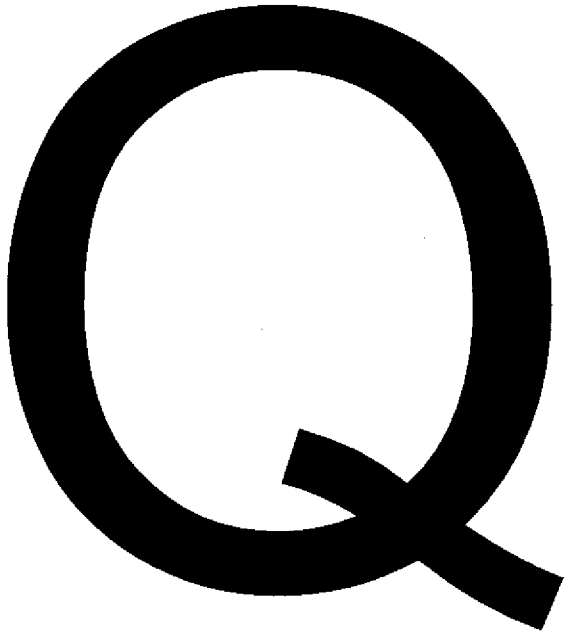

Court File No. CV12 – 9767 – 00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 25TH
	)	
JUSTICE MORAWETZ	)	DAY OF JUNE, 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A"

Applicants

INITIAL ORDER

THIS APPLICATION, made by Cinram International Inc. ("**CII**"), Cinram International Income Fund ("**Cinram Fund**"), CII Trust and the companies listed in Schedule "A" hereto (collectively, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of John Bell sworn June 23, 2012 and the Exhibits thereto (the "**Bell Affidavit**") and the Pre-filing Report of the Proposed Monitor, FTI Consulting Canada Inc. ("**FTI**"), and on being advised that the Pre-Petition First Lien Agent (as hereinafter defined) and the Administrative Agent under the Second Lien Credit Agreement (the "**Pre-Petition Second Lien Agent**", with the lenders under the Second Lien Credit Agreement being the "**Pre-Petition Second Lien Lenders**") were given notice of this Application, and on hearing the submissions of counsel for the Applicants and Cinram International Limited

Partnership (the "**Cinram LP**"), FTI and the Pre-Petition First Lien Agent and the DIP Agent (as hereinafter defined) (collectively, the "**Agent**"), and on reading the consent of FTI to act as the Court-appointed monitor (the "**Monitor**"),

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. THIS COURT ORDERS that unless otherwise indicated or defined herein, capitalized terms have the meaning given to them in the Bell Affidavit.

APPLICATION

3. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies. Although not an Applicant, Cinram LP (together with the Applicants, the "**CCAA Parties**") shall enjoy the benefit of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

4. THIS COURT ORDERS that the Applicants, or any one of them, shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**") between, *inter alia*, one or more of the CCAA Parties and one or more classes of creditors.

POSSESSION OF PROPERTY AND OPERATIONS

5. THIS COURT ORDERS that the CCAA Parties shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the CCAA Parties shall each continue

to carry on business in the ordinary course and in a manner consistent with the preservation of their business (the "**Business**") and the Property. The CCAA Parties shall each be authorized and empowered to continue to retain and employ the emplo yees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. THIS COURT ORDERS that the CCAA Parties shall be entitled to continue to utilize the central cash management system currently in place, including the CCAA Parties' current business forms, cheques and bank accounts, as described in the Bell Affidavit, including for the purpose of completing intercompany transfers among the CCAA Parties (other than between a CCAA Party that is not a Fund Entity (as hereinafter defined) and a Fund Entity) in the ordinary course of business, or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the CCAA Parties of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the CCAA Parties, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. THIS COURT ORDERS that, subject to the terms and conditions of the DIP Credit Agreement (as hereinafter defined) and subject to the applicable cash flow budget approved by the DIP Lenders (as hereinafter defined) (the "**Cash Flow Budget**"), the CCAA Parties shall be entitled but not required to pay the following expenses and satisfy the following obligations whether incurred prior to, on or after this Order:

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

(b) the fees and disbursements of any Assistants retained or employed by the CCAA Parties in respect of these proceedings or any other similar or ancillary proceedings in other jurisdictions in which the CCAA Parties or any subsidiaries or affiliates are domiciled or in respect of related corporate matters, at their standard rates and charges, including the fees and disbursements of legal counsel, financial advisors and investment bankers retained by the CCAA Parties;

(c) all amounts owing for goods and services actually supplied to the CCAA Parties, or to obtain the release of goods contracted for prior to the date of this Order, with the prior consent of the Monitor and the Agent, if in the opinion of the CCAA Parties and the Monitor the supplier is critical to the Business and ongoing operations of any of the CCAA Parties;

(d) with the prior consent of the Monitor and the Agent, all amounts owing in respect of the CCAA Parties' customer programs including rebates, refunds, relocation payments, warranties and similar programs or obligations (the "**Customer Programs**");

(e) with the prior consent of the Monitor, amounts owing by one or more of the CCAA Parties to another CCAA Party (other than between a CCAA Party that is not a Fund Entity and a Fund Entity) in order to settle their intercompany accounts and to make intercompany loans in the ordinary course of business, including as a result of the shared services (as described in the Bell Affidavit); and

(f) with the prior consent of the Monitor, any amounts owing prior to the date of this Order in respect of customs or duties for goods supplied to the CCAA

Parties where such goods have been paid for but lawfully retained or subject to a possessory lien.

8. THIS COURT ORDERS that, subject to the terms and conditions of the DIP Credit Agreement and subject to the Cash Flow Budget, and except as otherwise provided to the contrary herein, the CCAA Parties shall be entitled but not required to pay all reasonable expenses incurred by the CCAA Parties in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance and directors and officers tail insurance, provided that the premium for the tail insurance does not exceed $300,000), maintenance and security services;

(b) payment for goods or services actually supplied to the CCAA Parties following the date of this Order; and

(c) payments and credits in respect of the Customer Programs.

9. THIS COURT ORDERS that the CCAA Parties shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, and (iii) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the CCAA Parties in connection with the sale of goods and services by the CCAA Parties, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes

were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the CCAA Parties.

10. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the CCAA Parties shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the CCAA Parties and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. THIS COURT ORDERS that, except as specifically permitted herein, the CCAA Parties are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the CCAA Parties to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

12. THIS COURT ORDERS that the CCAA Parties shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations, and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $1,000,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate and to deal with any claims arising from such termination in the Plan;

(c) in accordance with paragraphs 13 and 14, vacate, abandon or quit the whole but not the part of any leased premises and/or disclaim any real property lease and any ancillary agreements relating to the leased premises, in accordance with section 32 of the CCAA;

(d) disclaim such of their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the CCAA Parties deem appropriate, in accordance with section 32 of the CCAA and to deal with any claims arising from such disclaimer in the Plan; and

(e) pursue all avenues of refinancing and offers for their Business or the Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraph (a) above),

all of the foregoing to permit the CCAA Parties to proceed with an orderly restructuring or sale of the Business, including effecting the Proposed Transaction (the "**Restructuring**").

13. THIS COURT ORDERS that the CCAA Parties shall provide each of the relevant landlords with notice of the relevant CCAA Party's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the CCAA Party's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such

landlord and the relevant CCAA Party, or by further Order of this Court upon application by the relevant CCAA Party on at least two (2) days notice to such landlord and any such secured creditors. If a CCAA Party disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the CCAA Party's claim to the fixtures in dispute.

14. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the relevant CCAA Party and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the CCAA Party in respect of such lease or leased premises and such landlord shall be entitled to notify the CCAA Party of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

SUPPORT AGREEMENT

15. THIS COURT ORDERS that the Applicants party to the support agreement dated as of June 22, 2012 (the "**Support Agreement**") between, among others, certain Applicants and certain Pre-Petition First Lien Lenders (the "**Initial Consenting Lenders**"), appended as Exhibit F to the Bell Affidavit, are authorized and empowered to take all steps and actions in respect thereof and to comply with all of their obligations pursuant thereto and the Applicants will cooperate with the Pre-Petition First Lien Agent in providing notice in any reasonable manner to lenders (the "**Pre-Petition First Lien Lenders**") under the Pre-Petition First Lien Credit Agreement (as hereinafter defined) of the Support Agreement to enable additional Pre-Petition First Lien Lenders to execute a

Consent Agreement in the form attached as Schedule "C" to the Support Agreement and to become bound thereby as Consenting Lenders (as defined in the Support Agreement).

16. THIS COURT ORDERS that any Pre-Petition First Lien Lender under the Pre-Petition First Lien Credit Agreement (other than an Initial Consenting Lender) who wishes to become a Consent Date Lender (as defined in the Support Agreement) and become entitled to the Early Consent Consideration (as defined in the Support Agreement) (if such Early Consent Consideration becomes payable pursuant to the terms of the Support Agreement, and subject to such Pre-Petition First Lien Lender providing evidence satisfactory to the Applicants in accordance with the Support Agreement of the aggregate principal amount of loans held under the Pre-Petition First Lien Credit Agreement by such Pre-Petition First Lien Lender as at the Consent Date) must execute a Consent Agreement and return it to the Applicants in accordance with the instructions set out in the Support Agreement such that it is received by the Applicants prior to the Consent Date and, upon doing so, such Pre-Petition First Lien Lender shall become a Consent Date Lender and shall be bound by the terms of the Support Agreement.

17. THIS COURT ORDERS that as soon as practicable after the Consent Date, the Applicants shall provide to the Monitor copies of all executed Consent Agreements received from Pre-Petition First Lien Lenders prior to the Consent Date.

18. THIS COURT ORDERS that the Applicants are authorized to pay the Early Consent Consideration to the Consent Date Lenders in accordance with the Support Agreement if the Consent Date Lenders become entitled thereto.

19. THIS COURT ORDERS that the Consent Date Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**Consent Consideration Charge**") on the Charged Property as security for the obligations to pay the Early Consent Consideration to the Consent Date Lenders if they become entitled thereto in accordance with the Support Agreement. The Consent Consideration Charge shall have the priority set out in paragraphs 57 and 59 herein. "**Charged Property**" as used in this Order shall mean all assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof of the CCAA Parties other than Cinram Fund, CII

Trust, Cinram International General Partner Inc. and Cinram LP (collectively, the "**Fund Entities**").

NO PROCEEDINGS AGAINST THE CCAA PARTIES OR THE PROPERTY

20. THIS COURT ORDERS that until and including July 25, 2012, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the CCAA Parties or the Monitor, or affecting the Business or the Property, except with the written consent of the CCAA Parties and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CCAA Parties or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

21. THIS COURT ORDERS that until and including the Stay Period, no Proceeding shall be commenced or continued against or in respect of any of the CCAA Parties' direct or indirect subsidiaries that are also party to an agreement with a CCAA Party (whether as surety or guarantor or otherwise) (each, a "**Subsidiary Counterparty**"), including any contract or credit agreement, or against or in respect of any of a Subsidiary Counterparty's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Subsidiary Property**") with respect to any guarantee, contribution or indemnity obligation, liability or claim in respect of or that relates to any agreement involving a CCAA Party and a Subsidiary Counterparty or the obligations, liabilities and claims of and against the CCAA Parties (collectively, the "**Related Claims Against Subsidiaries**"), except with the written consent of the CCAA Parties and the Monitor, or with leave of this Court, and any and all Proceedings currently under way by a Person against or in respect of any Subsidiary Counterparty or Subsidiary Property in respect of Related Claims Against Subsidiaries are hereby stayed and suspended pending further Order of this Court. For the purposes of paragraphs 21 and 23 of this Order: (a) "**Subsidiary Counterparty**" does not include Cinram Optical Discs S.A.S. that has filed insolvency proceedings in France; and (b) in the event a direct or indirect subsidiary of the CCAA Parties files insolvency proceedings in a foreign

jurisdiction (other than the United States), "**Subsidiary Counterparty**" shall be deemed to exclude any such subsidiary.

NO EXERCISE OF RIGHTS OR REMEDIES

22. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the CCAA Parties or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the CCAA Parties, the Monitor and the DIP Agent, or leave of this Court, provided that nothing in this Order shall (i) empower the CCAA Parties to carry on any business which the CCAA Parties are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

23. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any Person against or in respect of a Subsidiary Counterparty or Subsidiary Property in respect of Related Claims Against Subsidiaries are hereby stayed and suspended and shall not be commenced, proceeded with or continued, except with the written consent of the CCAA Parties and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower any Subsidiary Counterparty to carry on any business which such Subsidiary Counterparty is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

24. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the CCAA

Parties, except with the written consent of the CCAA Parties and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

25. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with a CCAA Party or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, licenses, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or a CCAA Party, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the CCAA Parties, and that the CCAA Parties shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the CCAA Parties in accordance with normal payment practices of the CCAA Parties or such other practices as may be agreed upon by the supplier or service provider and each of the applicable CCAA Parties and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

26. THIS COURT ORDERS that, subject to paragraphs 20 to 25, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the CCAA Parties. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

KEY EMPLOYEE RETENTION PROGRAM

27. THIS COURT ORDERS that the key employee retention program (the "**KERP**") as described in the Bell Affidavit relating to key employees, including certain key officers (collectively, the "**Key Employees**") is hereby approved.

