Court File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

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

MOTION BRIEF OF THE MONITOR
(**Motion for Unitholder Claims Procedure and Stay Extension**)

DATE OF HEARING: TUESDAY, JUNE 2, 2015, AT 10 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

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MOTION BRIEF OF THE MONITOR

INDEX

PART I LIST OF DOCUMENTS TO BE RELIED UPON

1. The Notice of Motion with the Proposed Orders attached as Appendices "1" and "2" thereto;

2. Twenty-First Report of the Monitor dated April 27, 2015 (the "**Twenty-First Report**");

3. Twenty-Second Report of the Monitor dated May 27, 2015 (the "**Twenty-Second Report**"); and

4. Such further and other materials as counsel may advise and this Court may permit.

PART II STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON

Tab

1	QBR 2.03, 3.02(1), 16.04, 16.08, 37.07(1) and 37.08(2)
2	*Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (hereinafter "CCAA") ss. 11 and 11.02
3	*Re ScoZinc Ltd.* (2009), 53 C.B.R. (5th) 96
4	*Re Pine Valley Mining Corp. (Re)* (2008), 41 C.B.R. (5th) 43
5	*Worldspan Marine Inc. (Re)*, 2011 BCSC 1758

PART III LIST OF POINTS TO BE ARGUED

1. This motion is for Orders:

   (a) validating and abridging the time for service of the Notice of Motion and supporting materials such that the motion is properly returnable on June 2, 2015 at 10:00 a.m. and dispensing with further service thereof;

   (b) approving the proposed claims process (the "**Unitholder Claims Process**") described in the draft Unitholders Claims Procedure Order at Appendix "1" to the Notice of Motion (the "**Unitholders Claims Procedure Order**");

   (c) extending the Stay Period until November 16, 2015; and

   (d) approving the Twenty-First and Twenty-Second Reports of the Monitor (the "**Twenty-First Report**" and "**Twenty-Second Report**", respectively) and the activities described therein.

2. The key points to be argued on this motion are as follows:

   (a) *Validating Service:* An order validating and abridging the time for service should be granted because the service effected and notice provided has been sufficient to bring these proceedings to the attention of the recipients;

   (b) *Unitholder Claims Process*: An order approving the proposed Unitholders Claim Process is appropriate because it will allow the Monitor to identify and resolve potential claims relating to the Initial Distribution (as defined in the Twenty-Second Report) in an orderly and efficient manner;

(c) *Stay Of Proceedings*: An order extending the Stay Period is appropriate to enable the Monitor to continue to work towards a resolution of the Unresolved Claims for the benefit of the stakeholders, to implement the process contemplated by the Plan, and to conduct the proposed Unitholder Claims Process; and

(d) *Approving Twenty-First and Twenty-Second Report and Activities*: An order approving the Twenty-First and Twenty-Second Report and the Monitor's activities as described therein should be approved as the stakeholders will have had a reasonable opportunity to review and take issue with the Twenty-First and Twenty-Second Report.

A. Validating Service

3. Notwithstanding the ordinary requirements of service under the QBR, this Court has authority to abridge the time requirements, to validate defective service or even dispense with service where necessary in the interest of justice.

(**Tab 1** – QBR 2.03, 3.02(1), 16.04, 16.08, 37.07(1) and 37.08(2))

4. The Twenty-First Report was served on all parties listed in the service list (prepared in accordance with paragraph 66 of the Initial Order) on April 29, 2015.

5. The Notice of Motion and the Twenty-Second Report were served on all parties listed in the service list (prepared in accordance with paragraph 66 of the Initial Order) on May 27, 2015.

6. It is respectfully submitted that the service effected and notice provided has been sufficient to bring these proceedings to the attention of the recipients and it is appropriate in the circumstances for this Honourable Court to validate service and proceed with the hearing of the relief requested.

B. The Proposed Unitholder Claims Process Should be Approved

7. The Monitor asks this Honourable Court to grant an Order approving the Unitholder Claims Process as described in the draft Unitholder Claims Procedure Order.

8. The CCAA does not set out a formal claims administration process for identifying or determining claims. Instead, Courts generally rely on the broad authority granted under the CCAA and their inherent jurisdiction to establish an appropriate claims process by court order. In *Re ScoZinc*, the Nova Scotia Supreme Court acknowledged that claims procedure orders are a "well accepted practice" and that the typical claims process should be "both flexible and expeditious."

(**Tab 2** – CCAA, s. 11.02(3))

(**Tab 3** – *Re ScoZinc Ltd.* (2009), 53 C.B.R. (5th) 96 at paras. 18-31)

9. The proposed Unitholder Claims Process is both flexible and expeditious. It will allow the Monitor to identify and resolve potential claims relating to the Initial Distribution in an orderly, fair and efficient manner for the benefit of all stakeholders of the Applicants.

10. The proposed claims process complies with the jurisprudence surrounding the Monitor's role in a claims procedure under the CCAA. As the Supreme Court of British Columbia described in *Re Pine Valley Mining Corp. (Re)*:

> I conclude from the CCAA and the Claims Procedure Order that the function of the Monitor, that is relevant to this application, is to determine the validity and amount of a claim on the basis of the evidence submitted. The Monitor's process in doing so is in no way akin to an adversarial process. Although his findings and opinion should be respectfully considered, he is not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant. Counsel have not called my attention to any authority for either of the following propositions, either that the CCAA claim process alters substantive law that would otherwise apply to the determination of such a claim, or that a monitor appointed on the terms here is entitled to the deference accorded a quasi-judicial officer like a court appointed claims officer

(**Tab 4 –** *Re Pine Valley Mining Corp. (Re)* (2008), 41 C.B.R. (5th) 43 at para. 13)

11. To the extent there is a claim that is submitted pursuant to the Unitholder Claims Process which is not resolved by the Resolution Deadline (being September 8, 2015 and as defined in the Unitholder Claims Procedure Order), the proposed Unitholder Claims Procedure Order contemplates the appointment of a Unitholder Claims Officer who will be empowered to determine the validity and value of those claims which are the subject of the Unitholder Claims Procedure Order.

12. Therefore, the Monitor submits that the Unitholder Claims Procedure Order will advance the Applicants' proceedings, benefit the Applicants' stakeholders and ought to be granted by this Honourable Court.

C. The Stay Of Proceedings Should Be Extended

13. The existing stay expires on June 15, 2014. It is necessary to extend the stay to enable the Monitor to continue to conduct the first Claims Process, to implement the Unitholder Claims Process, and to deal with other estate matters.

14. CCAA s. 11.02 gives the Court discretion to grant or extend a stay of proceedings. CCAA 11.02(2) applies when a stay of proceedings is requested other than on an initial application. It provides as follows:

> **11.02**(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.

