan*, for National Bank of Canada *Daniel V. MacDonald*, for the Bank of Nova Scotia *Robert W. Staley*, *Kevin J. Zych* and *Evangelia Kriaris*, for the Informal Committee of Noteholders *Stephanie Fraser*, for Pension Benefit Guaranty Company *Peter F.C. Howard* and *Ashley John Taylor*, for Ernst & Young Inc., the Court-Appointed Monitor **HEARD:** June 13-15, 2005

FARLEY J.

[1] As argued, the Superintendent of Financial Services (Ontario) moved as follows. Paragraphs 1 and 87 of the Superintendent's factum stated:

> 1. The Superintendent of Financial Services ("Superintendent") brings this motion for an Order directing the Monitor to distribute part of the proceeds of sale of the businesses of Ivaco Inc. ("Ivaco") and certain of its subsidiaries to four non-union pension plans in order to protect the

interests of a vulnerable group of persons – the pension beneficiaries. Alternatively, the Superintendent seeks an Order that an amount sufficient to satisfy the claims in respect of the non-union pension plans be held in segregated trust accounts for the benefit of the pension beneficiaries pending the payment of the claims.

87. For the foregoing reasons, the Superintendent respectfully requests that this Honourable Court make an order

(a) directing the Monitor to pay into the Non-Union Plans the amounts owing in respect of the unpaid contributions and the Companies' wind-up liabilities;

(b) alternatively, to the extent that any amount claimed by the Superintendent is not paid under paragraph (a), an order directing the Monitor to segregate into a separate trust sufficient funds to pay such claim;

(c) in the further alternative, to the extent that any amounts in (a) or (b) are not paid or segregated, to delay the granting of a bankruptcy order until all pension liabilities of the Companies are finally determined and paid.

[2] The Superintendent's factum also stated at para. 2:

2. Ivaco, Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc. ("Ifastgroupe") and Docap (1985) Corporation ("Docap") (being four of the Applicants, and collectively, the "Companies") had established various registered pension plans for their employees in Ontario. Under the provisions of the *Pension Benefits Act*, the Companies were required to make contributions to pension plans on a monthly basis, and under the terms of the Initial Order granted in these proceedings, the Applicants were entitled to make such contributions. However, the Companies claimed that unless they suspended payment of certain pension contributions, they would not have sufficient cash to continue operations until a sale of the Applicants' business could be concluded. On this basis, they obtained an order of this Honourable Court to permit them to suspend payments of certain pension contributions that became due after the Initial Order. Thus, apart from the DIP lender, which has been repaid in full out of the sale proceeds, the pensioners were the only creditors who provided a source of financing to the applicants so that a going concern sale could be concluded.

With respect, it would appear to me that the last sentence of para. 2 somewhat overstates the situation. What was suspended by the November 28, 2003 order (which was not opposed by any interested party, including salaried employees, salaried pensioners or pension regulators or overseers including the Superintendent – and as to which no one has utilized the come-back provisions, certainly on any timely basis or on any direct basis) was that the Ivaco Companies would not have to pay any past service contributions for any of the 16 affected pension plans including the four Salaried (i.e. Non-Union) Plans which were not assumed by the purchaser in the Heico sale transaction which closed as of December 1, 2004.

[3] The November 28, 2003 order provided:

> **Pension Payments**
>
> 3. THIS COURT ORDERS that notwithstanding any other provision of the Amended and Restated Order, the Applicants and Partnerships (as defined in the Amended and Restated Order) shall not make any past service contributions or special payments to funded pension plans maintained by an Applicant or Partnership (the "Pension Plans") during the Stay Period, pending further Order of this Court.
>
> 4. THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.
>
> 5. THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated Order.
>
> 6. Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

Even if the "priorities are reversed" with a bankruptcy, this does not affect paragraph 6 of the Order; the claims would be unsecured, not extinguished or compromised.

[4] The overstatement would appear to me to be that other stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due. On the other hand, notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a "fresh" obligation.

[5] Current pension obligation payments continued to be paid throughout the period subsequent to the November 28, 2003 order.

[6] While originally initiated as a restructuring CCAA proceeding with a filing under the CCAA on September 16, 2003, the emphasis rather soon thereafter functionally became a two track exercise, namely either a restructuring or a sale (and in the latter case it was hoped that it would be a sale as a going concern rather than a piecemeal liquidation).

[7] The Heico deal was a sale as a going concern with the purchaser assuming the unionized worker pension plans (but not the Salaried Plans) and with all workers (unionized and non-unionized) being taken on except for 5 non-unionized workers (one active and 4 inactive). In the periods (i) September 16, 2003 to November 28, 2003 and (ii) then to December 1, 2004, all unionized and non-unionized workers continued to be paid their wages and pensioners continued to be paid their pensions at full entitlement rates.

[8] It does not appear to be disputed that the Heico deal on a going concern basis maximized the value of the enterprise both for the creditors and, with the assumption of the unionized workers and virtually all non-unionized workers plus the assumption of the unionized worker pension plans, for the workers. It is unfortunate, but a realistic fact of life in these circumstances that the Salaried Plans were not assumed; the deficit in the Salaried Plans now being estimated at approximately $23 million which, according to present actuarial assumptions, may impact those pensions by 20% to 50%, according to the Pension Committee of Ivaco Inc.; however, the Superintendent's submissions were that the past contributions recovery would result in a pension reduction of 17% (and without recovery of the past contributions, the reduction would be 26%), notwithstanding the approximately $11 million increase in the Salaried Plans during the 14½ month period to December 1, 2004. Part of this deficiency will be picked up by the Ontario Pension Benefits Guarantee Fund ("PBGF") (recognizing that not all of the Salaried Plan beneficiaries are covered by the Ontario legislation). The PBGF payment would entitle the Superintendent to a subrogated charge against any then existing assets of the Ivaco Companies.

[9] The Ivaco Companies are still involved in the CCAA proceedings. It cannot be reasonably disputed that it is not reasonably possible for the Ivaco Companies to be restructured. In pith and substance what has happened is that there has been a liquidating CCAA proceeding.

[10] The National Bank, the Bank of Nova Scotia, the Informal Committee of Noteholders, and a very major trade creditor, QIT - Fer et Titane Inc., wish to have the proceedings transformed into BIA proceedings. It would not appear to me that there has been any conduct alleged to have been taken by any of these BIA desirous parties which would be considered "inequitable" in the sense of *Bulut* v. *Brampton (City)* (2000), 48 O.R. (3d) 108 (C.A.); *Re Christian Brothers of Ireland* (2004), 69 O.R. (3d) 507 (S.C.J.). See also *Unisource Canada Inc. (cob Barber-Ellis Fine Papers)* v. *Hong Kong Bank of Canada* (1998), 43 B.L.R. (2d) 226 (Ont. Gen. Div.), affirmed (2000), 15 P.P.S.A.C. (2d) 95 (Ont. C.A.); *AEVO Co.* v. *D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Gen. Div.).

[11] While in a non-bankruptcy situation, the Ivaco Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries by s. 57(3) of the *Pension Benefits Act* (Ontario), in a bankruptcy situation, the priority of such a statutory deemed trust ceases unless there is in fact a "true trust" in which the three certainties of trust law are found to exist, namely (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of object. For these three certainties to be met, the trust funds must be segregated from the debtor's general funds. See *British Columbia* v. *Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726 (S.C.C.); *British Columbia* v. *National Bank* (1994), 119 D.L.R. (4th) 669 (B.C.C.A.); *Bassano Growers Ltd.* v. *Price Waterhouse Inc.* (1998), 6 C.B.R. (4th) 199 (Alta. C.A.); *Re IBL Industries Ltd.* (1991), 2 O.R. (3d) 140 (Gen. Div.); *Continental Casualty Co.* v. *Macleod-Stedman Inc.* (1996), 141 D.L.R. (4th), 36 (Man. C.A.). There is no evidence that any of the "required" funds have been segregated or earmarked for the pension beneficiaries; nor did the Superintendent make such a request as a condition of the Heico deal being closed. Since there has been no such segregation, the deemed statutory trusts would not be effective as trusts upon the happening of a bankruptcy: see *Henfrey* at p. 141.

[12] An administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy. Section 2(1) of the BIA provides that a "secured creditor" includes a person who holds a lien (i.e. a "true lien") on a debt which is actually owing. Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA "lien": see *New Brunswick* v. *Peat Marwick Thorne Inc.* (1995), 37 C.B.R. (3d) 268 (N.B.C.A.). While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred s. 136(1) of the BIA determines the status and priority of claims: see *Deloitte, Haskins & Sells Ltd.* v. *Alberta (Workers' Compensation Board)* (1985), 19 D.L.R. (4th) 577 (S.C.C.); *Husky Oil Operations Ltd.* v. *Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.).