28. THIS COURT ORDERS that the CCAA Parties (and any other person that may be appointed to act on behalf of the CCAA Parties, including without limitation, any trustee, liquidator, receiver, interim receiver, receiver and manager or other person acting on behalf of any such person) are authorized and directed to perform the obligations under the KERP, including making all payments to the Key Employees of amounts due and owing under the KERP at the time specified and in accordance with the terms of the KERP.

29. THIS COURT ORDERS that the CCAA Parties are hereby authorized to execute and deliver such additional documents as may be necessary to give effect to the KERP, subject to prior approval of such documents by the Monitor or as may be ordered by this Court.

30. THIS COURT ORDERS that the Key Employees shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the Charged Property, which charge shall not exceed an aggregate amount of $3 million, as security for the obligations of the CCAA Parties to the Key Employees under the KERP. The KERP Charge shall have the priority set out in paragraph 57 and 59 herein.

31. THIS COURT ORDERS that the summary of the KERP attached as Exhibit K to the Bell Affidavit be sealed, kept confidential and not form part of the public record, but rather shall be placed separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of this Court.

INVESTMENT BANKER

32. THIS COURT ORDERS that CII is authorized to carry out and perform its obligations under its engagement letter with Moelis & Company LLC (the "**Engagement Letter**") as investment banker for the CCAA Parties (the "**Investment Banker**") (including payment of the amounts due to be paid pursuant to the terms of the Engagement Letter, including but not limited to any success or transaction fee under the Engagement Letter).

33. THIS COURT ORDERS that all claims of the Investment Banker pursuant to the Engagement Letter are not claims that may be compromised pursuant to any Plan under the CCAA, any proposal ("**Proposal**") under the *Bankruptcy and Insolvency Act* or any other restructuring and no such Plan, Proposal or restructuring shall be approved that does not provide for the payment of all amounts due to the Investment Banker pursuant to the terms of the Engagement Letter.

34. THIS COURT ORDERS that notwithstanding any order in these proceedings, the CCAA Parties are authorized to make all payments required by the Engagement Letter, including all fees and expenses, if and when due.

35. THIS COURT ORDERS that the Investment Banker, its affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of either its engagement by CII as Investment Banker or any matter referred to in the Engagement Letter except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the Investment Banker in performing its obligations under the Engagement Letter.

PROCEEDINGS AGAINST TRUSTEES, DIRECTORS AND OFFICERS

36. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future trustees, directors or officers of the Applicants with respect to any claim against the trustees, directors or officers that arose before the date

hereof and that relates to any obligations of the CCAA Parties whereby the trustees, directors or officers are alleged under any law to be liable in their capacity as trustees, directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the CCAA Parties, if one is filed, is sanctioned by this Court or is refused by the creditors of the CCAA Parties or this Court.

TRUSTEES', DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

37. THIS COURT ORDERS that the Applicants shall indemnify their trustees, directors and officers against obligations and liabilities that they may incur as trustees, directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any trustee, officer or director, the obligation or liability was incurred as a result of the trustee's, director's or officer's gross negligence or wilful misconduct.

38. THIS COURT ORDERS that the trustees, directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Charged Property, which charge shall not exceed an aggregate amount of $13 million, as security for the indemnity provided in paragraph 37 of this Order. The Directors' Charge shall have the priority set out in paragraphs 57 and 59 herein.

39. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' trustees, directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 37 of this Order.

APPOINTMENT OF MONITOR

40. THIS COURT ORDERS that FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the CCAA Parties with the powers and obligations set out in the CCAA or set forth herein and

that the CCAA Parties and their shareholders, officers, directors, trustees, partners and Assistants shall advise the Monitor of all material steps taken by the CCAA Parties pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

41. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the CCAA Parties' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Agent and the administrative agent (the "**Pre-Petition First Lien Agent**") under the amended and restated credit agreement dated April 11, 2011 (the "**Pre-Petition First Lien Credit Agreement**") and their counsel and financial advisors, on a weekly or bi-weekly basis as set out in the DIP Credit Agreement of financial and other information as agreed to between the Applicants party thereto and the Agent which may be used in these proceedings including reporting on a basis to be agreed with the Agent;

(d) advise the CCAA Parties in their preparation of the CCAA Parties' cash flow statements and reporting required by the Agent, which information shall be reviewed with the Monitor and delivered to the Agent and its counsel and financial advisors on a periodic basis, but not less than bi-weekly, or as otherwise agreed to by the Agent;

(e) advise the CCAA Parties in their development of the Plan and any amendments to the Plan;

(f) assist the CCAA Parties, to the extent required by the CCAA Parties, with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto, including retaining independent legal counsel, agents, experts, accountants or such other persons as the Monitor deems necessary or advisable respecting the exercise of this power;

(g) assist the CCAA Parties, to the extent required by the CCAA Parties, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(h) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the CCAA Parties, to the extent that is necessary to adequately assess the CCAA Parties' business and financial affairs or to perform its duties arising under this Order;

(i) assist the CCAA Parties and/or the Investment Banker with respect to any sales and marketing process to sell the Property and the Business or any part thereof;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(k) perform such other duties as are required by this Order or by this Court from time to time.

42. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

43. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally

contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

44. THIS COURT ORDERS that that the Monitor shall provide any creditor of the CCAA Parties and the Agent with information provided by the CCAA Parties in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the CCAA Parties is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the CCAA Parties may agree.

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

46. THIS COURT ORDERS that the Monitor, counsel to the Monitor, Canadian counsel to the CCAA Parties and U.S. Counsel to the CCAA Parties (together with

Canadian counsel to the CCAA Parties, "**CCAA Parties' Counsel**") and the Canadian and U.S. counsel to the DIP Agent and DIP Lenders and the Pre-Petition First Lien Agent and Pre-Petition First Lien Lenders (collectively, the "**Lenders' Counsel**") and the financial advisor of the DIP Lenders and Pre-Petition First Lien Lenders (the "**Lenders' Financial Advisor**") shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements), in each case at their standard rates and charges, by the CCAA Parties as part of the costs of these proceedings. The CCAA Parties are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, CCAA Parties' Counsel, Lenders' Counsel and Lenders' Financial Advisor on a bi-weekly basis and, in addition, the CCAA Parties are hereby authorized to pay to the Monitor, counsel to the Monitor, and CCAA Parties' Counsel, new retainers in the aggregate amount of up to $250,000 to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

47. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

48. THIS COURT ORDERS that the Monitor, counsel to the Monitor, the Investment Banker, the CCAA Parties' Counsel, the Lenders' Counsel and the Lenders' Financial Advisor shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Charged Property, which charge shall not exceed an aggregate amount of $3.5 million, as security for their professional fees and disbursements incurred at the standard rates and charges of the CCAA Parties' Counsel, Lenders' Counsel, Lenders' Financial Advisor and the Monitor and, in the case of the Investment Banker, pursuant to the Engagement Letter, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 57 and 59 hereof.

DIP FINANCING

49. THIS COURT ORDERS that the Applicants party thereto are hereby authorized and empowered to obtain and borrow under a credit facility from JP Morgan Chase Bank N.A., as administrative agent (the "**DIP Agent**"), and as lender and certain other lenders (collectively, the "**DIP Lenders**") in order to finance the CCAA Parties' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed US$15 million unless permitted by further Order of this Court.

50. THIS COURT ORDERS THAT such credit facility shall be on the terms and subject to the conditions set forth in the DIP credit agreement between the Applicants party thereto and the DIP Lenders dated as of June 22, 2012 (the "**DIP Credit Agreement**"), filed, as such terms of such DIP Credit Agreement may be amended by the Applicants party thereto and the DIP Lenders with the consent of the Monitor.

51. THIS COURT ORDERS that each of Schedule 2.01, Part D, E and G of Schedule 5.15, Part A.2 of Schedule 5.17, Schedule 7.06 and Schedule 7.08 to the DIP Credit Agreement be sealed, kept confidential and not form part of the public record, but rather shall be placed separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of this Court.

52. THIS COURT ORDERS that the Applicants party thereto are hereby authorized and empowered to execute and deliver the DIP Credit Agreement and such mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (such documents, together with the DIP Credit Agreement, collectively, the "**Definitive Documents**"), as are contemplated by the DIP Credit Agreement or as may be reasonably required by the DIP Lenders pursuant to the terms thereof, and the Applicants party thereto are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lenders under and pursuant to the DIP Credit

Agreement and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

53. THIS COURT ORDERS that the DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lenders' Court Charge**") on the Charged Property, including, without limitation, the real property described in Schedule "B" hereto, which DIP Lenders' Court Charge shall not secure an obligation that exists before this Order is made. The DIP Lenders' Court Charge and any contractual security interests granted pursuant to the Definitive Documents (collectively with the DIP Lenders' Court Charge, the "**DIP Lenders' Charge**") shall attach to the Charged Property and shall secure all obligations under the Definitive Documents. The DIP Lenders' Charge shall have the priority set out in paragraphs 57 and 59 hereof.

54. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

(a) the DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lenders' Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lenders' Charge (A) the DIP Agent and DIP Lenders may cease making advances to the Applicants, and (B) the DIP Agent, DIP Lenders, Pre-Petition First Lien Agent and Pre-Petition First Lien Lenders may (i) set off and/or consolidate any amounts owing by the DIP Lenders or the Pre-Petition First Lien Lenders to the Applicants against the obligations of the Applicants to the DIP Lenders or Pre-Petition First Lien Lenders under the DIP Credit Agreement, the Definitive Documents, the DIP Lenders' Charge or the Pre-Petition First Lien Credit Agreement and may make demand, accelerate payment and give other notices, and (ii) upon five days notice to the CCAA Parties and the Monitor, exercise any and all of its rights and remedies against the Applicants or the Charged Property under or pursuant to the DIP Credit Agreement, Definitive Documents, DIP Lenders' Charge, Pre-Petition First Lien Credit Agreement or the *Personal Property Security Act* of Ontario or any other applicable

jurisdiction, the *Uniform Commercial Code* of the applicable jurisdiction and/or *Mortgages Act* (Ontario) and equivalent legislation in the applicable jurisdiction, including, without limitation, to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants;

(c) upon receipt of any notice referenced in paragraph 54(b)(ii), the Monitor shall immediately advise the Court in a Monitor's Report that such notice was received and the 5 day notice period shall commence upon the filing of such Monitor's Report with the Court; and

(d) the foregoing rights and remedies of the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Charged Property.

55. THIS COURT ORDERS AND DECLARES that all claims of the DIP Agent and DIP Lenders pursuant to the Definitive Documents are not claims that may be compromised pursuant to any Plan filed by the CCAA Parties or any one of them under the CCAA, or any Proposal filed by the CCAA Parties or any one of them under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**") or any other restructuring, and the DIP Agent and the DIP Lenders shall be treated as unaffected in any Plan, Proposal or other restructuring with respect to any obligations outstanding to the DIP Agent or DIP Lenders under or in respect of the Definitive Documents.

56. THIS COURT ORDERS that the CCAA Parties or any one of them shall not file a Plan or Proposal in these proceedings or proceed with any other restructuring that does not provide for the indefeasible payment in full in cash of the obligations outstanding under the DIP Credit Agreement and the other Definitive Documents as a pre-condition to the implementation of any such Plan or Proposal or any other restructuring, without the prior written consent of the DIP Agent. Further, if the Support Agreement terminates in accordance with Section 7(a)(iv)(C) thereof, the stays of proceedings provided for herein shall not apply to the Pre-Petition First Lien Agent, Pre-Petition First Lien Lenders or their

respective rights under or in respect of the Pre-Petition First Lien Credit Agreement and the Pre-Petition First Lien Agent and Pre-Petition First Lien Lenders may (A) set off and/or consolidate any amounts owing by the Pre-Petition First Lien Lenders to the Applicants against the obligations of the Applicants to the Pre-Petition First Lien Lenders under the Pre-Petition First Lien Credit Agreement and may make, demand, accelerate payment and give other notices, and (B) upon 5 days notice to the CCAA Parties and the Monitor, exercise any and all of their rights and remedies under or pursuant to the Pre-Petition First Lien Credit Agreement or the *Personal Property Security Act* of Ontario or any other applicable jurisdiction, the *Uniform Commercial Code* of the applicable jurisdiction and/or *Mortgages Act* (Ontario) and equivalent legislation in the applicable jurisdiction, including, without limitation, to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants. Upon receipt of any notice referenced in clause (B) above, the Monitor shall immediately advise the Court in a Monitor's Report that such notice was received and the 5 day notice period shall commence upon the filing of such Monitor's Report with the Court.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

57. THIS COURT ORDERS that the priorities of the Directors' Charge, the Administration Charge, the KERP Charge, the Consent Consideration Charge and the DIP Lenders' Charge, as among them, shall be as follows, subject to paragraph 59 of this Order:

First – Administration Charge (to the maximum amount of $3.5 million);

Second – DIP Lenders' Charge;

Third – Directors' Charge (to the maximum amount of $13 million);

Fourth – KERP Charge (to the maximum amount of $3 million); and

Fifth – Consent Consideration Charge.