15. According to CCAA 11.02(3), the Court must be satisfied that (a) circumstances exist that make the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

(**Tab 2** – CCAA, s. 11.02(3))

16. As set out in the Twenty-Second Report, the Monitor believes that the Applicants have acted and continue to act in good faith and with due diligence. In addition, progress has been made in resolving the Unresolved Claims and finalizing provisional settlements of Claims since the date of the Twentieth Report of the Monitor.

17. In considering whether circumstances exist that make the order appropriate, the Court "must be satisfied that an extension of the Initial Order and stay

will further the purposes of the CCAA." The Monitor believes that an extension of the Stay Period until November 16, 2015 is appropriate, as it will allow additional time for the Monitor, in consultation with the Applicants, to continue to work towards a resolution of the remaining unresolved Claims filed in the Claims Process, as well as to conduct the Unitholder Claims Process. The proposed Stay extension date of November 16, 2015 is being requested based on the expected timeline for the resolution of the remaining unresolved Claims and the completion of the Unitholder Claims Process.

> (**Tab 5** – *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 [Pearlman J.] at paras. 13-15)

C. Approval Of Monitor's Reports And Activities

18. In accordance with the practice that has developed, the stakeholders have had a reasonable opportunity to review and take issue with the Twenty-First and Twenty-Second Report and the activities described therein and, absent any significant objection, this Report should be approved by this Honourable Court.

CONCLUSION

19. It is respectfully submitted that this Honourable Court ought to grant the proposed orders as they are consistent with the underlying purposes of the CCAA and will benefit the Applicants' estate and stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of May, 2015.

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TAB 1

COURT OF QUEEN'S BENCH RULES

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

General powers of court

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where order may be made

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Effective date of service

16.04(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

Service dispensed with

16.04(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date the order is signed, for the purpose of the computation of time under these rules.

VALIDATING SERVICE

16.08 Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

TIME FOR SERVICE

Where to master or other officer or uncontested

37.07(1) Where a motion is made on notice in any of the cases mentioned in clauses 37.05(2)(a) and (b), the notice of motion shall be served at least four days before the date on which the motion is to be heard.

Immediate hearing where urgent, etc.

37.08(2) In a case of urgency or where otherwise appropriate, the judge may proceed to hear the motion.

TAB 2

***Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended**

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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.

Marginal note: Stays, etc. — other than initial application

(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.

Marginal note: Burden of proof on application

(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.

Marginal note: Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

TAB 3

Case Name:

ScoZinc Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of ScoZinc Ltd., Applicant

[2009] N.S.J. No. 187

2009 NSSC 136

277 N.S.R. (2d) 251

53 C.B.R. (5th) 96

2009 CarswellNS 229

Docket: Hfx No. 305549

Registry: Halifax

Nova Scotia Supreme Court
Halifax, Nova Scotia

D.R. Beveridge J.

Heard: April 3, 2009.
Oral judgment: April 3, 2009.
Released: April 28, 2009.

(49 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Directions -- Monitors -- Powers, duties and functions -- Upon motion by monitor in proceedings under the Companies' Creditors Arrangement Act, the monitor was held to have the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the monitor to complete its assessment of claims -- To suggest the monitor did not have the authority to receive evidence and submissions and to consider them was to say it did

not have any real authority to carry out its court-appointed role to assess the claims that had been submitted.

Motion by monitor in proceedings under the Companies' Creditors Arrangement Act seeking directions from the court on whether it had the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the monitor to complete its assessment of claims. On Dec. 22, 2008, ScoZinc Ltd. had been granted protection by means of a stay of proceedings of all claims against it. The determination of creditors' claims was set by a claims procedure order of Feb. 18, 2009 setting dates for the submission of claims to the monitor, and for the monitor to assess the claims. The monitor was directed to review all proofs of claim filed on or before March 16, 2009 and accept, revise or disallow the claims. In three cases, revised proofs of claim were filed after this date.

HELD: Order granted. The monitor had the necessary authority. The Act gave no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. The determination that the claims must initially be identified and assessed by the monitor, and heard first by a claims officer, was a valid exercise of the court's inherent jurisdiction. It was not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the Bankruptcy and Insolvency Act. The Feb. 18, 2009 order accomplished this. It did not matter that revised claims were submitted after the claims bar date. In essence, the monitor simply acted to revise the proofs of claim already submitted to conform with the evidence elicited by the monitor, or submitted to it. The monitor had the necessary authority to revise the claims, either as to classification or amount. To suggest the monitor did not have the authority to receive evidence and submissions and to consider them was to say it did not have any real authority to carry out its court-appointed role to assess the claims that had been submitted.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.7, s. 12

Probate Act, R.S.N.S. 1900, c. 158,

Counsel:

John G. Stringer, Q.C., and Mr. Ben R. Durnford, for the applicant.

Robert MacKeigan, Q.C., for Grant Thornton.

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1 **D.R. BEVERIDGE J.** (orally):-- On December 22, 2008, ScoZinc Ltd. was granted protection by way of a stay of proceedings of all claims against it pursuant to s. 11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36. The stay has been extended from time to time. Grant Thornton was appointed as the Monitor of the business and financial affairs of ScoZinc pursuant to s. 11.7 of the *CCAA*.

2 The determination of creditors' claims was set by a Claims Procedure Order. This order set dates for the submission of claims to the Monitor, and for the Monitor to assess the claims. The Monitor brought a motion seeking directions from the court on whether it has the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the Monitor to complete its assessment of claims.

3 The motion was heard on April 3, 2009. At the conclusion of the hearing of the motion I concluded that the Monitor did have the necessary authority. I granted the requested order with reasons to follow. These are my reasons.

BACKGROUND

4 The procedure for the identification and quantification of claims was established pursuant to my order of February 18, 2009. Any persons asserting a claim was to deliver to the Monitor a Proof of Claim by 5:00 p.m. on March 16, 2009, including a statement of account setting out the full details of the claim. Any claimant that did not deliver a Proof of Claim by the claims bar date, subject to the Monitor's agreement or as the court may otherwise order, would have its claim forever extinguished and barred from making any claim against ScoZinc.

5 The Monitor was directed to review all Proofs of Claim filed on or before March 16, 2009 and to accept, revise or disallow the claims. Any revision or disallowance was to be communicated by Notice of Revision or Disallowance, no later than March 27, 2009. If a creditor disagreed with the assessment of the Monitor, it could dispute the assessment before a Claims Officer and ultimately to a judge of the Supreme Court.

6 The three claims that have triggered the Monitor's motion for directions were submitted by Acadian Mining Corporation, Royal Roads Corp., and Komatsu International (Canada) Inc.

7 ScoZinc is 100% owned by Acadian Mining Corp. These two corporations share office space, managerial staff, and have common officers and directors. Acadian Mining is a substantial shareholder in Royal Roads and also have some common officers and directors.

8 Originally Royal Roads asserted a claim as a secured creditor on the basis of a first charge security held by it on ScoZinc's assets for a loan in the amount of approximately $2.3 million. Acadian Mining also claimed to be a secured creditor due to a second charge on ScoZinc's assets securing approximately $23.5 million of debt. Both Royal Roads and Acadian Mining have released their security. Each company submitted Proofs of Claim dated March 4, 2009 as unsecured creditors.