[13] The Superintendent relies on my earlier decision of *Toronto-Dominion Bank* v. *Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). However this case is distinguishable in that while there was a bankruptcy petition outstanding at the time of the motion, no one was pressing it forward. The petitioner had died and the bank as the major creditor of Usarco only wished to proceed with a bankruptcy once the property was sold (which property had environmental problems of a significant nature). I indicated at pp. 2 and 4:

> While it is possible for the bank to be substituted or added as a petitioner in the Gold bankruptcy petition … it has not moved to do so. It is now approximately a year and a half since the Gold Petition. The bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view, it would be inappropriate for the bank to put all proceedings involving Usarco (including this motion by the administrator) into suspended animation while the bank determined if, as, and when it wished to take action.

Rather in the present case with the Ivaco Companies there are major creditors who wish to proceed forthwith – and for the reason that such a bankruptcy will enhance their position (i.e. the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims). See also *Usarco* at p. 5 where I observed:

> One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy.

See also *Re Black Brothers (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.); *Bank of Montreal* v. *Scott Road Enterprises Limited* (1989), 73 C.B.R. 273 (B.C.C.A.); *Re Beverley Bedding Corporation* (1982), 40 C.B.R. (N.S.) 95 (Ont. S.C.); *Re Harrop of Milton Inc.* (1979), 22 O.R. (2d) 245 (Ont. S.C.). Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.). A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why the order ought not to be granted. While in the present case, the Ivaco Companies as debtors have not objected to the proposed bankruptcy proceedings, they are not functionally in a position to do so as they are rudderless in this respect (the officers and directors have abandoned ship by resigning some months ago and the Monitor's increased powers not extending to this – see the order of December 17, 2004, which in respect of anything which may be considered touching the pension plan issues, only relates to, in effect a safekeeping of the Heico sale proceeds and other assets of the Ivaco Companies). However for the purposes of this motion, I think it fair to treat the Superintendent as the "champion" of the Ivaco Companies' interests in this issue in a surrogate capacity.

[14] Allow me to observe that the usual situation of invoking a s. 43(7) discretion is where (i) the petitioner has an ulterior motive in pursuing the petition (such as eliminating a competitor or inflicting harm on the debtor (together with its officers, directors, shareholders and/or other creditors) as a revenge tool) or (ii) there is no meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. What the Superintendent has submitted in opposition to the request to proceed in bankruptcy mode is not of this nature. Nor is

this type of situation of the nature envisaged at para. 12 of *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.) at p. 241 where Tysoe J. stated:

> 12. Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

There is no such reorganization possible under the existing circumstances. Rather the compromise of claims may be adequately effected under the BIA regime (as opposed to the submission of the Superintendent to appoint an interim receiver to operate under the CCAA proceedings). It would seem to me that those claims which have already been resolved under the CCAA proceeding could be "transferred" as resolved claims into a BIA proceeding.

[15] The Superintendent has not paid out any amount under the PBGF and thus has not effected nor perfected its status as a subrogee.

[16] Given the limited role of the Monitor as indicated above I do not see that the Monitor in fact, law and fairness can be considered a fiduciary to the pension beneficiaries in the nature of an administrator of the Salaried Plans.

[17] Pursuant to s. 57(3) and (4) of the *Pension Benefits Act*, what is the responsibility? It is that the employer (the Ivaco Companies) be deemed to hold the pension funding monies in trust for the pension beneficiaries. However there is no provision in that legislation that the monies be paid out to the pension plan at any particular time. As discussed above, those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The BIA does not contain any provision that the priority position is maintained in a bankruptcy; rather the case law is to the contrary: see *Henfrey* at p. 741; *Bassano* at pp. 201-202; *IBL* at pp. 143-4.

[18] In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed (and un-reconsidered) order of November 28, 2003, the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

[19] However, to allow sufficient time for consideration of appeal, no action or step is to be taken with respect to dealing with the bankruptcy for at least 60 days from the release of these

reasons. Of course it will be within the context of those bankruptcy proceedings that priorities will be determined if there is a bankruptcy, keeping in mind that s. 43(7) of the BIA may be raised at the hearing of the petition.

[20] While the Superintendent in effect griped about the machinations concerning certain "corporate" actions or steps to be taken concerning the Ivaco Companies to "prepare" them for a bankruptcy proceeding, I do not find that these mechanical steps as outlined in paragraphs 2-5 of the National Bank motion as being improper – but rather that these mechanical steps merely recognize the exposure and experience of the Superior Court of Justice (Ontario) to this situation. I have the similar view as to paragraphs 7-8. However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

[21] With respect to the Pension Committee of Ivaco Inc.'s motion to transfer the issue of whether the Ivaco Companies are obliged on a solidary basis for the obligations of each other for amounts owing to the Salaried Plan pursuant to s. 11 of the *Supplemental Pension Plans Act* (Quebec), I have the following observations. I do not rule out the possibility of requesting the Quebec Superior Court to determine this issue. However I do not find it necessary or desirable to make that decision at the present time. It would make sense to do so once it has been determined whether the Ivaco Companies are bankrupt or not (in the latter case one would conclude that likely the CCAA proceedings would be supplemented by an interim receivership) as different factors may come into functional play depending on that outcome.

[22] In the interim, I would note the following. Canadian courts have a good deal of experience in dealing with foreign law on a proven basis. There is an issue of extraterritorial application of the SPPA. When provincial legislation purports to have an extraterritorial effect, the courts of the enacting province do not have exclusive jurisdiction to determine the constitutional validity or scope of the legislation: see J. Walker, ed., *Castel & Walker: Canadian Conflict of Laws*, 6th ed., Vol. 1 (Toronto: Butterworths, 2005) at 2:7.

[23] This constitutional question would appear to arise incidentally to the ordinary course of these proceedings here in Ontario over which this Court has properly assumed jurisdiction – and such jurisdiction has not been challenged since the start of these proceedings on September 16, 2003. See *Hunt* v. *T&N plc*, [1993] 4 S.C.R. 289 where La Forest J. observed at pp. 308-10:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a

foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation. The distinction is clearly made by Lord Diplock in *Buck*, at pp. 886-87:

> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction.

Similarly in *Manuel v. Attorney General*, [1982] 3 All E.R. 786 (Ch. D.), while it was asserted that the courts of one country should not pronounce on the validity of a statute of another, the case where the question arises merely incidentally is expressly excepted.

The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. Formal determination of constitutionality is often purely fortuitous. It is often dependent on there happening to be parties interested in challenging the statute. This is unlikely to happen where, as in this case, most of the parties affected are outside the enacting jurisdiction. In this case, the Quebec statute has never been challenged by Quebec litigants because it does not arise in normal litigation in the province, and in extraprovincial litigation. Quebec defendants benefit while Quebec plaintiffs are normally unaffected. Why should a litigant not be able to argue constitutionality in the course of litigation that directly raises the issue? As a practical matter, it is not much more difficult to determine constitutionality than any other aspect of foreign law.

He went on to state at pp. 314-15:

> It may, no doubt, be advanced that courts in the province that enacts legislation have more familiarity with statutes of that province. It must not be forgotten, however, that courts are routinely called to apply foreign law in appropriate cases. It is thus only the fact that a constitutional issue is raised

> that differentiates this case. But all judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution. In a judicial system consisting of neutral arbiters trained in principles of a federal state and required to exercise comity, the general notion that the process is unfair simply is not legally sustainable, all the more so when the process is subject to the supervisory jurisdiction of this Court.
>
> This approach is even more persuasive where, as here, the issue relates to the constitutionality of the legislation of a province that has extraprovincial effects in another province. That is especially true where the constitutionality of the other province's legislation has never been challenged in the other province's courts, and where moreover, as here, such a challenge is unlikely. Where the violation is as much a violation against the Constitution of Canada, then the superior courts which must legitimately face the issue should be able to deal with the question. Against this position, it was observed that most of the parties interested in the question as interveners would be in the province whose statute is impugned. That may be, but where the alleged violation relates to extraterritorial effect, many of the interested parties are also outside Quebec. Above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction.

[24] The Ivaco Companies initiated the CCAA proceedings in Ontario; no party has questioned the appropriateness of their so doing. Under these circumstances one would have to consider that there should be an onus on the Pension Committee to demonstrate that Quebec is clearly the more appropriate forum on all aspects of the issue as framed. See *ABN Amro Bank et al*. v. *BCE Inc. et al*. (April 30, 2003) (Ont. S.C.J.) a decision of mine at para. 26. This motion is dismissed.

[25] Orders accordingly.

_____

J.M. Farley

Released: July 18, 2005

COURT FILE NO.: 03-CL-5145
DATE: 20050718

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

REASONS FOR JUDGMENT

FARLEY J.

Released: July 18, 2005

TAB 6

2017 SKQB 228
Saskatchewan Court of Queen's Bench

Affinity Credit Union 2013 v. Vortex Drilling Ltd.