58. THIS COURT ORDERS that the filing, registration or perfection of the Directors' Charge, the Administration Charge, the KERP Charge, the Consent Consideration Charge or the DIP Lenders' Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

59. THIS COURT ORDERS that each of the Directors' Charge, the Administration Charge, the KERP Charge, the Consent Consideration Charge and the DIP Lenders' Charge (all as constituted and defined herein) shall constitute a charge on the Charged Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, notwithstanding the order of perfection or attachment, except for any validly perfected security interest in favour of a "secured creditor" as defined in the CCAA existing as at the date hereof other than any validly perfected security interest in favour of the Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent, Pre-Petition First Lien Lenders or Pre-Petition Second Lien Lenders; provided that the Consent Consideration Charge is subordinate to the prior payment in full of all obligations under the Pre-Petition First Lien Credit Agreement in respect of the First-Out Revolving Credit Commitments (as defined in the Pre-Petition First Lien Credit Agreement). No Charge created by this Order shall attach to or create any claim, lien, charge, security interest or encumbrance on the property of a customer of a CCAA Party or where a customer has title to such property, notwithstanding that such property may be in a CCAA Party's possession. Nothing in this Order affects the priority of the Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent, Pre-Petition First Lien Lenders and the Pre-Petition Second Lien Lenders against the rights of third parties (other than beneficiaries of the Charges) as of the date of this Order.

60. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the CCAA Parties shall not grant any Encumbrances over any Charged Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge, the KERP Charge, the Consent Consideration Charge

or the DIP Lenders' Charge, unless the CCAA Parties also obtain the prior written consent of the Monitor, the DIP Lenders and the beneficiaries of the Directors' Charge, the Administration Charge, the KERP Charge and the Consent Consideration Charge, or further Order of this Court.

61. THIS COURT ORDERS that the Directors' Charge, the Administration Charge, the KERP Charge, the Consent Consideration Charge, the DIP Credit Agreement, the Definitive Documents and the DIP Lenders' Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the CCAA Parties, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Credit Agreement or the Definitive Documents shall create or be deemed to constitute a breach by the CCAA Parties of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the DIP Credit Agreement, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the CCAA Parties pursuant to this Order, the DIP Credit Agreement or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at

undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

62. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the CCAA Parties' interest in such real property leases.

FOREIGN PROCEEDINGS

63. THIS COURT ORDERS that Cinram International ULC is hereby authorized and empowered to act as the foreign representative in respect of the within proceedings for the purposes of having these proceedings recognized in a jurisdiction outside Canada.

64. THIS COURT ORDERS that Cinram International ULC is hereby authorized, as the foreign representative of the CCAA Parties and of the within proceedings, to apply for foreign recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including in the United States pursuant to Chapter 15 of the *U.S. Bankruptcy Code*, and to take such actions necessary or appropriate in furtherance of the recognition of these proceedings or the prosecution of any sale transaction (including the Proposed Transaction) in any such jurisdiction.

65. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States or in any other foreign jurisdiction, to give effect to this Order and to assist the CCAA Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the CCAA Parties and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to Cinram International ULC in any foreign proceeding, or to assist the CCAA Parties and the Monitor and their respective agents in carrying out the terms of this Order.

66. THIS COURT ORDERS that each of the CCAA Parties and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory

or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and any other Order issued in these proceedings.

SERVICE AND NOTICE

67. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in the Globe and Mail and the Wall Street Journal a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the CCAA Parties of more than $5000, and (C) prepare a list showing the names and addresses of those creditors, save and except creditors who are individuals, and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

68. THIS COURT ORDERS that the CCAA Parties and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the CCAA Parties' creditors or other interested parties at their respective addresses as last shown on the records of the CCAA Parties and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

69. THIS COURT ORDERS that the CCAA Parties, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on the Monitor's Website.

GENERAL

70. THIS COURT ORDERS that the CCAA Parties or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

71. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the CCAA Parties, the Business or the Property.

72. THIS COURT ORDERS that any interested party (including the CCAA Parties and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order, provided however that the DIP Lenders shall be entitled to rely on this Order as issued for all advances made under the DIP Credit Agreement and Definitive Documents up to and including the date this Order may be varied or amended.

73. THIS COURT ORDERS that, notwithstanding the immediately preceding paragraph, no order shall be made varying, rescinding or otherwise affecting the provisions of this Order with respect to the DIP Credit Agreement or the Definitive Documents, unless notice of a motion is served on the Monitor and the CCAA Parties and the DIP Agent, returnable no later than July 12, 2012.

74. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 25 2012

SCHEDULE A

Additional Applicants

Cinram International General Partner Inc.
Cinram International ULC
1362806 Ontario Limited
Cinram (U.S.) Holding's Inc.
Cinram, Inc.
IHC Corporation
Cinram Manufacturing LLC
Cinram Distribution LLC
Cinram Wireless LLC
Cinram Retail Services, LLC
One K Studios, LLC

SCHEDULE B

Charged Real Property Description

2255 Markham Road, Toronto, Ontario

Firstly:

PIN 06079-0067 (LT)

Part of Lot 18, Concession 3 Scarborough, designated as Parts 2 and 3 on Plan 64R6927 and Part 1 on Plan 64R7116, confirmed by 64B1990, subject to SC574898, Toronto, City of Toronto

Secondly:

PIN 06079-0280 (LT)

Part of Lot 18, Concession 3 Scarborough, designated as Parts 2 and 3 on Plan 66R23795, subject to an easement over Part 3 on Plan 66R23795 as in SC574898, City of Toronto

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A"

Applicants

Court File No: CV12 – 9767 – 00CL

ONTARIO
SUPERIOR COURT OF JUSTICE-
COMMERCIAL LIST

Proceeding commenced at Toronto

INITIAL ORDER

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick LSUC#: 35165K
Melaney J. Wagner LSUC#: 44063B
Caroline Descours LSUC#: 58251A

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants

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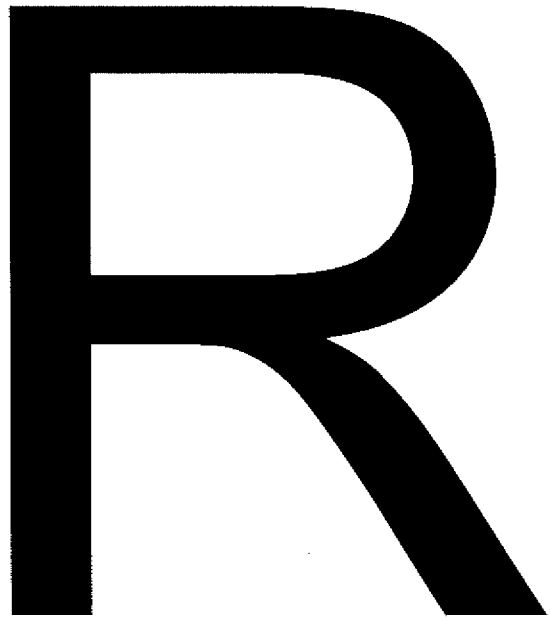


CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A"

REPORT OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS PROPOSED MONITOR OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A"

June 23, 2012

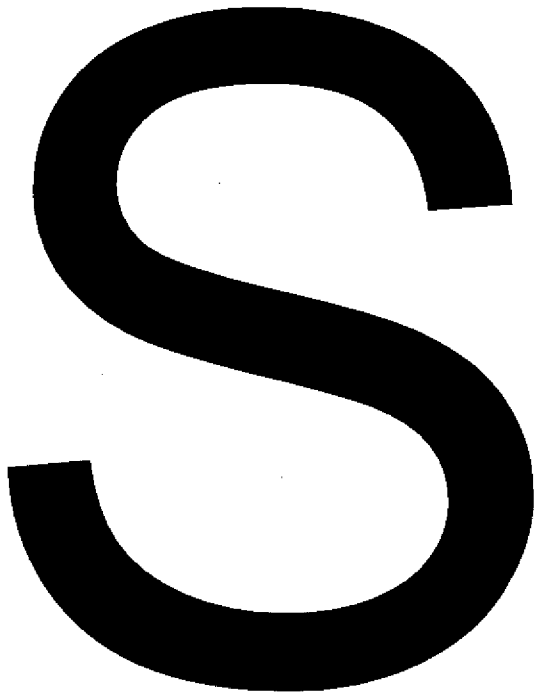
5. Cinram Fund, collectively with its direct and indirect subsidiaries, shall be referred to herein as "**Cinram**" or the "**Cinram Group**". The proceedings to be commenced by the Applicants under the CCAA will be referred to herein as the "**CCAA Proceedings**".

6. Unless otherwise stated, all monetary amounts contained in this report are expressed in United States dollars.

FTI'S QUALIFICATION TO ACT AS MONITOR

7. FTI has been retained by CII since February 2010 as Cinram's financial advisor, initially in North America and subsequently in Europe, to, among other things, assist with liquidity management and reporting (including assisting with the preparation of cash flow forecasts), the development and implementation of a multi-year financial plan and identification of cost reduction and other liquidity enhancement opportunities.

8. The professionals of FTI who have carriage of this matter, and who will have carriage of this matter for FTI as the Monitor (if appointed), have acquired considerable knowledge of the CCAA Parties and their business since the commencement of FTI's engagement as financial advisor. FTI is therefore in a position to immediately assist the company in the implementation of any restructuring process.



Court File No. CV14-10781-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE REGIONAL	)	WEDNESDAY, THE 3RD
	)	
SENIOR JUSTICE MORAWETZ	)	DAY OF DECEMBER, 2014

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 CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY (each an "Applicant" and collectively, the "Applicants")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Matthew Goldfarb sworn December 2, 2014 and the Exhibits thereto (the "**Goldfarb Affidavit**") and the Pre-Filing Report of the Proposed Monitor, FTI Consulting Canada Inc. ("**FTI**"), and on being advised that there are no secured creditors who are likely to be affected by the charges created herein other than those served, and on hearing the submissions of counsel for the Applicants, FTI, Marret Asset Management Inc. (on behalf of the beneficial holders of the Secured Notes (as defined below) (the "**Secured Noteholders**"), in such capacity "**Marret**") and such other counsel as were present, no one else appearing for any other party, and on reading the consent of FTI to act as the Monitor,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that each of the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court, individually or collectively, a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business in accordance with existing Business practices or for the carrying out of the terms of this Order.

5. THIS COURT ORDERS that the Applicants shall be entitled to continue to utilize the central cash management system currently in place as described in the Goldfarb Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or

legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

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

(a) all outstanding and future wages, salaries, commissions, bonuses, incentive payments, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order in respect of employees, contractors, directors, officers or other personnel providing services to the Applicants, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements and, without limiting the generality of the foregoing, the Applicants are authorized to have deposited with AIG Insurance Company of Canada an amount of up to $50,000 for the purpose of obtaining a directors and officers run-off insurance policy;

(b) all outstanding and future amounts owing to or in respect of individuals working as independent contractors in connection with the Business in respect of services provided to the Business and expenses payable in respect thereof, in each case in the ordinary course of business and consistent with existing policies and arrangements;

(c) the fees and disbursements of any Assistants retained or employed by any of the Applicants in respect of these proceedings or any similar or ancillary proceedings in other jurisdictions or in respect of related corporate matters, including, for greater certainty, any counsel or advisors referred to in paragraph 29 of this Order, at their standard rates and charges, including the fees and disbursements of legal counsel, financial advisors and other professional advisors retained by the Applicants; and

(d) any payment referred to in paragraphs 7(a) or 7(b) of this Order that was incurred during or that pertains to the period prior to the date of this Order if, in the opinion of the Applicants and with the consent of the Monitor, the supplier of the applicable good or service or the provider of the applicable license or permit, as applicable, is critical to the Business and the ongoing operations of the Applicants.

7. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance, security services and any license fees, permit fees, royalties, user fees or levies in respect of the Business or the Property; and

(b) payment for goods and services supplied or to be supplied to any of the Applicants, or to obtain the release of goods contracted for prior to the date of this Order.