9 Royal Roads claim was for $579,964.62. The claim by Acadian Mining was for $23,761.270.20. John Rawding, Financial Officer for Acadian Mining and ScoZinc, prepared the Proofs of Claim for both Royal Roads and Acadian Mining. It appears from the affidavit and materials submitted, and the Monitor's fifth report dated March 31, 2009 that there were errors in each of the Proofs of Claim.

10 Mr. Rawding incorrectly attributed $1,720,035.38 as debt by Acadian Mining to Royal Roads when it should have been debt owed by ScoZinc to Royal Roads. In addition, during year end audit procedures for Royal Roads, Acadian Mining and ScoZinc, other erroneous entries were discovered. The total claim that should have been advanced by Royal Roads was $2,772,734.19.

11 The appropriate claim that should have been submitted by Acadian Mining was $22,041,234.82, a reduction of $1,720,035.38. Both Royal Roads and Acadian Mining submitted revised Proofs of Claim on March 25, 2009 with supporting documentation.

12 The third claim is by Komatsu. Its initial Proof of Claim was dated March 16, 2009 for both secured and unsecured claims of $4,245,663.78. The initial claim did not include a secured claim for the equipment that had been returned to Komatsu, nor include a claim for equipment that was still being used by ScoZinc. A revised Proof of Claim was filed by Komatsu on March 26, 2009.

13 The Monitor, sets out in its fifth report dated March 31, 2009, that after reviewing the relevant books and records, the errors in the Proofs of Claim by Royal Roads, Acadian Mining and Komatsu were due to inadvertence. For all of these claims it issued a Notice of Revision or Disallowance on March 27, 2009, allowing the claims as revised "if it is determined by the court that the Monitor has the power to do so".

14 The request for directions and the circumstances pose the following issue:

ISSUE

15 Does the Monitor have the authority to allow the revision of a claim by increasing it based on evidence submitted by a claimant within the time period set for the monitor to carry out its assessment of claims?

ANALYSIS

16 The jurisdiction of the Monitor stems from the jurisdiction of the court granted to it by the *CCAA*. Whenever an order is made under s. 11 of the *CCAA* the court is required to appoint a monitor. Section 11.7 of the *CCAA* provides:

> 11.7 (1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.
>
> (2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.
>
> (3) The monitor shall
>
> (a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;
>
> (b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,
>
> (i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
> (ii) at least seven days before any meeting of creditors under section 4 or 5, or
> (iii) at such other times as the court may order;

(c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and

(d) carry out such other functions in relation to the company as the court may direct.

...

17 It appears that the purpose of the *CCAA* is to grant to an insolvent company protection from its creditors in order to permit it a reasonable opportunity to restructure its affairs in order to reach a compromise or arrangement between the company and its creditors. The court has the power to order a meeting of the creditors or class of creditors for them to consider a compromise or arrangement proposed by the debtor company (s. 4, 5). Where a majority of the creditors representing two thirds value of the creditors or class of creditors agree to a compromise or arrangement, the court may sanction it and thereafter such compromise or arrangement is binding on all creditors, or class of creditors (s. 6).

18 Section 12 of the *Act* defines a claim to mean "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." However, as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order.

19 The only guidance provided by the *CCAA* is that in the event of a disagreement the amount of a claim shall be determined by the court on summary application by the company or by the creditor. Section 12(2) of the *Act* provides:

Determination of amount of claim

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

20 The only parties who appeared on this motion were the Monitor, ScoZinc and Komatsu. No specific submissions were requested nor made by the parties with respect to the nature of the court's jurisdiction to determine the mechanism and time lines to classify and quantify claims against the debtor company.

21 Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s. 135(2) *BIA)*. A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

22 In contrast, the *CCAA* does not set out the procedure beyond the language in s. 12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on "summary application".

23 The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.

24 If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

25 The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., (Re)* 2007 NSSC 384; *Olympia & York Developments Ltd. (Re)* (1993), 17 C.B.R. (3d) 1 (Ont. S.C.J.); *Air Canada, (Re)* (2004) 2 C.B.R. (5th) 23 (Ont. S.C.J.); *Triton Tubular Components v. Steelcase Inc.*, [2005] O.J. No. 3926 (Ont. S.C.J.); *Muscletech Research & Development Inc.,(Re)*, [2006] O.J. No. 4087 (Ont. S.C.J.); *Pine Valley Mining Corp., (Re)* 2008 BCSC 356; *Blue Range Resource Corp.*, Re 2000 ABCA 285; *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222 (N.B.Q.B.).)

26 I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article "The CCAA and the Claims Bar Process", (2000), 13 Commercial In-

solvency Reporter 6, endorsed the utilization of a claims process on the basis of reliance on the court's inherent jurisdiction, provided the process adhered to the specific mandates of the *CCAA*. In unrelated contexts, caution has been expressed with respect to reliance on the inherent jurisdiction of the superior court as the basis for dealing with the myriad issues that can arise under the *CCAA* (See: *Clear Creek Contracting v. Skeena Cellulous Inc.*,(2003), 43 C.B.R (4th) 187) (B.C.C.A.) and *Stelco Inc.(Re)*, [2005] O.J. No. 1171 (CA.)).

27 Sir J.H. Jacob, Q.C. in his seminal article "The Inherent Jurisdiction of the Court", (1970) Current Legal Problems 23, concluded that it has been clear law from the earliest times that superior courts of justice, as part of their inherent jurisdiction, have the power to control their own proceedings and process. He wrote:

> Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. Some of the instances of the exercise of this power have been of far-reaching importance, others have dealt with matters of detail or have been of transient value. Some have involved the exercise of administrative powers, others of judicial powers. Some have been turned into rules of law, others by long usage or custom may have acquired the force of law, and still others remain mere rules of practice. The exercise of this power has been pervasive throughout the whole legal machinery and has been extended to all stages of proceedings, pre-trial, trial and post-trial. Indeed, it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice.
>
> p. 32-33

28 The *CCAA* gives no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. As noted earlier, the only reference is in s. 12 of the *Act* that if there is a dispute as to the amount of a claim, then the amount shall be determined by the court "on summary application". In *Re Freeman Estate*, [1922] N.S.J. No. 15, [1923] 1 D.L.R. 378 (en banc) the court considered the words "on summary application" as they appeared in the *Probate Act* R.S.N.S. 1900 c. 158. Harris C.J. wrote:

> [17] The words "summary application" do not mean without notice, but simply imply that the proceedings before the Court are not to be conducted in the ordinary way, but in a concise way.
>
> [18] The Oxford Dictionary p. 140 gives as one of the meanings of "summary" dispensing with needless details or formalities -- done with despatch.
>
> [19] In the case of the Western &c R. Co. v. Atlanta (1901), 113 Ga. 537, the meaning of the words "summary proceeding" is discussed at some length and the Court held at pp. 543-544:--

> "In a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."
>
> [20] I cite this not because it is a binding authority, but because its reasoning commends itself to my judgment and I adopt it.