2017 CarswellSask 399, 2017 SKQB 228, 282 A.C.W.S. (3d) 773, 50 C.B.R. (6th) 220, 7 P.P.S.A.C. (4th) 195

AFFINITY CREDIT UNION 2013 (PLAINTIFF) and VORTEX DRILLING LTD. (DEFENDANT)

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

IN THE MATTER OF THE SASKATCHEWAN BUSINESS CORPORATIONS ACT, RSS 1978, c B-10

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF VORTEX DRILLING LTD.

B. Scherman J.

Judgment: July 24, 2017
Docket: Saskatoon QBG 783/17, 1030/17

Counsel: Jeffrey M. Lee, Q.C., Paul D. Olfert, for Affinity Credit Union and Radius Credit Union
Mary I.A. Buttery, Jared Enns, for Vortex Drilling
Ian A. Sutherland, Jordan F. Richards, for Receiver
Brent Warga, for Interim Receiver
P. Koliaskis, for Proposed Monitor

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.E Miscellaneous

Headnote

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

Miscellaneous

Defendant company (V Ltd.) was in business of drilling oil wells and was hit hard by price drop of oil — In 2013, plaintiff financial institution (A Co.) advanced V Ltd. nearly $15 million to refinance two drilling rigs and to purchase third — While loan facilities were repayable on demand, prior to demand there was schedule of combined monthly interest and principal payments — Credit agreement also provided that any material change in risk or adverse change in financial condition of V Ltd. would constitute default — After oil prices collapsed, V Ltd. could not make its scheduled payments and A Co. agreed on several occasions to allow V Ltd. to defer principal payments — V Ltd. then failed to make negotiated balloon principal payments and in January 2017 failed to resume regular monthly principal and interest payments as V Ltd. had undertaken to do — A Co. demanded payment in May 2017, allowing V Ltd. 30 days to pay in full — A Co. applied for appointment of receiver; V Ltd. applied for adjournment of A Co.'s application to allow time to respond to A Co.'s affidavits and to apply for relief, including stay of proceedings pursuant to Companies' Creditors Arrangement Act (CCAA) — Interim receiver was appointed for short period under which interim receiver could investigate, monitor and facilitate V Ltd.'s continuing operation so as to give V Ltd. time to file responses and to make its CCAA application — A Co.'s application granted; V Ltd.'s application dismissed — It was evident that V Ltd. heavily relied on affidavit evidence from self-described Administrative Director and her evidence was based on information and belief that had no basis or establishment and would not be admissible on final order — Significant weight could not be placed on Administrative Director's evidence because reliability could not be assessed — A Co. provided significant relief from contractual terms over two-year period and in practical sense, had effectively provided V Ltd. with much of remedial opportunity contemplated by CCAA — V Ltd. had two-year benefit of debt repayment accommodations and forbearance and opportunity to seek alternate financing.

Bankruptcy and insolvency --- Receivers — Appointment

Defendant company (V Ltd.) was in business of drilling oil wells and was hit hard by price drop of oil — In 2013, plaintiff financial institution (A Co.) advanced V Ltd. nearly $15 million to refinance two drilling rigs and to purchase third — While loan facilities were repayable on demand, prior to demand there was schedule of combined monthly interest and principal payments — Credit agreement also provided that any material change in risk or adverse change in financial condition of V Ltd. would constitute default — After oil prices collapsed, V Ltd. could not make its scheduled payments and A Co. agreed on several occasions to allow V Ltd. to defer principal payments — V Ltd. then failed to make negotiated balloon principal payments and in January 2017 failed to resume regular monthly principal and interest payments as V Ltd. had undertaken to do — A Co. demanded payment in May 2017, allowing V Ltd. 30 days to pay in full — A Co. applied for appointment of receiver; V Ltd. applied for adjournment of A Co.'s application to allow time to respond to A Co.'s affidavits and to apply for relief, including stay of proceedings pursuant to Companies' Creditors Arrangement Act (CCAA) — Interim receiver was appointed for short period under which interim receiver could investigate, monitor and facilitate V Ltd.'s continuing operation so as to give V Ltd. time to file responses and to make its CCAA application — A Co.'s application granted; V Ltd.'s application dismissed — It was evident that V Ltd. heavily relied on affidavit evidence from self-described Administrative Director and her evidence was based on information and belief that had no basis or establishment and would not be admissible on final order — Significant weight could not be placed on Administrative Director's evidence because reliability could not be assessed — A Co. provided significant relief from contractual terms over two-year period and in practical sense, had effectively provided V Ltd. with much of remedial opportunity contemplated by CCAA — V Ltd. had two-year benefit of debt repayment accommodations and forbearance and opportunity to seek alternate financing.

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Miscellaneous

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Table of Authorities

Cases considered by *B. Scherman J.*:

Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc. (2016), 2016 SKQB 306, 2016 CarswellSask 607, 41 C.B.R. (6th) 141 (Sask. Q.B.) — considered

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

Lindsey Estate v. Strategic Metals Corp. (2010), 2010 ABQB 242, 2010 CarswellAlta 641, 67 C.B.R. (5th) 88 (Alta. Q.B.) — referred to

Lindsey Estate v. Strategic Metals Corp. (2010), 2010 ABCA 191, 2010 CarswellAlta 1049, 27 Alta. L.R. (5th) 241, 69 C.B.R. (5th) 42, 487 A.R. 262, 495 W.A.C. 262 (Alta. C.A.) — referred to

Romspen Investment Corp. v. Hargate Properties Inc. (2011), 2011 ABQB 759, 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49 (Alta. Q.B.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — referred to

Verlaan v. Lang Estate (2004), 2004 SKQB 376, 2004 CarswellSask 615 (Sask. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 243 — considered

s. 244(1) — considered

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

s. 11.02(1)(a) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3)(a) [en. 2005, c. 47, s. 128] — considered

Personal Property Security Act, 1993, S.S. 1993, c. P-6.2
s. 64 — considered

APPLICATION by plaintiff financial institution for appointment of receiver; APPLICATION by defendant company for relief including stay of proceedings to permit it to pursue successful arrangement or reorganization.

***B. Scherman J.*:**

Introduction

1 Affinity Credit Union 2013 [Affinity], a secured lender to Vortex Drilling Ltd. [Vortex], is owed in excess of $8,350,000 and has applied for the appointment of a Receiver of all of the assets and properties of Vortex under s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] and s. 64 of *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*].

2 Vortex has applied under s. 11.02(a) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], for an initial order granting various relief including a stay of all proceedings against Vortex for a period of time to permit it to pursue a successful arrangement or reorganization.

3 Vortex is insolvent. The other statutory requirements to permit Affinity to pursue the appointment of a Receiver under the *BIA* and for Vortex to seek an initial order and stay under the *CCAA* have been met or established.

4 Affinity has since early 2015 accommodated financial difficulties being faced by Vortex and agreed, under the terms of various agreements, to interest only payments for periods of time in return for various undertakings of Vortex. It says Vortex has breached those undertakings, has ceased making even interest payments and since April of 2017 has been in default under the terms of its credit agreements. Affinity has demanded payment in full of the indebtedness owed to it, and Vortex has failed to pay what it is contractually obligated to pay.

5 Vortex is in the business of drilling oil wells. It says that its financial difficulties are the direct result of the significant drop in the price of oil that occurred in 2014 and has continued to date. This has caused a related reduction in the demand for drilling rigs to drill new wells. Oil prices peaked well in excess of $100 U.S. per barrel and since 2014 have fallen to $50 U.S. or less per barrel.

6 Vortex argues the economic climate in the Western Canadian oil industry is improving, it is expecting a substantial improvement in its cash flow, Affinity is fully secured for the indebtedness owed and the initial *CCAA* order it seeks should be granted so as to give it an opportunity to seek refinancing from other lenders or to facilitate the making of a compromise or arrangements with its existing creditors so as to permit it to be able to continue in business.

7 The issue to be decided in the context of the competing applications is whether the appropriate order to make is to grant an initial order and stay of proceedings under the *CCAA* or to grant Affinity's application for the appointment of a Receiver.

Background Facts

8 Vortex was created in November of 2010 and subsequently purchased and/or constructed three drilling rigs largely utilizing borrowed funds. Under the terms of an August 12, 2013 Offer to Finance from Affinity [Credit Agreement] accepted and agreed to by Vortex, Affinity advanced Vortex, under three separate loan facilities, a total of $14,910,711 to pay out existing loans in respect of two rigs and to finance the construction of a third drilling rig. The individual loan facilities were each payable on demand, but before demand were to be paid by combined monthly principal and interest payments totalling $325,257. The Credit Agreement expressly provided that any material change in risk or adverse change in the financial condition of Vortex or failure to comply with any condition of the Offer to Finance would constitute an event of default entitling Affinity to demand payment of all sums owing and to realize on the security taken for the loan.