8. THIS COURT ORDERS that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan and (iii) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

9. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the applicable Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, at such intervals as such Rent is usually paid in the ordinary course of business, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. THIS COURT ORDERS that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; (c) to not grant credit or incur liabilities except in the ordinary course of the Business in accordance with existing Business practices; and (d) to make no payments in respect of equity claims or equity interests.

RESTRUCTURING

11. THIS COURT ORDERS that each of the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $750,000 in any one transaction or $1.5 million in the aggregate, subject to the prior approval of Marret;

(b) to sell assets not exceeding $750,000 in any one transaction or $1.5 million in the aggregate, subject to the prior approval of Marret;

(c) terminate the employment of such of its employees or temporarily or indefinitely lay off such of its employees as it deems appropriate and on such terms as may be agreed by the applicable Applicant and the applicable employee, or, failing such agreement, to deal with the consequences thereof in the Plan;

(d) in accordance with paragraphs 12 and 13, vacate, abandon or quit the whole but not part of any leased premises and disclaim any real property lease and any ancillary agreements relating to any leased premises, in accordance with Section 32 of the CCAA, on such terms as may be agreed upon between the applicable Applicant and such landlord, or failing such agreement, to deal with the consequences thereof in the Plan, subject in each case to the prior approval of Marret;

(e) disclaim, in whole or in part, such of its arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the applicable Applicant deems appropriate, in accordance with Section 32 of the CCAA, with such disclaimers to be on such terms as may be agreed upon between the applicable Applicant and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan, subject in each case to the prior approval of Marret;

(f) subject to the consent of the Monitor and Marret, return any equipment that is subject to a valid first-ranking security to the applicable equipment provider holding such security in satisfaction of such equipment provider's claims on terms to be agreed between the applicable Applicant and such equipment provider, or failing such agreement, to deal with the consequences thereof in the Plan; and

(g) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. THIS COURT ORDERS that each of the Applicants shall provide each of the relevant landlords with notice of the applicable Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the applicable Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and such Applicant, or by further Order of this Court upon application by such Applicant on at least two (2) days notice to such landlord and any such secured creditors. If any of the Applicants disclaims a lease governing a premises leased by such Applicant in accordance with Section 32 of the CCAA, such Applicant shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to such Applicant's claim to the fixtures in dispute.

13. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the applicable Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the applicable Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. THIS COURT ORDERS that until and including December 31, 2014, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all

Proceedings currently under way against or in respect of any of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with any of the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, equipment leasing services, transportation services, utility or other services to the Business or any of the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the applicable Applicant, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each

case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the applicable Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of any of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. THIS COURT ORDERS that each of the Applicants shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the applicable Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. THIS COURT ORDERS that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for the indemnities

provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 32 and 34 hereof.

22. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPOINTMENT OF MONITOR

23. THIS COURT ORDERS that FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA and as set forth herein, and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise and assist the Applicants in their preparation of the Applicants' cash flow statements, which information shall be reviewed with the Monitor on a periodic basis;

(d) advise and assist the Applicants in their development and implementation of the Plan and any amendments to the Plan;

(e) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' meetings for voting on the Plan;

(f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(g) assist the Applicants, to the extent required by the Applicants, with their restructuring activities;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) assist the Applicants, to the extent required by the Applicants, with any matters relating to any foreign proceedings commenced in relation to the Applicants, including retaining independent legal counsel, agents, experts, accountants or such other persons as the Monitor deems necessary or advisable; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

25. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

26. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the

Canadian Environmental Protection Act, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

27. THIS COURT ORDERS that the Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

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

29. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Applicants, the Chief Restructuring Officer of the Applicants (the "**CRO**") and counsel to Marret shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to or after the date of this Order, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor, counsel to the Applicants, the CRO and counsel to Marret on a weekly basis, or on such basis as otherwise agreed by the Applicants and the applicable payee and, in addition, the Applicants are hereby authorized to have paid to the Monitor a retainer in the amount of $50,000, to be held by the Monitor as security for payment of its fees and disbursements outstanding from time to time, and the Applicants are hereby

authorized to have paid to counsel to the Monitor a retainer in the amount of $40,000, to be held by counsel to the Monitor as security for the payment of its fees and disbursements outstanding from time to time.

30. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

31. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Applicants, the CRO and counsel to Marret shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $350,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor, the CRO and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 32 and 34 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

32. THIS COURT ORDERS that the priorities of the Directors' Charge and the Administration Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge; and

Second – Directors' Charge.

33. THIS COURT ORDERS that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

34. THIS COURT ORDERS that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, notwithstanding the order

of perfection or attachment, except for any security interest listed on Schedule "A" hereto that is validly perfected and enforceable.

35. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, including pursuant to the terms of the Plan, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the Monitor, Marret and the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") affected thereby, or further Order of this Court. The Applicants shall not seek any further Court-ordered charges on their Property or Business without the prior approval of Marret. Unless otherwise ordered by this Court, the terms of the release and discharge of any of the Charges shall be acceptable to the applicable Chargees affected thereby.

36. THIS COURT ORDERS that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees under the Charges shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., c. B-3, as amended (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by any of the Applicants of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by any of the Applicants pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances,

transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

37. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Applicants' interest in such real property leases.

THE INDENTURE TRUSTEE AND MARRET

38. THIS COURT ORDERS that, until the termination of these proceedings, further Order of this Court or as otherwise instructed in writing by the Secured Noteholders, Computershare Trust Company of Canada, in its capacity as indenture trustee (the "**Trustee**") in respect of the 10% senior secured bonds due June 15, 2014 (CUSIP 186905AA3 / ISIN CA 186905AA37) issued pursuant to the indenture dated December 13, 2011, as amended, and the 10% senior secured bonds due June 15, 2014 (CUSIP 186905AE5 / ISIN CA 186905AE58) issued pursuant to the indenture dated July 8, 2013, as amended (collectively the "**Secured Notes**") is hereby relieved of any obligation to take any further actions in these proceedings in respect of the Secured Notes and the indentures governing the Secured Notes (the "**Indentures**"), and Marret is hereby authorized and empowered to take all such actions in these proceedings, including without limitation: (i) filing claims of the Secured Noteholders in the CCAA claims process (provided that nothing herein prevents the Trustee from filing a proof of claim against the Applicants in relation to any unpaid fees and expenses incurred by it in the course of acting as Trustee in accordance with the Indentures); (ii) administering, soliciting and facilitating the casting of votes by the Secured Noteholders in respect of any plan of compromise or arrangement in respect of the Applicants; (iii) facilitating the distribution of consideration under the CCAA Plan to the Secured Noteholders; (iv) taking any steps or actions with respect to the security over the assets and property of the Applicants held by the Trustee in respect of the Secured Notes, including any waiver, discharge or enforcement of the security; and (v) taking any steps the Trustee is otherwise required or may be directed to take on behalf of the Secured Noteholders under the Indentures in respect of the Secured Notes. Notwithstanding the foregoing, upon agreement between Cline Mining Corporation, Marret and the Trustee, and with the consent of the Monitor, the Trustee may take such actions as are necessary to facilitate the distribution of consideration to the Secured Noteholders pursuant to the Plan. The Trustee is entitled to rely upon this

paragraph 38 and shall have no liability to any Person for complying with this paragraph 38. Cline Mining Corporation is hereby authorized to pay the reasonable and documented fees, expenses and disbursements of the Trustee (including the reasonable and documented fees, expenses and disbursements of the Trustee's counsel) incurred and payable in accordance with the Indentures up to an amount to be determined by agreement of the Applicants, the Trustee and the Monitor, or failing such agreement, by Order of the Court. In accordance with the Indentures, any amounts that are payable to the Trustee, in its individual corporate capacity, pursuant to the terms of the Indentures, if not paid in cash by the Applicants, shall be payable out of any distributions, dividends, securities or other consideration issued to the holders of the Secured Notes by the Applicants in any Plan, liquidation or otherwise.

SERVICE AND NOTICE

39. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in The Globe and Mail, the Denver Post and the Pueblo Chieftain a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against any of the Applicants of more than $1000, provided that with respect to contingent claims against the Applicants in respect of the WARN Act Class Action (as defined in the Goldfarb Affidavit), the Monitor shall only be required to send a notice to counsel of record for the representative plaintiffs in the WARN Act Class Action, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the names and addresses of individuals who are creditors publicly available and provided further that only the representative plaintiffs in the WARN Act Class Action shall be listed in respect of the contingent claims against the Applicants in respect of the WARN Act Class Action.

40. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-

protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: http://cfcanada.fticonsulting.com/cline.

41. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile or other electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile or other electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

42. THIS COURT ORDERS that the Applicants are hereby relieved of any obligation to call and hold annual meetings of their shareholders until after the termination of these CCAA proceedings or further Order of this Court.

43. THIS COURT ORDERS that each of the Applicants and the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Order or for advice and directions concerning the discharge of their respective powers and duties under this Order or the interpretation or application of this Order.

44. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

45. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor

and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

46. THIS COURT ORDERS that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of these CCAA proceedings for the purpose of having these CCAA proceedings recognized in a jurisdiction outside Canada. Without limiting the generality of the foregoing, the Monitor is hereby authorized, as the foreign representative of the Applicants, to, if deemed advisable by the Monitor and the Applicants, apply for recognition of these CCAA proceedings and to act as the representative of these CCAA proceedings in any proceedings in the United States pursuant to Chapter 15, Title 11 of the United States Code.

47. THIS COURT ORDERS that any interested party (other than the Applicants or the Monitor) that wishes to amend or vary this Order shall be entitled to appear or bring a motion before this Court on a date to be set by this Court upon the granting of this Order (the "**Comeback Date**"), and any such interested party shall give notice to any other party or parties likely to be affected by the order sought in advance of the Comeback Date.

48. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

DEC 3 - 2014

SCHEDULE "A"

SECURITY REGISTRATIONS

Secured Party	Filing No.	Collateral Description	Equipment Serial No. (if applicable)	Jurisdiction
Bank of Montreal/Banque de Montreal	675927639 – 20120130 1837 1532 2055 (5 years)	Accounts, Other (relates to security for balances in respect of corporate credit cards provided by Bank of Montreal)	N/A	Ontario
Komatsu Financial Limited Partnership & Power Motive Corporation	2010F070368	Grader Wheel Loader Wheel Loader	51669 66173 55610	Colorado
Applied Industrial Technologies, Inc.	21012F002747	Purchase Money Security Interest in and to all Consignee's now held or hereafter acquired equipment consigned or shipped to Consignee by or on behalf of Consignor or others and under any product name, including all additions and accessions thereto and substitutions therefor and products thereof.	N/A	Colorado
Caterpillar Global Mining Virginia LLC	20122061314	Miscellaneous Assembly Drive Units & Parts	CO-0-3529520146 888198	Colorado
Komatsu Financial Limited Partnership	20132010774	Crawler Dozer	11716	Colorado
Komatsu Financial Limited Partnership	20132011002	Crawler Dozer	81206	Colorado

Secured Party	Filing No.	Collateral Description	Equipment Serial No. (if applicable)	Jurisdiction
Applied Industrial Technologies, Inc.	098991194	Purchase Money Security Interest in and to all Consignee's now held or hereafter acquired equipment consigned or shipped to Consignee by or on behalf of Consignor or others and under any product name, including all additions and accessions thereto and substitutions therefor and products thereof.	N/A	Kansas
Komatsu Financial Limited Partnership	071129329	Motor Grader	51669	Kansas
Komatsu Financial Limited Partnership	071129386	Articulated Truck	A11045	Kansas
Komatsu Financial Limited Partnership	071129394	Articulated Truck	A11052	Kansas
Komatsu Financial Limited Partnership	071129402	Wheel Loader	55610	Kansas
Komatsu Financial Limited Partnership	071129410	Wheel Loader	66173	Kansas

Court File No. CV14-10781-00CL

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 CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

INITIAL ORDER

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
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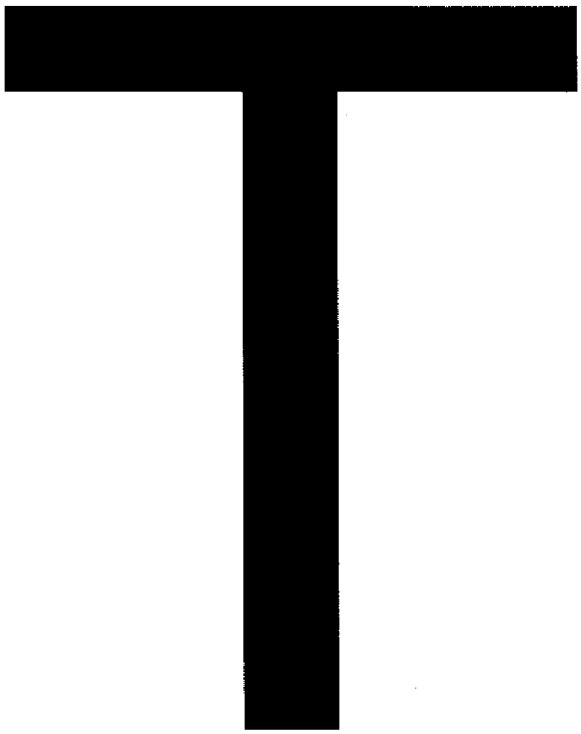
Lawyers for the Applicants