29 In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction.

30 The *CCAA* gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s. 11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s. 11.7(3)(d)).

31 In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The Claims Procedure Order of February 18, 2009 accomplishes this.

POWER OF THE MONITOR

32 The Monitor was required by the Order to publish a notice to claimants in the newspaper regarding the claims procedure. It was also required to send a claims package to known potential claimants identified by the Monitor through its review of the books and records of ScoZinc. The claims bar date was set as March 16, 2009, or such later date as may be ordered by the court.

33 The duties of the Monitor, once a claim was received by it, were set out in paragraphs 9 and 10 of the Claims Procedure Order. They provide as follows:

> 9. Upon receipt of a Proof of Claim:
>
> a. The Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;
>
> b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the claimant prior to accepting, revising or disallowing such Claim; and
>
> ...

> 10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

34 Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim. A claimant or the Monitor may appeal the Claims Officer's decision to the court.

35 The Monitor suggests that the power given to it under paragraph 9(a) and 10 is sufficient to permit it to accept the revised Proofs of Claim filed after the claim's bar date of March 16, 2009, but before its assessment date of March 27, 2009.

36 Reliance is also placed on the decision of the Alberta Court of Appeal in *Blue Range Resource Corp.* 2000 ABCA 285. As noted by the Monitor, the decision in *Blue Range* did not directly deal with the issue on which the Monitor here seeks directions. In *Blue Range*, the claims procedure established by the court set the claims bar date of June 15, 1999. Claims of creditors not proven in accordance with the procedures set out were deemed to be forever barred. Some creditors filed their Notice of Claim after the claims bar date. The monitor disallowed their claims. There were a second group of creditors who filed their Notice of Claim prior to the applicable claims bar date, but then sought to amend their claims after the claims bar date had passed. The monitor also disallowed these claims as late. What is not clear from the reported decisions is whether this second group of creditors requested amendments of their claims during the time period granted to the Monitor to carry out its assessment.

37 The chambers judge allowed the late and amended claims to be filed, [1999] A.J. No. 1308. Enron Capital Corp. and the creditor's committee sought leave to appeal that decision. Leave to appeal was granted on January 14, 2000 with respect to the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?
>
> *Re Blue Range Resources Corp.*, 2000 ABCA 16

38 Wittmann J.A. delivered the judgment of the court. He noted that all counsel conceded that the court had the authority to allow the late filing of claims and that the appeal was really a matter of what criteria the court should use in exercising that power. Accordingly, a Claims Procedure Or-

der that contains a claims bar date should not purport to forever bar a claim without a saving provision. Wittmann J.A. set out the test for determining when a late claim may be included to be as follows:

> [26] Therefore, the appropriate criteria to apply to the late claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> [27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.
>
> 2000 ABCA 285

39 The appellants claimed that they would be prejudiced if the late claims were allowed because if they had known the late claims would be allowed they would have voted differently. This assertion was rejected by the chambers judge. With respect to what is meant by prejudiced, Wittmann J.A. wrote:

> 40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd., [1995] B.C.J. No. 1600. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

40 In considering how the Monitor should carry out its duties and responsibilities under the Claims Procedure Order it is important to note that the Monitor is an officer of the court and is

obliged to ensure that the interests of the stakeholders are considered including all creditors, the company and its shareholders (See *Laidlaw Inc. Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J.).

41 In a different context Turnball J.A. in *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 commented that the monitor is an agent of the court and as a result is responsible and accountable to the court, owing a fiduciary duty to all of the parties (para. 28).

42 In my opinion, para. 9(a) is not of assistance in determining the authority of the Monitor to revise upward a claim filed after the claim's bar date but before the assessment date. Paragraph 9(a) authorizes the Monitor to use reasonable discretion as to the adequacy of compliance as to **the manner** to which Proofs of Claim are completed and executed. If it satisfied that the claim has been adequately proven it may waive strict compliance with the requirements of the order as to **completion** and the **execution** of a Proof of Claim.

43 Paragraph 10 of the Claims Procedure Order mandates the Monitor shall review all Proofs of Claim filed on or before the claims bar date. It shall "accept, revise or disallow such Proofs of Claim as contemplated herein". While normally a monitor's revision would be to reduce a Proof of Claim, there is in fact nothing in the Claims Procedure Order that so restricts the Monitor's authority. It is obviously contemplated by para. 10 that the monitor is to carry out some assessment of the claims that are submitted.

44 In my view, the Proofs of Claim that are filed act both as a form of pleading and an opportunity for the claimant to provide supporting documents to evidence its claim. In the case before me, the creditors discovered that the claims they had submitted were inaccurate and further evidence was tendered to the Monitor to demonstrate. The Monitor, after reviewing the evidence, accepted the validity of the claims.

45 Courts in a general way are engaged in dispensing justice. They do so by setting up and applying procedural rules to ensure that litigants are afforded a fair hearing. The resolution of disputes through the litigation process, including the ultimate hearing, is fundamentally a truth-seeking process to determine the facts and to apply the law to those facts. Can it be any different where the process is not in the court but under its supervision pursuant to a claims process under the *CCAA.?*

46 To suggest that the monitor does not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess the claims that have been submitted. The notion that the monitor cannot look at documentary evidence on its own initiative or at the instance of a claimant, and even consider submissions, is to deny it any real power to consider and make a preliminary determination of the merits of a claim.

47 The Claims Procedure Order contains a number of provisions that anticipate the exchange of information between the Monitor, the company and a creditor. Paragraph 9(b) authorizes the Monitor and ScoZinc to attempt to consensually resolve the classification and the amount of any claim with a claimant prior to accepting, revising or disallowing such claim. Paragraph 17 of the Claims Procedure Order directs that the Monitor shall at all times be authorized to enter into negotiations with claimants and settle any claim on such terms as the Monitor may consider appropriate.

48 In my opinion, it does not matter that revised claims were submitted after the claims bar date. In essence, the Monitor simply acted to revise the Proofs of Claim already submitted to con-

form with the evidence elicited by the Monitor, or submitted to it. The Monitor had the necessary authority to revise the claims, either as to classification or amount.

49 If a claimant seeks to revise or amend its claim after the assessment date set out in the Claims Procedure Order, different considerations may come into play. The appropriate procedure will depend on the provisions of the Claims Procedure Order. In addition, the court, as the ultimate arbiter of disputed claims under s. 12 of the *CCAA*, should always be viewed as having the jurisdiction to permit appropriate revision of claims.

D.R. BEVERIDGE J.