9 As required by the Credit Agreement, Vortex granted to Affinity, under the terms of a general security agreement registered in the personal property registries of each of Manitoba, Saskatchewan and Alberta [GSA], a security interest in all

of its present and after acquired property. The terms of the GSA included the right of Affinity, upon the occurrence of an event of default as therein defined, to seize and sell any of Vortex's property or to appoint a Receiver (see paragraphs 9 to 13 of the GSA). Events of default were widely defined and include the insolvency of Vortex.

10 With the collapse of oil prices and the resulting downturn in the oil industry Vortex was unable to make the monthly payments contemplated by the Credit Agreement and sought accommodations from Affinity. By a series of agreements Affinity provided principal repayment deferrals to Vortex, which resulted in Vortex paying only interest for most of the months of 2016. Vortex failed to fulfil its commitments to make balloon principal payments and to resume principal and interest payments by dates and in amounts contemplated by these accommodations or deferral agreements.

11 As of January 2017 regular monthly principal and interest payments of $325,257 were again to resume but Vortex failed to make such payments. In March of 2017 Vortex informed Affinity that it could only afford to make monthly payments of $100,000 rather than the $325,257 per month then required by the Credit Agreement. Affinity prepared an amendment to the Credit Agreement which would have permitted such reduced payments on condition that Vortex approach its shareholders to obtain an injection of equity capital to finance its business operations and reduce the indebtedness owing to Affinity. Vortex did not sign that amending agreement, has not made the required monthly payments, nor remedied the defaults that have occurred under the Credit Agreement, as amended from time to time.

12 By letter of May 1, 2017 Affinity gave Vortex notice of intention to enforce its security pursuant to s. 244(1) of the *BIA* and demanded that the full outstanding obligations (stated to be $8,422,061.01 as at April 28, 2017) be repaid within 30 days, failing which Affinity would proceed to avail itself of its legal remedies including enforcing its security. On June 6, 2017 Affinity filed with this Court its notice of application, returnable June 9, 2017, seeking the appointment of a receiver. By agreement between counsel for Affinity and Vortex this application was adjourned to June 23, 2017.

13 During this adjournment negotiations continued between the parties with Vortex seeking continuing accommodations or forbearance on the part of Affinity. Vortex was representing it had prospects to refinance the indebtedness with other lenders.

14 Affinity takes that position that these negotiations resulted in a concluded agreement under which Affinity was to provide an additional two-week period of forbearance so as to give Vortex additional time to pursue refinancing and would fund current payroll obligations of Vortex, in return for which Vortex would consent to the appointment of a receiver should its refinancing efforts fail. Vortex takes the position that no such agreement was ever concluded.

15 Affinity's application for the appointment of a receiver came before me on June 23, 2017. Vortex sought an adjournment of that application, advancing the position that it needed time to respond to the affidavits filed by Affinity and to bring its own application for *CCAA* relief. In the circumstances I ordered the appointment of an interim receiver for a period ending July 23, 2017 under which the interim receiver could investigate, monitor and facilitate Vortex's continuing operation so as to give Vortex an opportunity to file opposition affidavits and make its *CCAA* application.

16 That application and the affidavit evidence of both Vortex and Affinity on both applications are before me. As stated above, Vortex is insolvent, in the sense of being unable to pay its debts as they become due. The issue to be decided is whether in the circumstances the appointment of a Receiver or an initial order under the *CCAA* is most appropriate in the circumstances.

The Law Respecting CCAA Applications

17 Jurisprudence establishes that the following principles are applicable to *CCAA* applications:

a. The legislative purpose of the *CCAA* is to permit qualifying debtors to carry on business and where possible avoid the social and economic costs of liquidating its assets: See *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15, [2010] 3 S.C.R. 379 (S.C.C.) [*Century*].

b. The remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business: See *Hongkong Bank of*

Canada v. Chef Ready Foods Ltd. (1990), [1991] 2 W.W.R. 136 (B.C. C.A.).

c. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* jurisdiction: *Century* at para 70.

d. Appropriateness is assessed by inquiring whether the order sought advances the remedial purpose of the *CCAA*: *Century* at para 70

e. Section 11.02(3)(a) of the *CCAA* states that the court shall not grant a stay of proceedings unless:

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

18 I proceed on the basis that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence.

The Law Respecting Receivership Applications

19 In a previous unreported decision in *Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc.* [2016 CarswellSask 607 (Sask. Q.B.)]. (25 February 2016) Saskatoon, QB 1639 of 2015, I summarized jurisprudence with respect to applications to appoint a receiver under s. 243 of the *BIA*. I repeat here that summary, which I view as remaining accurate:

5. Under s. 243(1) of the *BIA* this court can, on application of a secured creditor, appoint a receiver where it considers it just and convenient to do so. Instructive decisions on the factors relevant to the court's determination of whether it is "just and convenient" include *Bank of Montreal v. Carnival National Leasing Ltd*. 2011 ONSC 1007 *and Kasten Energy Inc. v. Shamrock Oil & Gas Ltd*. 2013 ABQB 63.

6. In Carnival the court said the following regarding the just and convenient criteria at para 24 of its reason:

In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374;*Confederation Trust Co. v. Dentbram Developments Ltd*. (1992), 9 C.P.C. (3d) 399*; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd*. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc*. (1995), 30 C.B.R. (3d) 49.

7. In *Kasten* the court said the following:

13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at

130] to include:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

20 Consistent with my view that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence, I am of the view that an applicant under s. 243 of the *BIA* bears the burden of satisfying the Court that it would be just and convenient to appoint a receiver in the circumstances.

The Parties' Positions in Brief

21 Vortex's position is that on a proper application of the legislative and remedial purposes of the *CCAA* it is appropriate

to issue an initial order and grant a stay. It argues that putting Vortex into receivership is going to result in liquidation of its assets and the end of its business with the resulting loss of employment for many individuals as well as the loss of the other economic activity that Vortex generates in its home community.

22 Vortex says that the economic climate in the Western Canadian oil industry is improving and it is expecting a substantial improvement in its cash flow. It says it expects to soon secure additional business and that it is actively pursuing promising refinancing opportunities. Thus it says it is appropriate that it be given an opportunity to pursue such refinancing or a compromise with its creditors so as to avoid the social and economic costs of liquidation. It says that the security that Affinity holds has a value significantly beyond the debt owed by it, and there will be no real prejudice to Affinity by granting an initial order and granting a stay.

23 Affinity says the proper and appropriate order in the circumstances is the receivership order it seeks. It says that Vortex is insolvent, it has the contractual right to appoint a receiver or seize and sell the rigs upon an event of default (which both insolvency and failure to pay the debt owed are), it has already provided Vortex with lengthy and significant accommodations and for good and sufficient cause it has lost trust in Vortex. Affinity says Vortex has repeatedly failed to honour contractual commitments made to Affinity in return for the deferrals granted and that the evidence demonstrates that Vortex has not acted in good faith.

24 Beyond these factors Affinity's position is that, given the realities of the oil industry and Vortex's financial position, the business is unviable now and into the foreseeable future. Over nearly 2 1/2 years Affinity has accepted deferral in payments totalling some $4,500,000, but notwithstanding this accommodation Vortex has been unable to generate cash flow that permitted it to cover its variable operating costs, much less make a contribution to fixed costs. The application made by Vortex does not contain even the germ of a reorganization plan that has any prospect of succeeding. It relies on purported, but unverified, refinancing possibilities. Vortex has had many months' opportunity to obtain refinancing and has not been able to do so.

25 Affinity says that continuing to operate the rigs without generating revenue sufficient to cover the fixed costs (which includes repayment of the loans) means the rigs will continue to depreciate and Affinity's security position will be eroded.

26 For all of these reasons it says to issue an initial order and grant a stay of proceedings under the *CCAA* would be inappropriate and that is just and convenient to appoint a receiver.

Analysis of Vortex's Position that CCAA Relief is Appropriate

i. Evidentiary Concerns

27 At paragraphs 20 to 22 of the Vortex Brief of Law counsel argues as follows:

> 20. A stay of proceedings would fulfill the legislative objective of the CCAA by permitting Vortex to carry on its business operations during the reorganization process. The evidence in support of this application clearly demonstrates that such an order is appropriate in these circumstances:
>
> (a) the industry within which Vortex operates is seasonal, and Vortex's Rigs are generally deployed from the month of June onwards (Twietmeyer Affidavit, at para 18);
>
> (b) as the industry itself is seasonal, so too is Vortex's cash flow (Twietmeyer Affidavit, at para 18);
>
> (c) Vortex's assets are worth significantly more than its debts (Twietmeyer Affidavit, at paras 2 and 17);
>
> (d) two of Vortex's three Rigs are currently deployed and operational for the 2017 season, one for Crescent Point Energy Cop. (sic), which is one of Canada's largest light and medium oil producers, and the second Rig is currently in operation for Aldon Oil Ltd. (Twietmeyer Affidavit, at para 19);
>
> (e) Vortex's general manager and sales consultant are currently deploying significant efforts in order to secure a

> contract in respect of its third Rig. The evidence before this court is that these efforts have successfully generated new business for Vortex, including its most recent contract with Aldon Oil Ltd. Accordingly, and through these ongoing efforts, it is believed that it is highly likely that Vortex will secure a contract for its third Rig (Twietmeyer Affidavit, at para 20); and
>
> (f) assuming all of the relief sought in this application is granted, Vortex's cash-flow projections indicate that, if DIP Financing is approved, Vortex will have enough liquidity to meet its cash flow needs through to the end of the 13-week forecast period (Twietmeyer Affidavit, at para 61).