Court File No. _____

CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

PRE-FILING REPORT TO THE COURT SUBMITTED BY FTI CONSULTING CANADA INC., IN ITS CAPACITY AS PROPOSED MONITOR

December 2, 2014

FTI CONSULTING

D. ACTIVITIES OF THE PROPOSED MONITOR

27. Cline retained FTI as a financial advisor on April 9, 2014. FTI was retained in order to assist with the preparation of cash flow forecasts, to evaluate and assess restructuring alternatives available to the Applicants, and to assist the Applicants with their preparation for filing under the CCAA. For the purpose of this mandate, FTI has been involved in numerous activities, including, *inter alia*:

A. participating in numerous meetings and discussions with senior management of the Applicants and the Applicants' legal advisors in connection with the Applicants' business and financial affairs generally and in connection with the preparation of the Cash Flow Forecast;

B. participating in numerous meetings and discussions with the Applicants and counsel to the Applicants in connection with the proposed forms of Initial Order, Claims Procedure Order and Meeting Order;

C. engaging legal counsel, who also participated in certain of the above-noted meetings and discussions;

D. reviewing and considering various documentation in connection with the CCAA Proceedings; and

E. preparing this Pre-Filing Report.

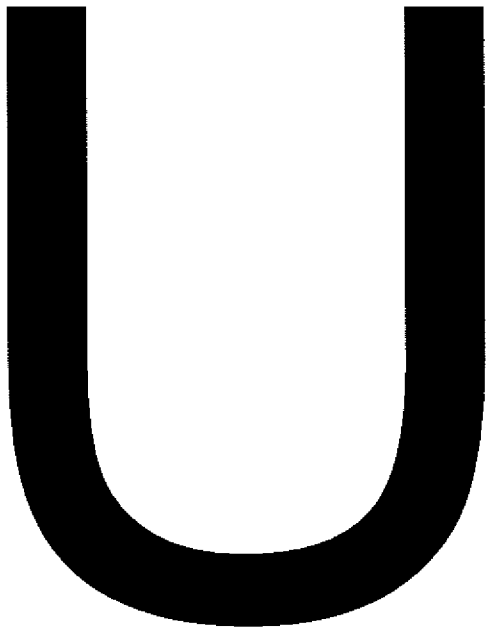
28. If this Honourable Court approves the appointment of FTI as Monitor, FTI will comment in a future report on, *inter alia*:

A. the Secured Notes and the validity, enforceability and perfection of the security granted by the Applicants in connection therewith; and

B. the development of the Plan and the Alternate Plan (as defined herein), and the terms and conditions contained therein, which will be included in the statutory report to the Court on the Plan pursuant to the terms of the CCAA at the appropriate time.

E. COURT-ORDERED CHARGES

29. The proposed form of Initial Order provides for a charge on the Applicants' Property in an amount not to exceed $350,000 (the "**Administration Charge**") to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, the Monitor (if appointed), the Monitor's counsel, the Chief Restructuring Officer of the Applicants and counsel to Marret both before and after the commencement of the CCAA Proceeding.



No. S-110587
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF ANGIOTECH PHARMACEUTICALS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

ORDER

BEFORE THE HONOURABLE	)	FRIDAY, THE 28th DAY
	)	
MR. JUSTICE WALKER	)	OF JANUARY, 2011

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 28th day of January, 2011 (the "**Order Date**"); AND ON HEARING Jeremy Dacks and Marc Wasserman, counsel for the Petitioners and those other counsel listed on Schedule "B" hereto; AND UPON READING the material filed, including the First Affidavit of K. Thomas Bailey sworn January 28, 2011 (the "**Bailey Affidavit**"), the consent of Alvarez & Marsal Canada Inc. to act as Monitor and the Pre-Filing Report of Alvarez & Marsal Canada Inc.; AND UPON BEING ADVISED that the secured creditors who are likely to be affected by the charges created herein were given notice; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "**CCAA**"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court:

SERVICE

1. THIS COURT ORDERS that the time for service of the Petition is hereby abridged and validated so that this Petition is properly returnable today and hereby dispenses with further service thereof.

JURISDICTION

2. THIS COURT ORDERS AND DECLARES that the Petitioners are companies to which the CCAA applies.

PETITION HEARING

3. THIS COURT ORDERS that the hearing of the Petition in this proceeding be held at the Courthouse at 800 Smithe Street, Vancouver, British Columbia at 10:00 a.m. on Tuesday, the 17th day of February, 2011, provided that the service referred to in paragraph 61 of this Order occur no later than February 2, 2011.

4. THIS COURT ORDERS that all of the relief provided for in the subsequent paragraphs of this Order is granted to the Petitioners on an interim basis only, and that the relief made in the subsequent paragraphs will expire at 11:59 p.m. (local Vancouver time) on February 17, 2011, unless extended by this Court at the hearing of the Petition on that date.

PLAN OF ARRANGEMENT

5. THIS COURT ORDERS that the Petitioners, or any one of them, shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the **"Plan"**).

POSSESSION OF PROPERTY AND OPERATIONS

6. THIS COURT ORDERS that, subject to this Order and any further Order of this Court, the Petitioners shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"), and continue to carry on their business (the "**Business**") in the ordinary course and in a manner consistent with the preservation of the Business and the Property. The Petitioners shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for carrying out the terms of this Order.

7. THIS COURT ORDERS that the Petitioners shall be entitled to continue to utilize the central cash management system currently in place as described in the Bailey Affidavit or, with the consent of the DIP Lender (as defined below), replace it with another substantially similar central cash management system, including any modifications required in connection with the DIP Facility (as defined below) (the "**Cash Management System**"), and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Petitioners of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Petitioners, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

8. THIS COURT ORDERS that, subject to the terms and conditions of and availability under the DIP Facility and subject to the applicable cash flow budget approved by the DIP

Lenders pursuant to the DIP Facility and the Consenting Noteholders' Advisors (as hereinafter defined) pursuant to the Recapitalization Support Agreement (each as defined in the Bailey Affidavit) (the "**Cash Flow Budget**"), the Petitioners shall be entitled, but not required, to pay the following expenses whether incurred prior to, on or after the Order Date:

(a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), bonuses (including payments made pursuant to the Annual Bonus Program and Sales Incentive Program, both as defined in the Bailey Affidavit), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred (collectively "**Wages**");

(b) payments made to employees' Registered Retirement Savings Plans and pursuant to the 401k Program, as defined in the Bailey Affidavit;

(c) the fees and disbursements of any Assistants retained or employed by the Petitioners which are related to the Petitioners' restructuring, at their standard rates and charges, including payment of the fees and disbursements of legal counsel retained by the Petitioners, whenever and wherever incurred, in respect of:

(i) these proceedings or any other similar proceedings in other jurisdictions in which the Petitioners or any subsidiaries or affiliated companies of the Petitioners are domiciled;

(ii) any litigation in which the Petitioners are named as party or parties or are otherwise involved, whether commenced before or after the Order Date;

(iii) services rendered in connection with the registration or maintenance of the Petitioners' worldwide patents, patent-equivalents or other intellectual property; and

(iv) any related corporate, tax, employee benefit or other similar matters.

(d) with the written consent of the Monitor:

(i) pay the entire amount of their obligations to any creditor if the amount of such obligations, as agreed between the Petitioners and the creditor, is $1,000 or less as at the Order Date;

(ii) pay an amount agreed to by the Petitioners and any other creditor to which the outstanding obligations of the Petitioners are greater than $1,000 as at the Order Date, provided such creditor agrees to accept that amount in full satisfaction of all obligations of the Petitioners to such creditor as at the Order Date;

(iii) pay amounts owing to creditors who hold valid and enforceable possessory or statutory liens against any asset of the Petitioners where the value of such asset exceeds the amount of the possessory or statutory liens or where the asset is deemed critical by the Petitioners and the Monitor to the business operations of the Petitioners; and

(iv) pay amounts outstanding to creditors for goods and services provided prior to the Order Date where expressly authorized by this Order or any further Order of this Court; and

(e) any and all amounts due and owing to American Express (as defined in the Bailey Affidavit) in connection with the employee credit card programs described in the Bailey Affidavit.

8A THIS COURT ORDERS that, for the period commencing on the date of this Order and ending on the date that the DIP Credit Agreement (as defined below) is executed by the parties thereto, all references to the Cash Flow Budget as it pertains to the DIP Lender, shall refer to the Budget as agreed to between the Petitioners and the DIP Lender and shall be subject to the same allowable variances to the Cash Flow Budget that will be included in the DIP Credit Agreement.

9. THIS COURT ORDERS that, notwithstanding any other provision of this Order, and subject to the terms and conditions of and availability under the DIP Facility and subject to the Cash Flow Budget, Angiotech U.S. (as defined in the Bailey Affidavit) are hereby authorized but not required to make payments or otherwise satisfy their obligations to creditors, suppliers, employees, taxing authorities and other persons whether incurred prior to or after the Order Date.

10. THIS COURT ORDERS that, subject to the terms and conditions of and availability under the DIP Facility and subject to the Cash Flow Budget, and except as otherwise provided herein, the Petitioners shall be entitled but not required to pay all expenses reasonably incurred by the Petitioners in carrying on the Business in the ordinary course following the Order Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably incurred and which are necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services;

(b) all obligations incurred by the Petitioners after the Order Date, including without limitation, with respect to goods and services actually supplied to the Petitioners following the Order Date (including those under purchase orders outstanding at the Order Date but excluding any interest on the Petitioners' obligations incurred prior to the Order Date); and

(c) fees and disbursements of the kind referred to in paragraph 8(b) which may be incurred after the Order Date.

11. THIS COURT ORDERS that the Petitioners are authorized to remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority in any other jurisdiction which are required to be deducted from Wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes or any such claims which are to be paid pursuant to Section 6(3) of the CCAA;

(b) all goods and services or other applicable sales and value added taxes (collectively, "**Sales Taxes**") required to be remitted by the Petitioners in connection with the sale of goods and services by the Petitioners, but only where

such Sales Taxes accrue or are collected after the Order Date, or where such Sales Taxes accrued or were collected prior to the Order Date but not required to be remitted until on or after the Order Date; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof, any local, state or federal taxation or other authority in any other jurisdiction in respect of municipal property taxes, municipal business taxes or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors.

12. THIS COURT ORDERS that until such time as a real property lease is disclaimed in accordance with the CCAA, Angiotech Canada (as defined in the Bailey Affidavit) shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated between Angiotech Canada and the landlord from time to time ("**Rent**"), for the period commencing from and including the Order Date, twice-monthly in equal payments on the first and fifteenth day of the month in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including Order Date shall also be paid.

13. THIS COURT ORDERS that, except as specifically permitted herein and subject to the Cash Flow Budget and the terms and conditions of the DIP Facility, the Petitioners are hereby directed, until further Order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Petitioners to any of their creditors as of the Order Date except as authorized by this Order, provided however that the Petitioners are hereby authorized and directed to make all such payments under the Wells Fargo Credit Agreement as required pursuant to the terms of the Definitive Documents (as defined below) and contemplated by the Cash Flow Budget, until paid in full in accordance with the terms of the DIP Facility;

(b) to make no payments in respect of any financing leases which create security interests;

(c) to grant no security interests, trust, mortgages, liens, charges or encumbrances upon or in respect of any of their Property, nor become a guarantor or surety, nor otherwise become liable in any manner with respect to any other person or entity except as authorized by this Order;

(d) to not grant credit except in the ordinary course of the Business only to their customers for goods and services actually supplied to those customers, provided such customers agree that there is no right of set-off in respect of amounts owing for such goods and services against any debt owing by the Petitioners to such customers as of the Order Date; and

(e) to not incur liabilities except in the ordinary course of Business.

14. THIS COURT ORDERS that notwithstanding any other provision in this Order, but subject to the terms and conditions of and availability under the DIP Facility and subject to the Cash Flow Budget, or with the consent of the DIP Lender, the Petitioners are hereby authorized to continue to make scheduled interest payments on their US$325 million senior floating rate notes due 2013 (the "**Floating Rate Notes**") as such payments come due.