TAB 4

Case Name:

Pine Valley Mining Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Business Corporations Act, R.S.B.C. 2002, c. 57, as amended
IN THE MATTER OF Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Globaltex Gold Mining Corporation, Petitioners

[2008] B.C.J. No. 510

2008 BCSC 356

41 C.B.R. (5th) 43

2008 CarswellBC 579

165 A.C.W.S. (3d) 842

Docket: S066791

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

N.J. Garson J.

Oral judgment: March 14, 2008.

(20 paras.)

[Editor's note: Supplementary reasons for judgment were released April 14, 2008. See [2008] B.C.J. No. 637.]

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Directions issued in this proceeding under the Companies' Creditors Arrangement Act to the effect that the creditor Pine Valley Mining Corporation bore the burden of proving its claim for a debt of $37,692,218, and that the matter would proceed to a summary trial -- The monitor's report confirming a debt was not en-

titled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- A summary trial was mandated by s. 12 of the Act -- Companies' Creditors Arrangement Act, s. 12.

Insolvency law -- Claims -- Priorities -- Directions issued in this proceeding under the Companies' Creditors Arrangement Act to the effect that the creditor Pine Valley Mining Corporation bore the burden of proving its claim for a debt of $37,692,218, and that the matter would proceed to a summary trial -- The monitor's report confirming a debt was not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- A summary trial was mandated by s. 12 of the Act -- Companies' Creditors Arrangement Act, s. 12.

Insolvency law -- Receivers, managers and monitors -- Duties and powers -- Directions issued in this proceeding under the Companies' Creditors Arrangement Act to the effect that the creditor Pine Valley Mining Corporation bore the burden of proving its claim for a debt of $37,692,218, and that the matter would proceed to a summary trial -- The monitor's report confirming a debt was not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- A summary trial was mandated by s. 12 of the Act -- Companies' Creditors Arrangement Act, s. 12.

The petitioners in this proceeding under the Companies' Creditors Arrangement Act sought directions respecting the process for determining the amount of the Pine Valley Mining Corporation's claim against Fall Mountain Coal (FMC) -- In the present application, the court was asked to determine (a) who bore the onus of proof of the amount and character of PVM's claim, and (b) whether the trial ought to be a summary trial or a conventional one with viva voce witnesses, or some combination of both -- PVM claimed that FMC, its wholly-owned subsidiary, owed it $37,692,218 -- The other major creditors disputed the amount on the grounds that advances to FMC were properly characterized as capital investment, not debt, with the result that PVM would rank behind the other unsecured creditors in the distribution of FMC assets -- The court-appointed monitor had reviewed the accounts and determined $27,070,166 was properly owed to PVM by FMC -- HELD: PVM bore the onus of proving its claim in the summary trial to follow -- The Monitor's process was in no way akin to an adversarial process -- He was not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- It followed that PVM had the burden of proving its claim -- Either party was at liberty to use the monitor's report or part of it at the trial as an expert report, provided the necessary notice was given to the other party -- Section 12 of the Act required a summary trial -- The court was not persuaded that the claim could not be tried summarily on the date reserved -- Either party had leave to apply to convert this summary trial to a conventional trial, but the parties were expected to make their best efforts to manage this generally as a summary trial.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.B.C. 2002, c. 57,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 12(2)

Counsel:

Counsel for Pine Valley Mining Corporation: J.R. Sandrelli, O. Jones.

Counsel for Tercon Mining PV Ltd.: B.G. McLean, C. Armstrong.

Counsel for the Monitor: W. Kaplan, Q.C.

Counsel for Petro-Canada: D.A. Garner.

Counsel for CN Rail: R.D. Watson.

Reasons for Judgment

1 **N.J. GARSON J.** (orally):-- This is an application for directions respecting the process for the determination of the amount of Pine Valley Mining Corporation's ("PVM") claim against Falls Mountain Coal Inc. ("FMC") within a proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, as amended, (the "CCAA Proceeding"), in which both PVM and FMC are related parties and petitioners.

2 FMC is a wholly-owned subsidiary of PVM. PVM claims that FMC owes PVM $37,692,218. The other major creditors of FMC dispute that amount largely on the basis that the advances made to FMC are properly characterized as capital investment in FMC, not debt, and therefore PVM should rank behind the other unsecured creditors in the distribution of FMC assets. The Monitor appointed by this Court in the CCAA Proceeding has reviewed the accounts of PVM and FMC and determined that $27,070,166 is properly owed to PVM by FMC as debt.

3 On this application the Court is asked to determine two issues:

1. Who bears the onus of proof of the amount and character of PVM's claim?
2. Should the trial be a summary trial or a conventional trial with *viva voce* witnesses, or some combination of those two procedures?

4 The relevant factual background to the matter may be stated as follows:

* FMC is the wholly-owned subsidiary of PVM.
* FMC operated the Willow Creek Coal Mine.
* On October 20, 2006, PVM and FMC petitioned this Court for a general stay of proceedings under the ***CCAA***. The order they sought was granted, and extended from time to time since the initial order.
* The Petition did not disclose an inter-company debt as between the two petitioners. All financial reporting was done on a consolidated basis. When the Monitor requested unconsolidated financial statements for each of the petitioners the inter-company debt was revealed. In recounting this history I make no adverse finding of fact on this point. That is a matter for the trial judge.
* On January 19, 2007, PVM filed a claim with the Monitor stating that FMC was indebted to PVM in the amount of $41,658,441.
* On March 16, 2007, the Monitor issued its Fourth Report to the Court. That report contained a detailed review of the transactions underlying the PVM claim.

As already noted, as a result of his investigations the Monitor "[proposed] to allow a revised PVM Claim against FMC in the amount of $27,070,166".

* Some of the creditors objected to the claim, including the revised claim, and agreed that the counsel for the largest creditor, Tercon, would have standing to defend the PVM claim and to raise all defences available to FMC and to creditors of FMC. The other main creditors have maintained - if I may describe it thus - an active watching brief.

5 A ten-day trial has been reserved for May of this year. The parties have reached an impasse on the two issues mentioned above. Mr. Sandrelli, counsel for PVM, says that "deference is owed to the Monitor's ... conclusions ... in [his] Fourth Report, such that the onus to challenge the Monitor's findings lies on the party appealing the Monitor's findings; and if deference is owed to the Monitor's findings, what standard of review applies to those findings".

6 I understood Mr. Sandrelli to use the term "appeal" in a loose sense. He acknowledged that this is not an appeal because Tercon did not participate in the original decision making process of the Monitor. He said in submissions that the process is more akin to a review on a correctness standard of review. He concluded his submissions by contending that Tercon should bear the onus of displacing the finding of the Monitor that PVM is owed $27 Million by FMC, and that PVM bears the onus of displacing the Monitor's finding that PVM is not entitled to the additional approximate $11 million it claims.

7 Mr. McLean, counsel for Tercon, contends that "the burden of proof lies upon the party who substantially asserts the affirmative of the issue": *Phipson on Evidence*, 14th ed. He says that PVM seeks to prove that it is a creditor of FMC and it must carry the burden of proof of that whole claim.