28 It should be noted that for each of the points in paragraph 20 (a) to (f) counsel references supporting evidence from affidavits of one Tina Twietmeyer. I have concluded that it is not appropriate for me to rely on much of the affidavit evidence of Tina Twietmeyer for the reasons that follow:

a. In paragraph 1 of her affidavit she describes herself as the Administrative Director of Vortex without providing any information or details as to what that job function involves and how it would give her the personal knowledge she claims to have. The evidence establishes she is not and has never been a corporate director of Vortex.

b. Notwithstanding her statement that she has personal knowledge of matters in question, on a close read of her affidavits it is apparent much of her evidence is based on information and belief without the basis for her information and belief being provided.

c. Rule 13-30 of *The Queen's Bench Rules* requires that an affidavit must be confined to facts within the personal knowledge of the person swearing the affidavit except that on an interlocutory application affidavit evidence based on information and belief is permissible provided the basis for the claimed information and belief is disclosed.

d. Applying the test in *Verlaan v. Lang Estate*, 2004 SKQB 376 (Sask. Q.B.), that an application is interlocutory where the decision in respect of it given in one way would finally dispose of the matter but if given in another way would allow the action to go on, I am of the opinion that an application for an initial order and stay of proceedings under the *CCAA* is not an interlocutory application. I fully appreciate that if the initial order is granted a further application approving a restructuring plan would be required. While the current application may lie close to the tipping point between what is a final application and an interlocutory application, it is my conclusion that Vortex's *CCAA* application has more of the characteristics of a final application than of an interlocutory application and thus I find the application to not be an interlocutory application. The result is that affidavit evidence based on information and belief is not admissible and should not be considered.

e. If I am wrong in my conclusion that the application is not interlocutory, then nonetheless, in various instances where Ms. Twietmeyer is giving evidence based upon information and belief for which the basis is not provided, the weight and reliability to be given to much of her evidence cannot be assessed.

f. Beyond these concerns, the Rules applicable to affidavit evidence do not permit opinion, argument, irrelevant matters or hearsay on either an interlocutory or final application. Much of Ms. Twietmeyer's affidavit evidence consists of opinion, argument and hearsay or irrelevant matters and thus should not be considered on those grounds.

g. An example of this is her evidence at paragraph 3 of her referenced affidavit that "the economic climate in the Western Canadian oil industry is improving. As a result, Vortex is experiencing significant growth in its business and is expecting a substantial improvement in its cash flow". This evidence includes inadmissible opinion, speculation and argument.

h. On the basis of all of the evidence, I conclude it is wrong to say that Vortex is experiencing significant growth. Rather it is limping along drilling wells on a "one-off" basis as and when such contracts come available. This work is done at depressed prices that cover the variable costs of operation, if that, and the bulk of its capacity is unused.

i. Ms. Twietmeyer is in no position to provide opinion evidence that the economic climate in the Western Canadian oil industry is improving, and her statement that Vortex is expecting a substantial improvement in its cash flow can at best

be viewed as her hope, but in the context of affidavit evidence is inadmissible speculation.

29 With reference to the points made in paragraph 20 of the Vortex Brief of Law above:

i. The facts stated in paragraphs 20 (a) and (b) that the industry in which Vortex operates and thus its cash flow is seasonal is of no or little relevance. The fact that the oil well drilling industry cash flow is seasonal is simply a fact of the business that should be accommodated in the budgeting. The evidence establishes that over a continuous 2 1/2 years this business has been unviable.

ii. The statement at paragraph 20 (c) that Vortex's assets are worth significantly more that its debts is either or both inadmissible hearsay evidence or inadmissible opinion evidence. Paragraph 17 of Ms. Twietmeyer's affidavit indicated that an appraisal of the equipment had been obtained valuing it at $17,146,000, but Vortex has not filed this appraisal claiming confidentiality. This is not an acceptable reason for not filing an appraisal relied upon. Where appropriate, evidence with confidentiality concerns can be filed on a basis that protects the confidentiality.

iii. Opinion evidence can only be given by an individual found to be qualified to give such opinion evidence. To attempt to bootstrap opinion evidence of value into the record in this way is an attempt to introduce hearsay evidence. It denies Affinity any ability to test the opinion evidence or respond. Opinion evidence of value should be provided directly by the person expressing the opinion accompanied by the details of qualifications and the opinion so as to give the party opposite and this Court an opportunity to assess its reliability.

iv. Given no evidence that establishes the expertise of the provider of such appraisal and other evidence that the daily rates for drilling rigs have declined from in excess of $16,000 per day to under $7,000 per day and that only one out of three of Vortex's rigs has been operating on any regular basis gives significant basis to be concerned about the reliability of such evidence.

v. Paragraph 20 (d) of the Vortex brief argues, based on paragraph 19 of the Twietmeyer affidavit, that two of Vortex's three rigs are operational for the 2017 season. This is misleading as to the true state of affairs. The current evidence, as of the date this matter was heard, was that the second rig had drilled one well for Aldon, over a period of approximately one week, and has since been idle. While there may be two rigs which are in operating condition, the relevant fact is that these two rigs are far from fully engaged.

vi. The argument advanced at paragraph 20(e) of the Vortex brief that "it is believed that it is highly likely that Vortex will secure a contract for its third Rig" is based on an expressed "belief" in paragraph 20 of the Twietmeyer affidavit without Twietmeyer having provided any basis for such belief other than reference to efforts on the part of a Messrs. Geysen and Rae. If there is relevant evidence on efforts and prospects for future work it should be given by these individuals rather than in the second-hand, hearsay manner here attempted. Reduced to its essence this is speculation and argument, not evidence.

30 An applicant seeking relief under the *CCAA* should be placing before the Court the best evidence available. Section 11.02(3) of the *CCAA* requires the applicant to satisfy the Court that circumstances exist that make the order sought appropriate. It is a concern to me that I have a number of affidavits from Ms. Twietmeyer but no affidavit on this application from Mr. Geysen, who is the President and General Manager of Vortex, and thus presumably the responsible person within the company who has the requisite personal knowledge.

31 Counsel for Vortex argues that I should have similar or enhanced concerns with respect to the affidavit evidence filed on behalf of Affinity and says I need to consider Ms. Spencer's affidavits with great care. I do not find reason for overall concern. While Ms. Spencer has expressed opinions or beliefs with regard to the impact on the viability of Vortex given Mr. Big Eagle is no longer on the Board or the Chief Executive Officer of Vortex, I have not relied on that evidence for the decisions I have made.

32 Ms. Spencer's affidavits make it clear that she has had day-to-day responsibility for administration of Affinity's account relating to Vortex and that she has conducted a detailed review of the books, records, files and correspondence of Affinity relating to that account. To the extent to which she provides factual evidence based upon the knowledge of the

books, records, files and correspondence of Affinity, I find the factual evidence provided by Ms. Spencer in her affidavits to be appropriate and reliable. To the extent to which she engaged in measures of speculation, argument or providing evidence that she did not have personal knowledge of, I have not relied on such evidence.

ii. Good Faith Considerations in CCAA Applications

33 I find on the basis of the evidence before me that there have been elements of bad faith in Vortex's dealings with Affinity. Vortex had, arising from both the nature of their relationship and by virtue of express contractual provisions, an obligation to provide complete and accurate financial information to Affinity and to not hide or misrepresent matters relevant to their relationship. Good faith of the applicant is a baseline consideration for a Court when considering *CCAA* applications.

34 As of June 20, 2017, with Affinity's receivership application before this Court, but adjourned while the parties were negotiating a potential forbearance agreement, Vortex represented to Radius Credit Union (a member of the Affinity lending syndicate and independently providing an operating line of credit to Vortex) it had no accounts payable. This it did by writing cheques purporting to pay various accounts payable, but then holding those cheques totalling some $235,548 and not delivering them to the payees. This accounting fiction that accounts payable had been paid was used by Vortex to access, under the Radius margining formula, some $121,000 in operating credits that would not have been available had the facts been accurately disclosed. I find this to be a breach of Vortex's contractual covenants to Affinity to provide honest and accurate financial information to Affinity notwithstanding that the misrepresentation was made to Radius in the first instance. Given the circumstances and Affinity's concerns with respect to Vortex's financial position, this action was a failure to act in good faith. It only came to light by reason of investigations by the Interim Receiver.