RESTRUCTURING

15. THIS COURT ORDERS that, subject to such requirements as are imposed by the CCAA and the terms of the Recapitalization Support Agreement and the FRN Support Agreement (as defined in the Bailey Affidavit), and such covenants as may be contained in the Definitive Documents (as hereinafter defined), the Petitioners shall have the right to:

(a) permanently or temporarily cease, downsize or shut down all or any part of their Business or operations and commence marketing efforts in respect of any of their redundant or non-material assets and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2,000,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate;

(c) in accordance with paragraphs 16 and 17, with the prior consent of the Monitor or further Order of the Court, vacate, abandon or quit the whole but not part of any leased premises and/or disclaim any real property lease and any ancillary agreements relating to any leased premises, in accordance with Section 32 of the CCAA, on such terms as may be agreed upon between the Petitioners and such landlord, or failing such agreement, to deal with the consequences thereof in the Plan;

(d) disclaim, in whole or in part, with the prior consent of the Monitor or further Order of the Court, such of their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Petitioners deem appropriate, in accordance with Section 32 of the CCAA, with such disclaimers to be on such terms as may be agreed upon between the Petitioners and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; and

(e) pursue all avenues of refinancing for their Business or Property, in whole or part;

all of the foregoing to permit the Petitioners to proceed with an orderly restructuring of the Business (the **"Restructuring"**).

16. THIS COURT ORDERS that Angiotech Pharmaceuticals, Inc. (**"ANPI"**) may, in accordance with the terms of the lease and on prior notice to the landlord, assign the False Creek Research Park lease to a legal entity affiliated or associated with ANPI (including, without limitation a new entity incorporated by any of the Petitioners), as part of or in connection with the corporate reorganization of ANPI's affairs under the CCAA, and the consequences of the release and discharge of ANPI or any assignor in respect of such assignment shall be dealt with in the Plan.

17. THIS COURT ORDERS that the Petitioners shall provide each of the relevant landlords with notice of the Petitioners' intention to remove any fixtures from any leased premises at least

seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Petitioners' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors who claim a security interest in the fixtures, such landlord and the Petitioners, or by further Order of this Court upon application by the Petitioners, the landlord or the applicable secured creditors on at least two (2) clear days' notice to the other parties. If the Petitioners disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any dispute concerning such fixtures (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Petitioners' claim to the fixtures in dispute.

18. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then: (a) during the period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours on giving the Petitioners and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer, the landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims the landlord may have against the Petitioners, or any other rights the landlord might have, in respect of such lease or leased premises and the landlord shall be entitled to notify the Petitioners of the basis on which it is taking possession and gain possession of and re-lease such leased premises to any third party or parties on such terms as the landlord considers advisable, provided that nothing herein shall relieve the landlord of its obligation to mitigate any damages claimed in connection therewith.

19. THIS COURT DECLARES that, pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronics Documents Act*, S.C. 2000, c. 5 and Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, and any regulations promulgated under authority of either Act, as applicable (the "**Relevant Enactment**"), the Petitioners, in the course of these proceedings, are permitted to, and hereby shall, disclose personal information of identifiable individuals in their possession or control to stakeholders, their advisors, prospective investors,

financiers, buyers or strategic partners (collectively, "**Third Parties**"), but only to the extent desirable or required to negotiate and complete the Restructuring or to prepare and implement the Plan or transactions for that purpose; provided that the Third Parties to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners binding them in the same manner and to the same extent with respect to the collection, use and disclosure of that information as if they were an organization as defined under the Relevant Enactment, and limiting the use of such information to the extent desirable or required to negotiate or complete the Restructuring or to prepare and implement the Plan or transactions for that purpose, and attorning to the jurisdiction of this Court for the purposes of that agreement. Upon the completion of the use of personal information for the limited purposes set out herein, the Third Parties shall, upon the request of the Petitioners, return the personal information to the Petitioners or destroy it. If the Third Parties acquire personal information as part of the Restructuring or the preparation and implementation of the Plan or transactions in furtherance thereof, such Third Parties may, subject to this paragraph and any Relevant Enactment, continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioners.

20. THIS COURT ORDERS that the Petitioners are hereby authorized to (i) take such steps as are required to implement the Recapitalization Transaction (as defined in the Bailey Affidavit) and (ii) comply with the Recapitalization Support Agreement.

21. THIS COURT ORDERS that, notwithstanding any other provision in this Order, the Petitioners are hereby authorized to (i) take such steps as are required to implement the FRN Exchange Offer (as defined in the Bailey Affidavit) and (ii) comply with the FRN Support Agreement.

22. THIS COURT ORDERS that the counterparties to the Recapitalization Support Agreement and the FRN Support Agreement shall be required to obtain the permission of this Court prior to exercising any rights or remedies they may have against the Petitioners under or in respect of the Recapitalization Support Agreement and/or the FRN Support Agreement, other

than in respect of contractual termination rights, which termination rights may be exercised without further permission of this Court.

STAY OF PROCEEDINGS, RIGHTS AND REMEDIES

23. THIS COURT ORDERS that until and including February 17, 2011, or such later date as this Court may order (the "**Stay Period**"), no action, suit or proceeding in any court or tribunal (each, a "**Proceeding**") against or in respect of the Petitioners or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of the Petitioners and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Petitioners or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

24. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Petitioners or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Petitioners and the Monitor or leave of this Court.

25. THIS COURT ORDERS that, nothing in this Order, including paragraphs 23 and 24, shall: (i) empower the Petitioners to carry on any business which the Petitioners are not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a mortgage, charge or security interest (subject to the provisions of Section 18.5 of the CCAA relating to the priority of statutory Crown securities); or (iv) prevent the registration or filing of a lien or claim for lien or the commencement of a Proceeding to protect lien or other rights that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such lien, claim for lien or Proceeding except for service of the initiating documentation on the Petitioners.

NO INTERFERENCE WITH RIGHTS

26. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Petitioners, except with the written consent of the Petitioners and the Monitor or leave of this Court.

CONTINUATION OF SERVICES

27. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Petitioners or mandates under an enactment for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Petitioners, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Petitioners, and that the Petitioners shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the Order Date are paid by the Petitioners in accordance with normal payment practices of the Petitioners or such other practices as may be agreed upon by the supplier or service provider and the Petitioners and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

28. THIS COURT ORDERS that, notwithstanding any provision in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the Order Date, nor shall any Person be under any obligation to advance or re-advance any monies or otherwise extend any credit to the Petitioners on or after the Order Date. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

29. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Petitioners with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Petitioners whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Petitioners, if one is filed, is sanctioned by this Court or these proceedings under the CCAA are terminated. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of the Petitioners that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

DIRECTORS AND OFFICERS INDEMNIFICATION AND CHARGE

30. THIS COURT ORDERS that the Petitioners shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Petitioners, including the members of the Independent Committee (as defined in the Bailey Affidavit) after the commencement of the within proceedings, except to the extent that, with respect to any director or officer, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

31. THIS COURT ORDERS that the directors and officers of the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,000,000, as security for the indemnity provided in paragraph 30 of this Order. The Directors' Charge shall have the priority set out in paragraphs 54 and 56 herein.

32. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Petitioners' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 30 of this Order.

APPOINTMENT OF MONITOR

33. THIS COURT ORDERS that Alvarez & Marsal Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Petitioners with the powers and obligations set out in the CCAA or set forth herein, and that the Petitioners and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Petitioners pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

34. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Petitioners' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Petitioners, to the extent required by the Petitioners, in their dissemination to the DIP Lender (as hereinafter defined), its counsel and other advisors and the Consenting Noteholders' Advisors of financial and other information as agreed to between the Petitioners and the DIP Lender or the

holders of the Subordinated Notes that executed the Recapitalization Support Agreement and that are represented by Goodmans LLP (the "**Consenting Noteholders**"), as applicable, which may be used in these proceedings, including reporting on a basis to be agreed with the DIP Lender and as agreed with the Consenting Noteholders;

(d) advise the Petitioners in their preparation of the Petitioners' cash flow statements and reporting required by the DIP Lender and the Consenting Noteholders, which information shall be reviewed with the Monitor and delivered to the DIP Lender, its counsel and other advisors and the Consenting Noteholders' Advisors on a periodic basis as agreed to by the DIP Lender and the Consenting Noteholders, as applicable;

(e) advise the Petitioners in their development of the Plan and any amendments to the Plan and, to the extent required by the Petitioners, in their negotiations with creditors, customers, suppliers and other interested Persons;

(f) assist the Petitioners, to the extent required by the Petitioners, with the holding and administering of creditors' meetings for voting on the Plan;

(g) assist the Petitioners, to the extent required by the Petitioners, in dealing with their respective creditors, customers, suppliers and other interested Persons;

(h) assist the Petitioners, to the extent required by the Petitioners, with their financing and restructuring activities;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Petitioners, to the extent that is necessary to adequately assess the Petitioners' business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(k) perform such other duties as are required by this Order or by this Court from time to time.

35. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof, and nothing in this Order shall be construed as resulting in the Monitor being an employer or a successor employer, within the meaning of any statute, regulation or rule of law or equity, for any purpose whatsoever.

36. THIS COURT ORDERS that nothing herein contained shall require or allow the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, **"Possession"**) of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Fisheries Act*, the British Columbia *Environmental Management Act*, the British Columbia *Fish Protection Act* and regulations thereunder (the **"Environmental Legislation"**), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. For greater certainty, the Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

37. THIS COURT ORDERS that the Monitor shall provide any creditor of the Petitioners, the DIP Lender and the Consenting Noteholders' Advisors with information provided by the Petitioners in response to reasonable requests for information made in writing by such creditor or such creditors' advisors addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Petitioners is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Petitioners may agree.

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

ADMINISTRATION CHARGE

39. THIS COURT ORDERS that the Monitor, Canadian and U.S. counsel to the Monitor, Canadian and U.S. counsel and the financial advisor to the Petitioners, counsel and the financial advisor to the Consenting Noteholders (the **"Consenting Noteholders' Advisors"**) and counsel and the financial advisor to the Independent Committee shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Petitioners as part of the cost of these proceedings. The Petitioners are hereby authorized and directed to pay the accounts of the Monitor, Canadian and U.S. counsel to the Monitor, Canadian and U.S. counsel and the financial advisor to the Petitioners, the Consenting Noteholders' Advisors and counsel and the financial advisor to the Independent Committee on a periodic basis and, in addition, the Petitioners are hereby authorized to pay to the Monitor, counsel to the Independent Committee, Canadian and U.S. counsel to the Monitor and Canadian and U.S. counsel to the Petitioners retainers collectively in the amount of $1,200,000 to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

40. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the British Columbia Supreme Court and may be heard on a summary basis.

41. THIS COURT ORDERS that the Monitor, Canadian and U.S. counsel to the Monitor, Canadian and U.S. counsel and the financial advisor to the Petitioners, the Consenting Noteholders' Advisors and counsel and the financial advisor to the Independent Committee shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,500,000, as security for their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel and advisors, both before and after the making of this Order which are related to the Petitioners' restructuring. For greater certainty, in respect of the fees and disbursements of the financial advisors to the Petitioners and the Consenting Noteholders, the authorization granted in paragraph 39 herein and the scope of the Administration Charge shall refer to and include only obligations relating to monthly work fees and not the payment of any success fees or other bonuses triggered upon implementation of the Recapitalization Transaction or any alternative restructuring transaction. The Administration Charge shall have the priority set out in paragraphs 52 and 54 hereof.

DIP FINANCING

42. THIS COURT ORDERS that the Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility (the "**DIP Facility**") from Wells Fargo Capital Finance, LLC, as agent, and as lender, and certain other lenders (collectively, the "**DIP Lender**") in order to finance the Petitioners' working capital requirements and other general corporate purposes, provided that borrowings under such credit facility shall not exceed $28,000,000 unless permitted by further Order of this Court.

43. THIS COURT ORDERS THAT such credit facility shall be on substantially the same terms and subject to the conditions set forth in the draft credit agreement, by and among the

Petitioners and the DIP Lender dated as of January 28, 2011 (the "**DIP Credit Agreement**"), provided to the Court by counsel to the Petitioners, as the terms of such DIP Credit Agreement may be amended by the Petitioners and the DIP Lender with the consent of the Monitor. Such draft credit agreement shall be referred to herein as the "Draft Credit Agreement".

44. THIS COURT ORDERS that the DIP Facility and the DIP Credit Agreement be and are hereby approved.

45. THIS COURT ORDERS that the Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the DIP Credit Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Credit Agreement and the Definitive Documents, including, but not limited to the fees and expenses of the DIP Lender's Canadian and U.S. counsel, and other advisors, as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

46. THIS COURT ORDERS that the Petitioners shall notify the Consenting Noteholders' Advisors of any borrowings or repayments under the DIP Facility.

47. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property in the maximum amount of all Obligations (as that term is defined in the DIP Credit Agreement) outstanding under the DIP Facility at any given time (including, without limitation, on account of principal, interest, fees and expenses) (the "**DIP Obligations**"), which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. For greater certainty, advances made to the Petitioners under the DIP Credit Agreement shall not be used to pay amounts outstanding under the Wells Fargo Credit Agreement. The DIP Lender's Charge shall have the priority set out in paragraphs 54 and 56 hereof.

47A THIS COURT ORDERS that the Petitioners are hereby directed to deposit receipts received after the date of this Order in an amount sufficient to cash collateralize all of the letters of credit issued by Wells Fargo Capital Finance, LLC under the Wells Fargo Credit Agreement in a cash collateral account (the "**Cash Collateral Account**") on terms agreed to between Wells Fargo Capital Finance, LLC and the Petitioners. The Cash Collateral Account shall not form part of the Property and shall be excluded from the Charges (as defined herein).

48. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) the DIP Lender may cease making advances to the Petitioners in accordance with and as provided in the DIP Credit Agreement;

(c) upon the occurrence of an Event of Default under and as defined in the DIP Credit Agreement, or the DIP Lender's Charge or, before the execution of the DIP Credit Agreement the happening of an event that is defined as an Event of Default under the Draft Credit Agreement, the DIP Lender and/or agent and the lenders under the Wells Fargo Credit Agreement, may, upon five (5) days notice to the Petitioners and the Monitor; (i) exercise any and all of its, or their, rights and remedies against the Petitioners or the Property under or pursuant to the Wells Fargo Credit Agreement, the DIP Credit Agreement, the Definitive Documents and the DIP Lender's Charge including without limitation to set-off and/or consolidate any amounts owing to the DIP Lenders and/or the agents and lenders under the Wells Fargo Credit Agreement by the Petitioners against the DIP Obligations, the Definitive Documents, the DIP Lender's Charge or the Obligations under the Wells Fargo Credit Agreement, to make demand, accelerate payment and give notices or to apply to Court for the appointment of a receiver, receiver manager or interim receiver or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners

and; (ii) the DIP Lender, the agent and lenders under the Wells Fargo Credit Agreement shall be entitled to seize and retain proceeds from the sale of Property and the cash flow of the Petitioners to repay amounts owing to the Lenders under the Wells Fargo Credit Agreement and the DIP Lender under the DIP Facility in each case, in accordance with the Definitive Documents and the DIP Lender's Charge, but subject to the priorities as set out in paragraphs 55 and 57 of the Order; and

(d) the foregoing rights and remedies of the DIP Lender and the agent and lenders under the Wells Fargo Credit Agreement shall be enforceable against any trustee in bankruptcy, interim receiver, receiver, or receiver and manager of the Petitioners or the Property.

49. THIS COURT ORDERS AND DECLARES that the DIP Lender, in such capacity, and Wells Fargo Capital Finance, LLC, in its capacity as agent and lender under the Wells Fargo Credit Agreement, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners, or any one of them, under the CCAA, or any proposal filed by the Petitioners under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under and obligations outstanding in respect of the Wells Fargo Credit Agreement and the DIP Obligations outstanding under the Definitive Documents.

49A THIS COURT ORDERS that the Petitioners shall not file a Plan in these proceedings that does not provide for the indefeasible payment in full in cash of the obligations outstanding in respect of the Wells Fargo Credit Agreement and the DIP Obligations outstanding under the Definitive Documents as a pre-condition to the implementation of any such Plan, without the prior written consent of Wells Fargo Capital Finance, LLC and the DIP Lender, as applicable. Subject to paragraph 47(b) herein, the stays of proceedings provided for in this Order shall not apply to Wells Fargo Capital Finance, LLC, the DIP Lender or their respective rights under or in respect of the Wells Fargo Credit Agreement, the DIP Facility or the Definitive Documents, as applicable.

INTER-COMPANY CHARGES

50. THIS COURT ORDERS that, subject to the terms of the DIP Facility and the Cash Flow Budgets, (a) Angiotech U.S. are hereby authorized to make advances of funds to Angiotech Canada from time to time in accordance with inter-company transaction practices existing as of the Order Date and (b) Angiotech Canada are hereby authorized to repay funds previously advanced to Angiotech Canada by Angiotech U.S. from time to time in accordance with inter-company transaction practices existing as of the Order Date.

51. THIS COURT ORDERS that, subject to the terms of the DIP Facility and the Cash Flow Budgets, (a) Angiotech Canada are hereby authorized to make advances of funds to Angiotech U.S. from time to time in accordance with inter-company transaction practices existing as of the Order Date and (b) Angiotech U.S. are hereby authorized to repay funds previously advanced to Angiotech U.S. by Angiotech Canada from time to time in accordance with inter-company transaction practices existing as of the Order Date.

52. THIS COURT ORDERS that Angiotech U.S. shall be entitled to the benefits of, and are hereby granted, a charge (the **"U.S. Inter-Company Charge"**) on the Property in an amount equal to but not exceeding the aggregate amounts actually outstanding at any given time based on advances made by Angiotech U.S. to Angiotech Canada pursuant to the authorization granted under paragraph 49 herein from and after the Order Date. The U.S. Inter-Company Charge shall have the priority set out in paragraphs 54 and 56 hereof.

53. THIS COURT ORDERS that Angiotech Canada shall be entitled to the benefits of, and are hereby granted, a charge (the **"Canada Inter-Company Charge"**) on the Property in an amount equal to but not exceeding the aggregate amounts actually outstanding at any given time based on advances made by Angiotech Canada to Angiotech U.S. pursuant to the authorization granted under paragraph 50 herein from and after the Order Date. The Canada Inter-Company Charge shall have the priority set out in paragraphs 54 and 56 hereof. The U.S. Inter-Company Charge and the Canada Inter-Company Charge are collectively referred to herein as the Inter-Company Charges.

54. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefits of the Inter-Company Charges to the maximum amount of the DIP Obligations outstanding at any given time and such assignment shall remain in effect only until such time as the DIP Obligations are repaid and satisfied in full and the DIP Lender's Charge has been discharged.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

55. THIS COURT ORDERS that the priorities of the Administration Charge, the Directors' Charge, the Inter-Company Charges and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $1,500,000);

Second – Directors' Charge (to the maximum amount of $1,000,000);

Third – Any existing liens, charges, security interests or other encumbrances securing the obligations under the Wells Fargo Credit Agreement;

Fourth - DIP Lender's Charge;

Fifth – Inter-Company Charges, which shall rank *pari passu* with each other;

Sixth – Administration Charge (to the maximum amount of $1,000,000); and

Seventh – Director's Charge (to the maximum amount of $1,000,000).

56. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge, the DIP Lender's Charge, the Inter-Company Charges and the Directors' Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect any such Charges.

57. THIS COURT ORDERS that each of the Administration Charge, the DIP Lender's Charge, the Inter-Company Charges and the Directors' Charge (all as constituted and defined

herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), in favour of any Person, notwithstanding the order of perfection or attachment, except for any validly perfected purchase money security interest in favour of a secured creditor or any valid statutory Encumbrance existing on the date of this Order in favour of any Person that is a Secured Creditor (as defined in the CCAA) in respect of any of source deductions from wages, employer health tax, workers compensation, vacation pay and banked overtime for employees, amounts under the Wage Earners Protection Program that are subject to a super priority claim under the BIA.

58. THIS COURT ORDERS that except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioners shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Petitioners obtain the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Administration Charge, the Inter-Company Charges and the Director's Charge.

59. THIS COURT ORDERS that the Administration Charge, the Director's Charge, the Inter-Company Charges, the DIP Credit Agreement, the Definitive Documents and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Petitioners; and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Credit Agreement, the Definitive Documents, the Recapitalization Support Agreement or the FRN Support Agreement shall create or be deemed to constitute a breach by the Petitioners of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Petitioners entering into the DIP Credit Agreement, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made and the incurrence and performance of obligations by the Petitioners pursuant to this Order, the DIP Credit Agreement, the Definitive Documents, the Recapitalization Support Agreement or the FRN Support Agreement, and the granting of the Charges, including the payments referred to in paragraph 13(a) herein, do not and will not constitute preferences, fraudulent conveyances or transfers, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

60. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Petitioners' interest in such real property leases.

SERVICE AND NOTICE

61. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in *The Globe and Mail* and *The Wall Street Journal* a notice containing the information prescribed under the CCAA, (ii) within five days after Order Date, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Petitioners of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a)

of the CCAA and the regulations made thereunder, provided that, for the purposes of this list, (i) with respect to the Subordinated Notes and the Floating Rate Notes, only the name and address of the indenture trustee of such notes and the aggregate amount owing in respect of such notes shall be listed and made publicly available and (ii) the Monitor shall not make the names and addresses of individuals who are creditors publicly available.

62. THIS COURT ORDERS that the Petitioners and the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Petitioners' creditors or other interested parties at their respective addresses as last shown on the records of the Petitioners and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

63. THIS COURT ORDERS that the Monitor shall maintain a list (the "**Service List**") of all parties, including emails and other contact information of such parties, that have appeared in these proceedings or have in writing requested that the Monitor add them to the Service List. The Monitor shall post the Service List on its website at: www.alvarezandmarsal.com/angiotech.

64. THIS COURT ORDERS that any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at: www.alvarezandmarsal.com/angiotech.

65. THIS COURT ORDERS that notwithstanding paragraphs 62 and 64 of this Order, service of the Petition, the Notice of Hearing of Petition, the Affidavit #1 of K. Thomas Bailey, this Order and any other pleadings in this proceeding (collectively, the "**Materials**"), shall be made on the federal and British Columbia Crowns in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and regulations thereto, in respect of the federal Crown, and the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, in respect of the British Columbia Crown.

GENERAL

66. THIS COURT ORDERS that the Petitioners or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

67. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Petitioners, the Business or the Property.

68. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any Federal or State Court or administrative body in the United States of America, including the United States Bankruptcy Court for the District of Delaware, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

69. THIS COURT ORDERS that each of the Petitioners and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

70. THIS COURT ORDERS that the Monitor is hereby directed, as a foreign representative of the Petitioners to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended.

71. THIS COURT ORDERS that the Petitioners may (subject to the provisions of the CCAA and the BIA) at any time file a voluntary assignment in bankruptcy or a proposal pursuant to the commercial reorganization provisions of the BIA if and when the Petitioners determine that such a filing is appropriate.

72. THIS COURT ORDERS that the time limited for filing and serving a Response to the Petition along with any affidavit material upon which the Person filing such Response intends to rely shall, for Persons in Canada, be 14 days from the date of service of the Materials upon such Person, and, for persons outside Canada, be 21 days from the date of service of the Materials upon such Person.

73. THIS COURT ORDERS that the Petitioners are hereby at liberty to apply for such further interim or interlocutory relief as it deems advisable within the time limited for Persons to file and serve Responses to the Petition.

74. THIS COURT ORDERS that short leave is hereby granted to allow the hearing of any Notice of Application filed in these proceedings on two (2) clear days' notice after delivery of such Notice of Application and all affidavits in support, subject to the Court in its discretion further abridging or extending the time for service.

75. THIS COURT ORDERS that any interested party (including the Petitioners and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

76. THIS COURT ORDERS that endorsement of this Order by counsel appearing on this application, other than counsel for the Petitioners, is hereby dispensed with.

77. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. local Vancouver time on the Order Date.

BY THE COURT

DISTRICT REGISTRAR

APPROVED AS TO FORM:

Counsel for the Petitioners

Schedule "A"

1. 0741693 B.C. Ltd.
2. Angiotech International Holdings, Corp.
3. Angiotech Pharmaceuticals (US), Inc.
4. American Medical Instruments Holdings, Inc.
5. NeuColl, Inc.
6. Angiotech BioCoatings Corp.
7. Afmedica, Inc.
8. Quill Medical, Inc.
9. Angiotech America, Inc.
10. Angiotech Florida Holdings, Inc.
11. B.G. Sulzle, Inc.
12. Surgical Specialties Corporation
13. Angiotech Delaware, Inc.
14. Medical Device Technologies, Inc.
15. Manan Medical Products, Inc.
16. Surgical Specialties Puerto Rico, Inc.