8 Mr. Sandrelli argues that in the special context of a ***CCAA*** proceeding the Monitor, who is appointed by the court, should be accorded deference and that the review of his decision is akin to a review of a ***CCAA*** claims officer's decision in a ***CCAA*** proceeding. He relies for this proposition on dicta in ***Olympia & York Developments Ltd. (Re)*** (1993), 17 C.B.R. (3d) 1; ***Air Canada (Re.)*** (2004), 2 C.B.R. (5th) 23; ***Canadian Airlines (Re)***, 2001 ABQB 146; ***Matte v. Roux***, 2007 BCSC 902; ***Triton Tubular Components Corp v. Steelcase Inc.***, [2005] O.J. No. 3926 (S.C.J.); and ***Muscletech Research & Development Inc.*** (2006), 25 C.B.R. (5th) 231.

9 In ***Olympia & York***, the decision under review was that made by a claims officer. The claims officer is akin to a judicial officer. The proceeding before him is an adversarial one and naturally he should be granted some deference. That decision is distinguishable on the grounds that the court appointed Monitor in this proceeding, while undoubtedly an impartial agent of the court, reviews the claim but is in no way engaged to conduct a hearing or any type of adversarial or quasi-judicial type proceeding. Similarly, ***Air Canada*** involved an appeal from a decision of a claims officer appointed in the ***CCAA*** proceeding in which the claims officer had dismissed a contingent claim. The appeal was dismissed. The ***Air Canada*** case is distinguishable for the same reasons as the ***Olympia & York*** case. In ***Canadian Airlines***, the decision under review was also that of a claims officer appointed to determine disputed claims within a ***CCAA*** proceeding. Paperny J., as she then was, held that the review was a trial *de novo*, but that was because the law in Alberta differed from Ontario. The ***Matte*** case involved the standard of review of a master's decision and for the same reasons, I find it unhelpful and distinguishable. ***Triton*** also involved the review of a claims officer's decision. The court determined that the standard of review was correctness but, for the same reasons as above, the case is distinguishable. The ***Muscletech*** case is similarly distinguishable.

10 In none of the cases cited above was the decision under review one of a monitor, not engaged in an adversarial process.

11 Paragraph 17 of the Claims Procedure Order pronounced December 8, 2006, provides:

> Where a Creditor delivers a Dispute Notice in accordance with the terms of this Order, such dispute shall be resolved as directed by this Court or as the Creditor in question, the Petitioners and Monitor may agree.

12 Section 12(2) of the ***CCAA*** provides in part as follows:

> For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of the unsecured claim shall be the amount
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor;

13 I conclude from the ***CCAA*** and the Claims Procedure Order that the function of the Monitor, that is relevant to this application, is to determine the validity and amount of a claim on the basis of the evidence submitted. The Monitor's process in doing so is in no way akin to an adversarial process. Although his findings and opinion should be respectfully considered, he is not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant. Counsel have not called my attention to any authority for either of the following propositions, either that the CCAA claim process alters substantive law that would otherwise apply to the determination of such a claim, or that a monitor appointed on the terms here is entitled to the deference accorded a quasi-judicial officer like a court appointed claims officer. It follows that PVM has the burden of proving its claim. PVM shall file a statement of claim. Tercon, with standing to defend on behalf of FMC, shall file a statement of defence.

14 I turn next to the procedural questions.

15 The Monitor has spent a good deal of time investigating the PVM claim. His report documents the numerous transactions that are at issue, and provides a very useful framework for the court. There is much in the report that may be of use to the parties at the hearing of this matter. In exercising my jurisdiction to give directions for a summary determination of this matter I order that either party is at liberty to use the Monitor's report or part of the report at the trial of this matter, as an expert report, provided the necessary notice is given to the other. The Monitor may be required to be cross-examined on the report.

16 The second issue I have been asked to determine is the question of the format of this trial. Section 12 of the ***CCAA*** requires a summary trial. I recognize that in some cases, courts have held that that does not preclude a conventional trial. (See ***Algoma Steel Corporation v. Royal Bank of Canada*** (1992), 8 O.R. (3d) 449 (C.A.). I do not understand Mr. McLean to object in principle to an order that this matter be determined in a summary way but, rather, I think he reserves his right to object to the suitability of such a procedure depending on how the evidence unfolds. It is my view

that s. 12 of the ***CCAA*** informs any decision the court must make as to the format of a trial and that trial must surely be as the section dictates, a summary trial, unless to do otherwise would be unjust, or there is some other compelling reason against a summary trial. I am not persuaded that this claim cannot be tried summarily on the date reserved in May of this year. The parties have one week to work out an agreement as to a time line for the necessary steps to prepare for that trial, including the exchange of pleadings, disclosure of documents as requested by Tercon, agreed facts, delivery of affidavits, expert reports (including notice of reliance on all or part of the Monitor's reports), delivery and responses to notices to admit, examination for discovery if consented to, and delivery of written arguments. I acknowledge that many of these steps are underway.

17 Mr. Sandrelli says he will now have to marshall all the evidence to prove his claim from ground zero as opposed to simply relying in the first instance on the Monitor's report. As I have said, he may rely on all or part of the Monitor's report. I am not persuaded yet that he cannot marshall his evidence in the time remaining before the May trial date. I will hear submissions on the trial schedule if, by March 21, 2008, the parties have been unable to reach agreement on it. The parties may contact the registry to arrange such a hearing prior to ordinary court hours. Either party has leave to apply to cross-examine the deponent of an affidavit out of court or in court. Either party has leave to apply to convert this summary trial to a conventional trial but I expect the parties to make their best efforts to manage this generally as a summary trial.

18 The parties have each proposed somewhat differing forms of order, concerning various procedural matters relevant to the conduct and hearing of the inter-company claim. Also Mr. Watson, for CN, objects to the following clause proposed by PVC:

> No other creditor, claimant or counsel therefore shall be entitled to participate by having representation in the proceedings concerning the determination of the Issues and in relation to the claim of PVM against FMC without leave of the Court, which application for leave,if any, shall be made on 4 days' notice to PVM and Tercon by no later than March 31, 2008.

19 Mr. Watson, counsel for CN, one of the creditors, contends that his client should be exempted from the limitation imposed on all other creditors contemplated by this last mentioned clause in the draft order. I agree with Mr. Sandrelli that it is necessary for the orderly conduct of the resolution of the claim that PVM and Tercon have some certainty as to what counsel are involved. On the other hand, CN and Petro-Canada have maintained what I earlier described as an active watching brief on the progress of the inter-company claim resolution. They should have the ability to continue to do so. Their submissions have generally been helpful and consequently I see no prejudice in permitting them to continue in that role, at least until shortly before the hearing. I will leave it to counsel to work out a date by which those two creditors will be barred from seeking leave to participate. I have in mind something like two weeks before the hearing but if counsel cannot agree they may make further submissions on this point.