35 In a June 30, 2016 revision to the Credit Agreement, which allowed Vortex's request to pay interest only from July through November, Vortex agreed that any financial settlement with one Harvey Turcotte would be funded from outside sources and not from Vortex's cash flow. Notwithstanding this agreement, in February of 2017 Vortex made a payment of $525,000 to Harvey Turcotte from its cash flow in breach of this agreement. This fact was not disclosed by Vortex to Affinity and only came to light by reason of investigations by the Interim Receiver. This I find to be a failure on the part of Vortex to act in good faith.

iii. Is CCAA Relief Appropriate or the Appointment of a Receiver Just and Convenient?

36 On the basis of the totality of the evidence before me, I have concluded that it is not appropriate to make an initial order nor grant a stay of proceedings as requested by Vortex in its *CCAA* application. For reasons that overlap, I find it is just and convenient that a Receiver be appointed. I am assisted in these findings by the information provided in the Interim Receiver's reports. In particular I note the Interim Receiver's statements in his July 18, 2017 report, that:

a. Vortex is not contemplating any debt payment to be made to Affinity during the period July 17, 2017 to September 24, 2017 (para. 39); and

b. "Vortex would not have been able to manage its cash flow needs from ongoing operations without the injection of the July 7, 2017 payroll funded by the Interim Receiver." (para. 41).

37 Vortex bears the burden of satisfying me that the relief they seek is appropriate in the circumstances. I am fully alive to the consequences that appointing a receiver may have upon Vortex's employees, unsecured creditors, shareholders and business associates. However, the evidence satisfies me that:

a. The prospect of Vortex finding a lender to refinance it, at the level required to satisfy all of the indebtedness to Affinity and other creditors without significant equity injections by the shareholders, is remote or non-existent.

b. The shareholders of Vortex have demonstrated over the last 2 1/2 years that they are not prepared to invest further monies in Vortex. While Vortex says it has interest from other lenders in refinancing it, Vortex has chosen not to share with Affinity and the Court the details of such refinancing proposals. In the circumstances I am unable to give weight to

suggestions that there are real prospects of refinancing that do not involve either substantial write-off of current indebtedness or the injection of significant additional equity.

c. Vortex has long known that Affinity wanted additional capital injection to the company. Vortex has, given the accommodations Affinity provided over the last two years, had ample opportunity to pursue alternate financing. At a minimum they have since May 1, 2017 had the knowledge that the need for alternate financing was immediate.

d. Two years of financial statements of Vortex establishes that, given the day rates for drilling rigs and the work available, it is unviable at its current debt levels. To the extent Vortex has been able to generate revenue, that revenue has barely covered, and during some periods not covered, the variable costs of operating those rigs, much less making a contribution to fixed costs. Vortex is currently in breach of its statutory obligation to pay employee withholdings to Canada Revenue Agency.

e. While Vortex argues that the economic prospects are improving, there is no credible evidence provided to support that argument. Rather the evidence is that since 2014 the day rate paid for drilling rigs has been reduced to less than one half of their previous levels and even at these rates Vortex is unable to find work that does more than partially utilize its rigs.

f. Oil prices remain below $50.00 per barrel, and Vortex has provided no evidence to support a conclusion that drill utilization rates or daily charges can or will improve beyond the rates experienced over the last 2 1/2 years. No statistical evidence has been provided that establishes the number of rigs available in Western Canada and their current utilization rates nor economic forecasts or analysis that demonstrates that those utilization rates or the presently available day rates for such rigs will increase.

g. If alternate or takeout financing is not available, then the only other justification for an initial order and stay would be to provide time to Vortex to negotiate a compromise agreement between Vortex and its creditors, secured and unsecured. Affinity is the only secured creditor, and it has made it clear that it is not prepared to compromise its debts. Affinity cannot be criticized for such a position. Indeed the members of Affinity would have good reason to criticize Affinity management were they to compromise a debt which it has reasonable prospects to fully recover.

h. Affinity's position is that they have lost confidence in and no longer trust Vortex. This position is reasonable given that Vortex has repeatedly over the last two years failed to meet its commitments to make balloon payments or to resume regular payments coupled with the concerns with respect to Vortex's good faith discussed above.

i. While Vortex argues Affinity is not only fully secured, but has a significant cushion of security such that Affinity would suffer no prejudice by permitting Vortex to pursue *CCAA* relief, that argument is but one of many considerations to weigh. It does not weigh heavily given the absence of admissible and credible evidence as to the value of Affinity's security and my common sense conclusion, given the utilization rates and day rates available to Vortex, that the present value of these rigs is a matter of significant uncertainty.

j. Continued operation of the rigs carries with it the consequence that to some greater or lesser extent the value of the rigs will continue to physically depreciate independent from market forces related to the depressed state of the Western Canadian oil industry or that may result from the introduction of new technologies in drilling rigs and practices.

k. If Vortex were granted *CCAA* protection, Affinity would effectively bears the risks and costs associated with that action since, with the exception of the relatively insignificant dollar amount owed to unsecured creditors (some $193,000), Affinity is the only creditor. If Vortex were given *CCAA* protection then, under the usual DIP financing protocols of *CCAA* protection, costs arising from the continuing operation of Vortex that are in excess of its revenue, including the costs of the Monitor and its legal counsel, will effectively be borne by the security Affinity holds. The Pre-Filing Report of the Proposed Monitor contemplates approval of up to $1,000,000 in DIP financing for the proposed 13-week cash flow period which includes $500,000 in professional fees. Such DIP financing would, of course, assume a super priority position over the secured financing of Affinity. Thus the risks associated with *CCAA* protection are effectively borne by Affinity and the unsecured lenders if the security cushion suggested by Vortex turns out not to exist.

38 The contractual agreement between Affinity and Vortex clearly contemplated loans payable on demand, with specified

principal and interest payments before demand. Affinity has provided significant relief from the contractual terms over a two-year period. In a practical sense, Affinity has already effectively provided Vortex with much of the remedial opportunity contemplated by the *CCAA*. Vortex has had the benefit of two years of debt repayment accommodations and forbearance and the opportunity to seek alternate financing. During this period Vortex has failed to honour undertakings it gave in exchange of the deferral relief provided. Affinity is contractually entitled, following its demand, to either seize and sell the rigs or to have a Receiver appointed. Having regard to the relevant factors I outlined in paragraph 19 above, I conclude that it is just and convenient to appoint a Receiver as sought by Affinity.

iv. Other Considerations

39 Affinity argued that there was a concluded agreement in which Vortex had agreed to consent to the appointment of a Receiver. Vortex disputes that such an agreement was concluded and took exception to evidence Affinity wished to rely on as being without prejudice communications. In light of the conclusions I have reached above, I do not find it necessary to address these arguments and the related argument relating to settlement privilege. My decision is made without regard to the evidence and argument submitted surrounding these issues.

Conclusion

40 For the reasons set forth above:

a. I dismiss Vortex's application for relief under the *CCAA*.

b. I order that Deloitte Restructuring Inc. be appointed Receiver of Vortex effective immediately.

c. I contemplate that the form of that order will be substantially in the form of the draft order filed by counsel for Affinity on July 6, 2017. However, at the hearing of the applications counsel for Affinity and Vortex asked that the final form of the order not be settled until after counsel had reviewed my decision and had discussion on the final form of order. I ask counsel to consult promptly. If they are able to agree on the form of order they shall file same for my approval. If they cannot agree on the form of the order, a conference call with me shall be arranged to settle this matter.

c. I approve the actions of the Interim Receiver since the date of appointment as Interim Receiver to the termination of that order.

Plaintiff's application granted; defendant's application dismissed.

End of Document

TAB 7

2020 SKQB 19
Saskatchewan Court of Queen's Bench

Pillar Capital Corp. v. Harmon International Industries Inc.

2020 CarswellSask 34, 2020 SKQB 19, 314 A.C.W.S. (3d) 470

PILLAR CAPITAL CORP. (APPLICANT) and HARMON INTERNATIONAL INDUSTRIES INC. (RESPONDENT)

R.W. Elson J.