20 I will leave it to the parties to work out the balance of the terms of the order. They have leave to speak to the matter if those terms cannot be agreed upon.

N.J. GARSON J.

TAB 5

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Worldspan Marine Inc. (Re),*
2011 BCSC 1758

Date: 20111221
Docket: S113550
Registry: Vancouver

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

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44
and the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc.,
Queenship Marine Industries Ltd., 27222 Developments Ltd.
and Composite FRP Products Ltd.

Petitioners

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

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Counsel for The Monitor:	G. Dabbs
Place and Date of Hearing:	Vancouver, B.C. December 16, 2011
Place and Date of Judgment:	Vancouver, B.C. December 21, 2011

INTRODUCTION

[1] On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

POSITIONS OF THE PARTIES

[2] The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel "QE014226C010" (the "Vessel") with Fraser Yachts, to explore potential Debtor In Possession ("DIP") financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

[3] The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

[4] The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

[5] These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

[6] The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately $4.9 million. In April or May 2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") in these proceedings.

[7] Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals $20,945,924.05.

[8] Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

[9] Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

> Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have

> gone to the company. Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

[10] Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

[11] As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

DISCUSSION AND ANALYSIS

[12] On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

> (a) whether circumstances exist that make the order appropriate; and
>
> (b) whether the applicant has acted, and is acting, in good faith and with due diligence.

[13] In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

[14] In *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 70, Deschamps J., for the Court, stated:

> ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the

> means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[15] A frequently cited statement of the purpose of the *CCAA* is found in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 51 B.C.L.R. (2d) 84, [1990] B.C.J. No. 2384 at p. 3 where the Court of Appeal held:

> The purpose of the C.C.A.A. 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. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

[16] In *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070 (S.C.) Brenner J. (as he then was) summarized the applicable principles at para. 26:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

[17] In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, the Court of Appeal set aside the extension of a stay granted to the debtor property development company. There, the Court held that the *CCAA* was not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise on which the creditors could vote. At para. 26, Tysoe J.A., for the Court said this:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

[18] At para. 32, Tysoe J.A. queried whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan or arrangement intended to be made by the debtor company simply proposed that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

[19] In *Cliffs Over Maple Bay Investments Ltd.* at para. 38, the court held:

> ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[20] As counsel for the petitioners submitted, *Cliffs Over Maple Bay Investments Ltd.* was decided before the current s. 36 of the *CCAA* came into force. That section permits the court to authorize the sale of a debtor's assets outside the ordinary course of business without a vote by the creditors.

[21] Nonetheless, *Cliffs Over Maple Bay Investments Ltd.* is authority for the proposition that a stay, or an extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

[22] Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co. (Re)*, 2007 NSSC 347, 40 C.B.R. (5th) 80 at paras. 24-29.

[23] The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings , the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at paras. 14-17.

Whether circumstances exist that make an extension appropriate

[24] The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

[25] There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

(a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.

(b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while

> recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the determination of *in rem* claims against the Vessel. Because this Court has jurisdiction in the CCAA proceedings, and the Federal Court exercises its maritime law jurisdiction over the Vessel, there have been applications in both Courts with respect to the marketing of the Vessel.
>
> (c) The Vessel, which is the principal asset of the petitioner Worldspan, is a partially completed custom built super yacht for which there is a limited market.

[26] All of these factors have extended the time reasonably required for the petitioners to proceed with their restructuring, and to prepare a plan of arrangement.

[27] On September 19, 2011, when this court confirmed and extended the Initial Order to December 16, 2011, it also authorized the petitioners to commence marketing the Vessel unless Mr. Sargeant paid $4 million into his solicitor's trust account on or before September 29, 2011.

[28] Mr. Sargeant failed to pay the $4 million into trust with his solicitors, and subsequently made known his intention not to fund the completion of the Vessel by the petitioners.

[29] On October 7, 2011, the Federal Court also made an order authorizing the petitioners to market the Vessel and to retain a leading international yacht broker, Fraser Yachts, to market the Vessel for an initial term of six months, expiring on April 7, 2012. Fraser Yachts has listed the Vessel for sale at $18.9 million, and is endeavouring to find a buyer. Although its efforts have attracted little interest to date, Fraser Yachts have expressed confidence that they will be able to find a buyer for the Vessel during the prime yacht buying season, which runs from February through July. Fraser Yachts and the Monitor have advised that process may take up to 9 months.

[30] On November 10, 2011, this Court, on the application of the petitioners, made an order authorizing and approving the sale of their shipyard located at 27222

Lougheed Highway, with a leaseback of sufficient space to enable the petitioners to complete the construction of the Vessel, should they find a buyer who wishes to have the Vessel completed as a Crescent yacht at its current location. The sale and leaseback of the shipyard has now completed.

[31] Both this Court and the Federal Court have made orders regarding the filing of claims by creditors against the petitioners and the filing of *in rem* claims in the Federal Court against the Vessel.

[32] The determination of the *in rem* claims against the Vessel is proceeding in the Federal Court.

[33] After dismissing the *in rem* claims of various creditors, the Federal Court has determined that the creditors having *in rem* claims against the Vessel are:

Sargeant	$20,945.924.05
Capri Insurance Services	$ 45,573.63
Cascade Raider	$ 64,460.02
Arrow Transportation and CCY	$ 50,000.00
Offshore Interiors Inc.	$659,011.85
Continental Hardwood Co.	$ 15,614.99
Paynes Marine Group	$ 35,833.17
Restaurant Design and Sales LLC	$254,383.28

[34] The petitioner, Worldspan's, *in rem* claim in the amount of $6,643,082.59 was dismissed by the Federal Court and is currently subject to an appeal to be heard January 9, 2012.

[35] In addition, Comerica Bank has asserted an *in rem* claim against the Vessel for $9,429,913.86, representing the amount it advanced toward the construction of the Vessel. Mr. Mohammed Al-Saleh, a judgment creditor of certain companies controlled by Mr. Sargeant has also asserted an *in rem* claim against the Vessel in the amount of $28,800,000.

[36] The Federal Court will determine the validity of the outstanding *in rem* claims, and the priorities amongst the *in rem* claims against the Vessel.

[37] The petitioners, in addition to seeking a buyer for the Vessel through Fraser Yachts are also currently in discussions with potential DIP lenders for a DIP facility for approximately $10 million that would be used to complete construction of the Vessel in the shipyard they now lease. Fraser Yachts has estimated that the value of the Vessel, if completed as a Crescent brand yacht at the petitioners' facility would be $28.5 million. If the petitioners are able to negotiate a DIP facility, resumption of construction of the Vessel would likely assist their marketing efforts, would permit the petitioners to resume operations, to generate cash flow and to re-hire workers. However, the petitioners anticipate that at least 90 days will be required to obtain a DIP facility, to review the cost of completing the Vessel, to assemble workers and trades, and to bring an application for DIP financing in both this Court and the Federal Court.