Judgment: January 22, 2020
Docket: Saskatoon QBG 1401/19

Counsel: Michael J. Russell, Kevin N. Hoy, for Applicant
Jared D. Epp, for Respondent

Subject: Corporate and Commercial; Evidence; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Respondent debtor had been engaged in manufacture of various equipment, it had carried on business for almost 30 years, but it stopped operating as going concern — Applicant creditor specialized in providing short-term loans for companies that required non-traditional debt financing, and it advanced secured loan of $3.3 million to debtor — Debtor defaulted on its payments, and it owed funds exceeding $3.7 million to creditor — Creditor applied for appointment of receiver of all of assets and properties of debtor pursuant to s. 243 of Bankruptcy and Insolvency Act (BIA) — Application granted — Debtor was insolvent person within meaning of s. 2 of BIA — There was more than enough evidence to establish insolvency through circumstances listed in ss. 2(a) and (b) of BIA, being unable to meet obligations as they generally became due, and ceasing to pay current obligations in ordinary course of business as they generally became due — Debtor's failure to pay creditor or to meet its property tax obligations was sufficient to establish insolvency — It was both just and convenient for court to appoint receiver — Most of relevant factors favoured court appointment of receiver — Given that debtor had not carried on active business for some time, with no stated intention of doing so, balance of convenience clearly favoured granting application — Nature and condition of property, appropriately described as "catastrophe of asset", factored heavily in favour of court-appointed receiver in preference to one appointed under security agreement.

Table of Authorities

Cases considered by *R.W. Elson J.*:

Affinity Credit Union 2013 v. Vortex Drilling Ltd. (2017), 2017 SKQB 228, 2017 CarswellSask 399, 50 C.B.R. (6th) 220, 7 P.P.S.A.C. (4th) 195 (Sask. Q.B.) — considered

Bank of Montreal v. Carnival National Leasing Ltd. (2011), 2011 ONSC 1007, 2011 CarswellOnt 896, 74 C.B.R. (5th)

300 (Ont. S.C.J.) — considered

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — considered

Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc. (February 25, 2016), Doc. Saskatoon QB 1639/15 (Sask. Q.B.) — considered

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd. (2013), 2013 ABQB 63, 2013 CarswellAlta 153, 20 P.P.S.A.C. (3d) 128, 99 C.B.R. (5th) 178, 76 Alta. L.R. (5th) 407, 555 A.R. 305 (Alta. Q.B.) — considered

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 "insolvent person" — considered

s. 2 "person" — considered

s. 243 — considered

s. 244(1) — considered

APPLICATION by creditor for appointment of receiver of all of assets and properties of debtor.

***R.W. Elson J.*:**

Introduction

1 In a brief fiat, dated January 16, 2020, I directed the issue of an order for the appointment of a receiver of all assets, undertakings and property of Harmon International Industries Inc. [Harmon]. In that fiat, I stated that reasons would follow in a published decision. This fiat contains those reasons.

2 Harmon is a Saskatoon company that has been engaged in the manufacture of various equipment, including light agricultural equipment. It stopped operating as a going concern on an undisclosed date, in late 2018 or early 2019. Before that, it had carried on business for almost 30 years.

3 Pillar Capital Corp. [Pillar] is a company specializing in providing short/medium-term loans for companies that require "non-traditional debt financing". Pillar advanced a secured loan of $3.3 million to Harmon in the summer of 2018. Harmon defaulted on its payment against the debt. It now finds itself owing in excess of $3.7 million to Pillar.

4 Pillar applies to this Court for the appointment of a receiver of all of the assets and properties of Harmon under s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

5 For the reasons that follow, I am satisfied that: 1) Harmon is insolvent; and 2) it is both just and convenient for the Court to make the appointment requested.

Background Facts

6 The facts relating to this application are drawn from a considerable volume of affidavit evidence and exhibits to those affidavits. The affidavit material includes two affidavits from Steven Dizep, Pillar's president, and three affidavits from Calvin Moneo, one of Harmon's principal officers.

7 Harmon was incorporated in 1989. It carried on its manufacturing operations from the date of incorporation until its decision to cease operations, altogether. Its facilities and equipment have been idle since that time.

8 Prior to its financing arrangement with Pillar, Harmon appears to have been experiencing debt and cash flow issues. In the summer of 2018, it decided it would consolidate its existing debt. To that end, it approached Pillar through a brokerage to explore refinancing possibilities. According to Mr. Dizep, Harmon had existing mortgages on six parcels of real property, in Saskatoon's north industrial district. The addresses of the land, consisting of almost seven acres, are at 2401 Millar Avenue and 821 - 47th Street East. Harmon told Pillar that the requested loan was to serve as bridge financing to pay out the existing mortgages. In turn, Harmon planned to sell all six parcels of land in order to extinguish any remaining debt then in place.

9 Pillar agreed to provide the financing. Under a loan agreement, dated July 10, 2018, Pillar made available to Harmon a 12-month term facility in the maximum principal amount of $3.3 million. As consideration for the loan, Harmon executed a promissory note in favour of Pillar for the principal amount under the loan agreement plus interest.

10 In further support of the loan agreement, Harmon granted security to Pillar under the following documents, all dated July 26, 2018:

a. a general security agreement, covering all present and after-acquired personal property of Harmon;

b. a collateral mortgage, over the six parcels of the land; and

c. a general assignment of rents in regard to the six parcels of land.

11 The general security agreement provides Pillar with the right to pursue specific remedies in the event of Harmon's default. One such remedy, set out in para. 13(a), is the right to appoint a receiver by way of an instrument in writing. Subject to the provisions of the appointing instrument, para. 13(a) recognizes that the extra-judicially appointed receiver possesses broad powers, including: 1) taking possession of the collateral; 2) preserving the collateral or its value; 3) carrying on or concur in carrying on all or any part of Harmon's business; and 4) selling, leasing, licensing or otherwise disposing of the collateral, or concurring in same.

12 Pillar also received security from Harmon's two principals, being Mr. Moneo and his brother, Victor. The Court was advised that no steps are being taken, in this particular application, against that security. Accordingly, it is not necessary to describe the particulars of that security in this decision.

13 The evidence shows that Pillar advanced to Harmon the full principal amount of the loan on August 10, 2018. Following the advance, Harmon made monthly payments, in accordance with the loan agreement, up to and including the month of April 2019. The monthly payment due on May 31, 2019 was not paid until June 14, 2019. Since then, Harmon has failed to make any payments to Pillar as they became due.

14 By letter, dated August 19, 2019, Pillar's counsel wrote to Harmon and the other entities from whom security and/or guarantees had been provided, giving notice of the default and demanding payment of the outstanding indebtedness. According to the letter, the indebtedness under the loan agreement amounted to $3,430,483.52 as at July 10, 2018. The letter further noted that, pursuant to the loan agreement, interest was accruing on the outstanding amount at $1,678.50 per day. The notices, provided under cover of counsel's letter, included the notice of intention to enforce security pursuant to s. 244(1) of the *BIA*.

15 Following the provision of the ten-day notice, Pillar endeavoured to facilitate the conclusion of an agreement between

itself, Harmon, and a third-party auctioneer for the purpose of arranging for the voluntary liquidation of Harmon's personal property by way of auction. Notwithstanding Pillar's efforts to reach an agreement, no such contract was entered into and discussion concerning the voluntary liquidation of Harmon's assets have since broken down.

16 The Court received oral submissions on this application in two separate hearings, one on October 8, 2019 and the other on January 10, 2020. When the application was filed in advance of the first hearing, Pillar expressed serious concern for the protection of its security. Pillar grounded its concerns on two circumstances. First, it presented considerable evidence that Harmon had neglected the buildings, equipment and inventory. The evidence included photographs which showed considerable clutter as well as disrepair of Harmon's two buildings.

17 The second circumstance reflected, in Pillar's view, a much more urgent worry. In this regard, Pillar informed the Court that Harmon had accrued considerable arrears in its utility payments. This circumstance presented the real risk that the power and natural gas for its buildings would be shut off.

18 By the date of the first hearing, this second circumstance became less worrisome. The Court was advised that, since the affidavit evidence was filed, Harmon had covered the utility payments. While Pillar continued to seek the appointment of a receiver, the risk to its security was not as dire as it was at the time the application was filed.

19 Further, a few hours before the first hearing, the Court received an affidavit from Mr. Moneo. Aside from confirming the utility payments, Mr. Moneo deposed to the efforts he and his brother were taking to sell the parcels of land. He also exhibited an appraisal report, dated August 28, 2017, prepared by Brunsdon Lawrek & Associates [Brunsdon]. That report appraised the value of the five parcels of land, specifically located at 2401 Millar Avenue, at $5.5 million.

20 In addition to the Brunsdon report, Mr. Moneo also exhibited a valuation opinion by the commercial realtors with whom Harmon had listed the same five parcels. That valuation, dated September 4, 2018, was estimated at $5,125,000. The Court also learned that the land is for sale at a list price of $5,290,000.

21 Relying substantially on Mr. Moneo's evidence, Harmon vigorously argued that the court appointment of a receiver was premature. Aside from the absence of any immediate risk to Pillar's security, Harmon relied heavily on the prospect that it could pay out the debt in full if the land sold at a value approximating the valuations it had received.

22 After the October hearing, I wrote a short fiat in which I adjourned Pillar's application to January 10, 2020. In doing so, I concluded that it was "fair, just and convenient" to give the dispute between the parties more time to sort out. In particular, I felt that the additional time might allow Harmon and its officers the opportunity to show how serious they were in addressing all of Pillar's concerns and, in particular, paying down the indebtedness.

23 Unfortunately, when this application returned to court in the New Year, little had changed. The additional affidavit evidence, presented for the second hearing, disclosed that the indebtedness had increased to in excess of $3.7 million, as of January 6, 2020, with interest accruing at $1,835.55 per day. In the meantime, property taxes, which were in arrears at the time of the October hearing, remain unpaid and continue to accrue. The Court learned that the total tax arrears for both addresses now exceeds $100,000.

24 The Court also received more illuminating evidence on the value of the land that Harmon "purportedly" intends to sell. First, Pillar obtained an appraisal report from its own appraisers, Suncorp Valuations [Suncorp]. This appraisal, for the same five parcels of land described in the Brunsdon report, values the property within a range of $3.43 million to $3.65 million. Notably, Suncorp stipulates that its appraisal is based on "extraordinary assumptions". These assumptions are: 1) that the assessment of "deferred maintenance" issues presented to Suncorp are accurate; and 2) that the areas of the building unavailable to Suncorp during the site visit are of a similar condition to the remainder of the building. The author of the report took care in pointing out that the assumptions are "extraordinary" because they pertain to matters for which the appraiser did not have specialized knowledge or training, such as matters relating to the structural integrity of the building.

25 As a footnote to this report, it should be noted that Harmon's principals were less than cooperative in providing Suncorp access to the Millar Avenue property. Despite representations that the appraiser would be accommodated at an earlier time, access was not permitted until January 6, 2020, leaving little time before the matter returned to court.

26 As for efforts to sell the land, Harmon showed no interest or movement in this direction, at all. Specifically, the Court heard that Harmon maintained the list price of $5.295 million in place since the listing was issued. Secondly, and somewhat interestingly, the Court also received affidavit evidence from the commercial realtors with the listing of the land at 2401 Millar Avenue. One of the agents confirmed that he had provided Mr. Moneo with the market valuation he described in his earlier affidavit. The agent deposed that the valuation was based on an assumption that the interior of the industrial facility on the property was in a usable condition. Based on his personal inspection since that time, the realtor is of the view that the $5,125,000 list price is excessive. The realtor also deposed that, at Harmon's instruction, the listing agreement provided for a price of $5,290,000. He said that, in the course of the realtor's engagement with Harmon, he verbally advised Mr. Moneo that the list price was too high and should be reduced. Despite this advice, no such reduction was authorized.

27 In passing, I should also note that, in his most recent affidavit, Mr. Moneo expressed some umbrage at the fact that Harmon's realtors deposed affidavit evidence in support of Pillar. He also said that Harmon intends to change listing agents and reduce the list price to $4.5 million as soon as a new listing agent is retained.

Relevant Legislation

28 This application engages Part XI of the *BIA*, specifically s. 243, which reads as follows:

> **243(1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.
>
> **(1.1)** In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
>
> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) the court considers it appropriate to appoint a receiver before then.
>
> **(2)** Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who
>
> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
>
> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

> **(3)** For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).
>
> **(4)** Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).
>
> **(5)** The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.
>
> **(6)** If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.
>
> **(7)** In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

29 This application also engages two specific definitions in s. 2 of the *BIA*. They are the definitions of the word "person" and the phrase "insolvent person", which read as follows:

> **2.** In this Act
>
> . . .
>
> **"person"** includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;
>
> . . .
>
> **"insolvent person"** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

Issues

30 There are two issues for the Court to determine in this application. They are:

a. Is Harmon an insolvent person within the meaning of the *BIA*?

b. If Harmon is insolvent, is it just or convenient for the Court to appoint a receiver over its property, assets, and undertakings of Harmon?

Law

Insolvent Person

31 The Court's authority to appoint a receiver under s. 243 first depends on a finding that the subject debtor is either a "bankrupt" or an "insolvent person" within the meaning of the respective definitions set out in s. 2. As Harmon is obviously not a bankrupt, the question is whether it is an insolvent person.

32 The definition of an "insolvent person" in s. 2 contains three discrete circumstances. As the list of these circumstances is worded disjunctively, the applicant need only establish that the debtor fits within one listed circumstance. Consequently, a debtor, who has ceased to meet its obligations as they generally became due, as described in subparagraph (a), is insolvent even if the aggregate value of the debtor's property is sufficient to pay out all the debtor's obligations.

33 In the present case, there has been an arguable dispute about the value of Harmon's property, and whether that value was sufficient for it to pay out all its obligations, and its obligation to Pillar, in particular. While the evidence in the most recent affidavits raises considerable doubt about the present state of the earlier property valuations, I am satisfied that there is more than enough evidence to establish insolvency through the circumstances listed in subparagraphs (a) and (b). Harmon's failure to pay Pillar, or to meet its property tax obligations, is sufficient to establish insolvency. Accordingly, I find that Harmon is an insolvent person within the meaning of s. 2 of the *BIA*.

Just or Convenient

34 Having found insolvency, the Court's authority to make the requested appointment depends on whether it is "just or convenient" for the Court to do so. The burden in this regard lies with the party seeking the appointment.

35 The jurisprudence relative to the "just or convenient" test is considerable. In *Affinity Credit Union 2013 v. Vortex Drilling Ltd.*, 2017 SKQB 228, 50 C.B.R. (6th) 220 (Sask. Q.B.) [*Vortex*], Scherman J. repeated his earlier summary of that jurisprudence from an unreported decision, *Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc.* (February 25, 2016), Doc. Saskatoon QB 1639/15 (Sask. Q.B.). In the summary, two notable authorities were referenced, namely, *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007, 74 C.B.R. (5th) 300 (Ont. S.C.J.) [*Carnival*], and *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 ABQB 63, 99 C.B.R. (5th) 178 (Alta. Q.B.) [*Kasten*]. The summary is recited at para. 19 of the *Vortex* decision:

> . . .
>
> 5. Under s. 243(1) of the *BIA* this court can, on application of a secured creditor, appoint a receiver where it considers it just and convenient to do so. Instructive decisions on the factors relevant to the court's determination of whether it is "just and convenient" include *Bank of Montreal v. Carnival National Leasing Ltd*. 2011 ONSC 1007 *and Kasten Energy Inc. v. Shamrock Oil & Gas Ltd*. 2013 ABQB 63.
>
> 6. In Carnival the court said the following regarding the just and convenient criteria at para 24 of its reason:
>
> In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
>
> > 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram*

Developments Ltd. (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd*. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc*. (1995), 30 C.B.R. (3d) 49.

7. In *Kasten* the court said the following:

> 13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

36 In the consideration of the non-exhaustive factors cited in *Kasten*, it is important to observe that, while the factors vary in their importance, no one factor is determinative. This includes the presence, or not, of irreparable harm to the applicant or the applicant's security. See *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]). By and large, courts have taken a contextual approach to the consideration of these factors. A court is expected to have consideration for all attendant circumstances, including the interests of all concerned, in the "just or convenient" analysis.

37 A question that often arises in the "just or convenient" analysis pertains to whether a court should appoint a receiver where the applicant's security provides for the private appointment of a receiver, as the security does in the present case. While the right to make such an appointment is a factor, the real inquiry is whether a court appointment is the "preferable" option — not the "essential" one. This point was also addressed in *Carnival*, where, at para. 27, Newbould J. recited the following passage from the decision of Blair J. in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]):

> **27** ...
>
> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplate, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

38 Turning to the application at bar, I am satisfied that it is both just and convenient that the requested application be granted. In my view, most of the factors identified in *Kasten* favour court appointment of a receiver. Given that Harmon has not carried on active business for some time, with no stated intention of doing so, the balance of convenience clearly favours the application.

39 More importantly, however, I am persuaded that the nature and condition of the property factors heavily in favour of a court appointed receiver — in preference to one appointed under the security agreement. It is now reasonably clear that the sanguine picture Mr. Moneo painted in his first affidavit does not bear up to the image now presented in the most recent evidence. In his most recent submission, Mr. Hoy described Harmon's property as a "catastrophe of an asset". As unfortunate as that description is, I am satisfied that it is apt.

Conclusion

40 In the result, the Court appoints Hardie & Kelly Inc. as receiver, without security, of all assets, undertakings and properties of Harmon. The order may issue in the form of the draft order filed by Pillar, subject to one modification. That modification, which counsel for Pillar agreed to in chambers, is the removal of the reference to the assets of Harmon's principals, Victor Moneo and Calvin Moneo, in para. 2 of the draft. In all other respects, the order may issue in the form of the draft.

41 In the event there are any matters related to the issuance of this order, or its terms, I shall consider myself seized with those matters.

Application granted.