[38] An extension of the stay will not materially prejudice any of the creditors or other stakeholders. This case is distinguishable from *Cliffs Over Maple Bay Investments Ltd.*, where the debtor was using the *CCAA* proceedings to freeze creditors' rights in order to prevent them from realizing against the property. Here, the petitioners are simultaneously pursuing both the marketing of the Vessel and efforts to obtain DIP financing that, if successful, would enable them to complete the construction of the Vessel at their rented facility. While they do so, a court supervised process for the sale of the Vessel is underway.

[39] Mr. Sargeant also relies on *Encore Developments Ltd. (Re)*, 2009 BCSC 13, in support of his submission that the Court should refuse to extend the stay. There, two secure creditors applied successfully to set aside an Initial Order and stay granted *ex parte* to the debtor real estate development company. The debtor had obtained the Initial Order on the basis that it had sufficient equity in its real estate projects to fund the completion of the remaining projects. In reality, the debtor company had no equity in the projects, and at the time of the application the debtor

company had no active business that required the protection of a *CCAA* stay. Here, when the petitioners applied for and obtained the Initial Order, they continued to employ a skeleton workforce at their facility. Their principal asset, aside from the shipyard, was the partially constructed Vessel. All parties recognized that the *CCAA* proceedings afforded an opportunity for the completion of the Vessel as a custom Crescent brand yacht, which represented the best way of maximizing the return on the Vessel. On the hearing of this application, all of the creditors, other than Mr. Sargeant share the view that the Vessel should be marketed and sold through and orderly process supervised by this Court and the Federal Court.

[40] I share the view of the Monitor that in the particular circumstances of this case the petitioners cannot finalize a restructuring plan until the Vessel is sold and terms are negotiated for completing the Vessel either at Worldspan's rented facility, or elsewhere. In addition, before the creditors will be in a position to vote on a plan, the amounts and priorities of the creditors' claims, including the *in rem* claims against the Vessel, will need to be determined. The process for determining the *in rem* claims and their priorities is currently underway in the Federal Court.

[41] The Monitor has recommended the Court grant the extension sought by the petitioners. The Monitor has raised one concern, which relates to the petitioners' current inability to fund ongoing operating costs, insurance, and professional fees incurred in the continuation of the *CCAA* proceedings. At this stage, the landlord has deferred rent for the shipyard for six months until May 2012. At present, the petitioners are not conducting any operations which generate cash flow. Since the last come back hearing in September, the petitioners were able to negotiate an arrangement whereby Mr. Sargeant paid for insurance coverage on the Vessel. It remains to be seen whether Mr. Sargeant, Comerica Bank, or some other party will pay the insurance for the Vessel which comes up for renewal in January, 2012.

[42] Since the sale of the shipyard lands and premises, the petitioners have no assets other than the Vessel capable of protecting an Administration Charge. The Monitor has suggested that the petitioners apply to the Federal Court for an

Administration Charge against the Vessel. Whether the petitioners do so is of course a matter for them to determine.

[43] The petitioners will need to make arrangements for the continuing payment of their legal fees and the Monitor's fees and disbursements.

[44] The *CCAA* proceedings cannot be extended indefinitely. However, at this stage, a *CCAA* restructuring still offers the best option for all of the stakeholders. Mr. Sargeant wants the stay lifted so that he may apply for the appointment of Receiver and exercise his remedies against the Vessel. Any application by Mr. Sargeant for the appointment of a Receiver would be resisted by the other creditors who want the Vessel to continue to be marketed under the Court supervised process now underway.

[45] There is still the prospect that through the *CCAA* process the Vessel may be completed by the petitioners either as a result of their finding a buyer who wishes to have the Vessel completed at its present location, or by negotiating DIP financing that enables them to resume construction of the Vessel. Both the marine surveyor engaged by Comerica Bank and Fraser Yachts have opined that finishing construction of the Vessel elsewhere would likely significantly reduce its value.

[46] I am satisfied that there is a reasonable possibility that the petitioners, working with Fraser Yachts, will be able to find a purchaser for the Vessel before April 13, 2012, or that alternatively they will be able to negotiate DIP financing and then proceed with construction. I find there remains a reasonable prospect that the petitioners will be able to present a plan of arrangement to their creditors. I am satisfied that it is their intention to do so. Accordingly, I find that circumstances do exist at this time that make the extension order appropriate.

Good faith and due diligence

[47] Since the last extension order granted on September 19, 2011, the petitioners have acted diligently by completing the sale of the shipyard and thereby reducing their overheads; by proceeding with the marketing of the Vessel pursuant to orders

of this Court and the Federal Court; and by embarking upon negotiations for possible DIP financing, all in furtherance of their restructuring.

[48] Notwithstanding the dispute between Mr. Barnett and Mr. Blane, which resulted in the commencement of litigation in the State of Florida at or about the same time this Court made its Initial Order in the *CCAA* proceedings, the petitioners have been able to take significant steps in the restructuring process, including the sale of the shipyard and leaseback of a portion of that facility, and the applications in both this Court and the Federal Court for orders for the marketing of the Vessel. The dispute between Mr. Barnett and his former partner, Mr. Blane has not prevented the petitioners from acting diligently in these proceedings. Nor am I persuaded on the evidence adduced on this application that dispute would preclude the petitioners from carrying on their business of designing and constructing custom yachts, in the event of a successful restructuring.

[49] While the allegations of misconduct, fraud and misappropriation of funds made by Mr. Barnett against Mr. Blane are serious, at this stage they are no more than allegations. They have not yet been adjudicated. The allegations, which are as yet unproven, do not involve dishonesty, bad faith, of fraud by the debtor companies in their dealings with stakeholders in the course of the *CCAA* process.

[50] In my view, the failure of the petitioners to disclose the dispute between Mr. Barnett and Mr. Blane does not constitute bad faith in the *CCAA* proceedings or warrant the exercise of the Court's discretion against an extension of the stay.

[51] This case is distinguishable from *Re San Francisco Gifts Ltd.*, where the debtor company had pleaded guilty to 9 counts of copyright infringement, and had received a large fine for doing so.

[52] In *Re San Francisco Gifts Ltd*., at paras 30 to 32, the Alberta Court of Queen's Bench acknowledged that a debtor company's business practices may be so offensive as to warrant refusal of a stay extension on public policy grounds. However, the court declined to do so where the debtor company was acting in good

faith and with due diligence in working toward presenting a plan of arrangement to its creditors.

[53] The good faith requirement of s. 11.02(3) is concerned primarily with good faith by the debtor in the *CCAA* proceedings. I am satisfied that the petitioners have acted in good faith and with due diligence in these proceedings.

Conclusion

[54] The petitioners have met the onus of establishing that circumstances exist that make the extension order appropriate and that they have acted and are acting in good faith and with due diligence. Accordingly, the extension of the Initial Order and stay to April 13, 2012 is granted on the terms pronounced on December 16, 2011.

"PEARLMAN J."