Schedule "B"

Counsel	Appearance
Osler, Hoskin & Harcourt LLP 100 King Street West Toronto, Ontario **Jeremy Dacks** **Marc Wasserman** Farris, Vaughan, Wills & Murphy LLP Suite 2500, 700 West Georgia Street Vancouver, B.C. **Rebecca Morse**	*Counsel for Petitioners*
Goodmans LLP Suite 3400, 333 Bay Street Toronto, Ontario **Rob Chadwick** **Logan Willis**	*Counsel for Consenting Noteholders*
Fasken Martineau DuMoulin LLP Suite 2900, 550 Burrard Street Vancouver, B.C. **John Grieve**	*Counsel for Alvarez & Marsal Canada Inc., the Monitor*
Stikeman Elliott LLP Suite 1700, 666 Burrard Street Vancouver, B.C. **Maria Konyuckhova**	*Counsel for Independent Committee*

Schedule "B"

Counsel	Appearance
Osler, Hoskin & Harcourt LLP 100 King Street West Toronto, Ontario **Jeremy Dacks** **Marc Wasserman** Farris, Vaughan, Wills & Murphy LLP Suite 2500, 700 West Georgia Street Vancouver, B.C. **Rebecca Morse**	*Counsel for Petitioners*
Goodmans LLP Suite 3400, 333 Bay Street Toronto, Ontario **Rob Chadwick** **Logan Willis**	*Counsel for Consenting Noteholders*
Fasken Martineau DuMoulin LLP Suite 2900, 550 Burrard Street Vancouver, B.C. **John Grieve**	*Counsel for Alvarez & Marsal Canada Inc., the Monitor*
Stikeman Elliott LLP Suite 1700, 666 Burrard Street Vancouver, B.C. **Maria Konyuckhova**	*Counsel for Independent Committee*

Counsel	Appearance
Blake, Cassels & Graydon LLP Suite 2600, 595 Burrard Street Vancouver, B.C. **Bill Kaplan, Q.C.** **Peter Rubin**	*Counsel for Wells Fargo*

V

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANGIOTECH PHARMACEUTICALS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PRE-FILING REPORT OF THE PROPOSED MONITOR ALVAREZ & MARSAL CANADA INC.

Companies" are references to the global enterprise as a whole. The three Petitioners incorporated in Canada are referred to as "**Angiotech Canada**". The fifteen Petitioners incorporated in the United States and other foreign jurisdictions are referred to as "**Angiotech U.S.**". References to Angiotech's direct or indirect subsidiaries located in Europe and other jurisdictions outside of Canada and the United States are referred to as "**Angiotech Europe**".

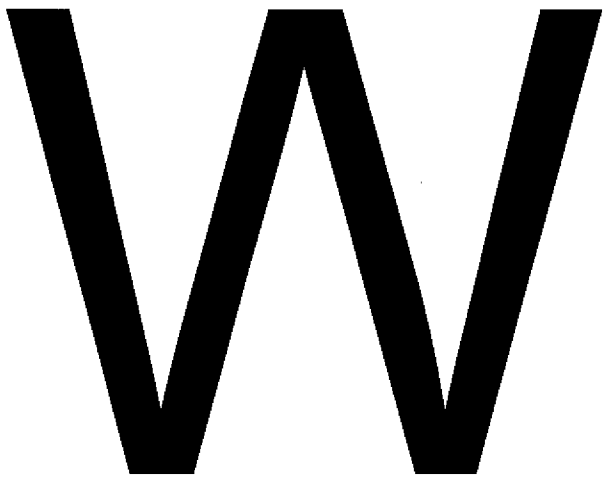
2.4 Unless otherwise stated, all monetary amounts contained in this report are expressed in United States dollars, which is the Company's common reporting currency.

3.0 A&M'S QUALIFICATION TO ACT AS MONITOR

3.1 A&M was engaged by Angiotech on August 17, 2010 to provide consulting services to the Company's Chief Financial Officer and Board of Directors in connection with the Company's restructuring efforts including providing assistance to the Company should it need to prepare for formal proceedings under the CCAA.

3.2 A&M is a trustee within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act (Canada)*. Neither A&M nor any of its representatives have been at any time in the two preceding years the auditor, a director, officer or employee of the Petitioners or otherwise related to the Petitioners or to any director or officer of the Petitioners or a trustee (or related to any such trustee) under a trust indenture issued by any of the Petitioners or any person related to the Petitioners.

3.3 A&M is related to Alvarez & Marsal Holdings, LLC, an independent international professional services firm providing amongst other things, bankruptcy, insolvency and restructuring services. The senior A&M professional personnel with carriage of this



Industry Canada Industrie Canada

Corporate, Insolvency and Competition Law Policy

Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

Canada

Corporate, Insolvency and Competition Law Policy

Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

Discussion Paper

This publication is available online in html at https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00021.html.

This publication is also available in accessible formats (Braille, large print, etc.) upon request. Contact the **Industry Canada Web Services Centre**:

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Executive Summary

Pursuant to a statutorily-mandated review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, Industry Canada is conducting public consultations to obtain submissions from interested Canadians regarding Canada's insolvency legislation. The discussion paper, which sets out numerous issues identified from key stakeholder input and an environmental scan of the insolvency marketplace, is intended to provide a framework for the public consultations.

The discussion paper is divided into four sections: first, an introduction; second, consumer insolvency issues; third, commercial insolvency issues; and, finally, administrative and technical issues.

The introduction provides general information regarding Canada's insolvency regime and the policy objectives that underlie it, as well as recent marketplace changes and insolvency trends.

The sections on consumer and commercial issues set out broad themes under which specific issues may be found. For example, the consumer insolvency themes include protection of consumer interests, the "fresh start" principle, consumer exemptions, protecting families, and treatment of student loans in bankruptcy. The commercial insolvency themes include encouraging restructuring, protecting vulnerable creditors and enhancing equity, deterring fraud and abuse, and cross-border insolvencies.

The section on administrative and technical issues sets out a number of discrete matters, including renaming the *Bankruptcy and Insolvency Act*, creating a unified insolvency Act, and marshalling of charges.

Pursuant to the statutory review provisions contained in both Acts, the Minister of Industry is to table a report in Parliament on the "provisions and operations" of the Act by September 2014. The report would then be

referred to a Parliamentary committee for study and report within 12 months of the initial tabling. Any decisions regarding possible legislative or regulatory reforms as part of the statutory review would be taken following consideration of the Parliamentary committee's study and report.

Introduction

The Importance of Insolvency Law

Insolvency laws have a significant impact on the economy. Insolvency rules offer security for investors and lenders in both consumer and commercial borrowing transactions. This, in turn, influences credit market risks, which can affect the cost and availability of credit. In the commercial sphere, the reliability of the insolvency system plays a role in attracting domestic and foreign investment, as well as in promoting entrepreneurship and innovation.

One of the principal considerations in an era of increased globalization and competitiveness is how to make the insolvency process as efficient as possible, while maintaining fairness. By facilitating corporate restructuring and directing assets to productive use, the insolvency system contributes to Canada's economic competitiveness and performance.

Rules governing personal insolvency play an important socio-economic role. They allow honest but unfortunate individuals who experience difficult financial distress to release their debts and obtain a fresh start. The consumer insolvency provisions are aimed at balancing the interests of debtors with the interest of creditors who extended credit in the expectation of repayment.

As such, insolvency laws contribute in a meaningful way to the effective and efficient functioning of the marketplace.

Canada's Insolvency Regime

Legislative Framework

The insolvency regime makes up part of Canada's fundamental marketplace framework laws and relies on two main statutes: the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA).

The BIA provides a legislative framework to address both consumer and commercial insolvency situations. In bankruptcy, the Act provides for the liquidation of the bankrupt's assets by a trustee and the distribution of the proceeds in a fair and orderly way among the creditors. Alternatively, the Act provides a mechanism for insolvent consumers or commercial debtors to avoid bankruptcy by negotiating settlements with their creditors to reorganize the debtor's financial affairs.

The CCAA provides a legislative framework for the reorganization of insolvent commercial debtors under the court's supervision. It enables an insolvent business to seek a court order staying its creditors from taking action against it while it negotiates an arrangement with them for the rescheduling or compromise of its debts. The CCAA provides a more flexible, court-driven process than the BIA. Businesses reorganizing under the Act must have more than $5 million in debt.

Administrative Framework

Canada's insolvency regime's administrative framework is supported by three pillars:

- **Office of the Superintendent of Bankruptcy** (OSB): regulator with oversight responsibilities for the insolvency system;
- **Trustees-in-Bankruptcy**: licensed by the Superintendent, they are responsible for administering estates and performing various roles under the BIA and CCAA; and
- **Courts** (including registrars in bankruptcy): supervise CCAA proceedings and adjudicate matters under both the BIA and CCAA.

The OSB has statutory responsibility to supervise the administration of all estates and matters under the BIA. Additionally, the OSB has certain functions under the CCAA, including maintaining a public record of CCAA proceedings and investigating complaints regarding the conduct of monitors. In fulfilling its mandate, the OSB sets standards and provides guidance to stakeholders regarding expected conduct through Directives, notices, position papers and programs.

Trustees-in-bankruptcy are responsible for administering insolvencies and can often be engaged to provide advice to financially distressed individuals and businesses. They work with the debtor to complete necessary steps in a bankruptcy, proposal to creditors or restructuring. This involves filing documents with the OSB and ensuring the debtor fulfills the requirements under the BIA or CCAA. Where the debtor fails to fulfill the requirements, as an officer of the court, the trustee is to bring the issues to the attention of the creditors and the court.

The role of the courts varies depending upon the nature of the proceeding. Most individuals who file for bankruptcy will not be required to go to court. Instead, they will obtain a discharge from bankruptcy after the specified period of time through an automatic process. If a trustee or creditor opts to oppose a bankrupt's discharge, the matter is brought to the courts. In other proceedings, the courts are involved at various stages. For example, the courts may be required to resolve disputes or sanction specific actions proposed by the debtor or creditors. In CCAA proceedings, the court plays a key role. Court approval is required to commence a proceeding and it may make various other orders, including approving interim financing, the process for sale of assets, and the disclaimer of contracts. Courts are also responsible for sanctioning any plan of arrangement or compromise.

Objectives of Insolvency Law

Insolvency laws aim to minimize the impact of a debtor's insolvency on all stakeholders. They do this by pursuing the key objectives of equitable distribution of the debtor's assets, and, where possible, by rehabilitation of the debtor.[1] As noted by the Supreme Court of Canada:

> The very design of insolvency legislation raises difficult policy issues for Parliament. Legislation that establishes an orderly liquidation process for situations in which reorganization is not possible, that averts races to execution and that gives debtors a chance for a new start is generally viewed as a wise policy choice. Such legislation has become part of the legal and economic landscape in modern societies. But it entails a price, and those who might have to pay that price sometimes strive mightily to avoid it. Despite the proven wisdom of the policies underpinning the insolvency legislation, it is understandable that few appreciate the "haircuts" or even outright losses that bankruptcies trigger.[2]

It is generally accepted that the objectives of insolvency law may be achieved through legislation that does the following:

- provides certainty in the market to promote economic stability and growth;
- maximizes value of assets;
- strikes a balance between liquidation and reorganization;
- ensures equitable treatment of similarly situated creditors;
- provides for timely, efficient and impartial resolution of insolvency;
- preserves the insolvency estate to allow equitable distribution to creditors;
- ensures a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and
- recognizes existing creditor rights and establishes clear rules for ranking of priority claims.[3]

It is in this context that Canada's insolvency laws have been developed by Parliament and have evolved through court decisions.

Marketplace Changes

Since the last public consultations on insolvency laws conducted in 2001-2002, which resulted in the legislative reforms of 2008 and 2009, the characteristics of the Canadian consumer marketplace have changed. The ratio of consumer debt to personal disposable income in Canadian households has increased from approximately 110 percent in 2000 to 160 percent in 2012.[4] The increase can be attributed to higher mortgage debt levels and an increase in home equity extraction, both associated with elevated housing prices.[5] Higher mortgage debt levels are a potential source of risk as Canadians may be more vulnerable to a decline in housing prices or an increase in interest rates.

In the commercial context, marketplace changes include the growing importance of intellectual property to Canadian companies, the use of more complex corporate structures, a shift by lenders away from relationship lending, significant growth in the use of derivatives to hedge risk and in the practice of distressed debt trading, and an increasing number of cross-border insolvency proceedings. At the same time, the cost and complexity of restructuring proceedings, particularly under the CCAA, continues to grow, resulting in a shift towards other types of workout arrangements such as private workouts and arrangements under the *Canada Business Corporations Act*.

Insolvency Trends

National Insolvency Rates

Figure 1 illustrates the national consumer and business insolvency rates between 2000 and 2012.[6] An overview of insolvency rates provides a clearer picture of trends than does the total volume alone, because it takes into account changes in population sizes over time. As shown in Figure 1, consumer and business insolvency rates have trended in opposite directions during the past decade. The consumer insolvency rate remained relatively steady from 2002 to 2007 before increasing to 5.8 during the economic downturn in 2009 and declining in subsequent years. In 2000 and 2012, the national consumer insolvency rates were 3.7 and 4.4, respectively. This represents an 18 percent increase in the insolvency rate over this period. On the other hand, other than a small increase during the 2001 economic downturn, business insolvency rates have trended downward throughout the decade. In 2000 and 2012, the national business insolvency rates were 5.7 and 1.8 respectively, representing a 68.4 percent decrease.

Figure 1: Consumer and Business Insolvency Rates

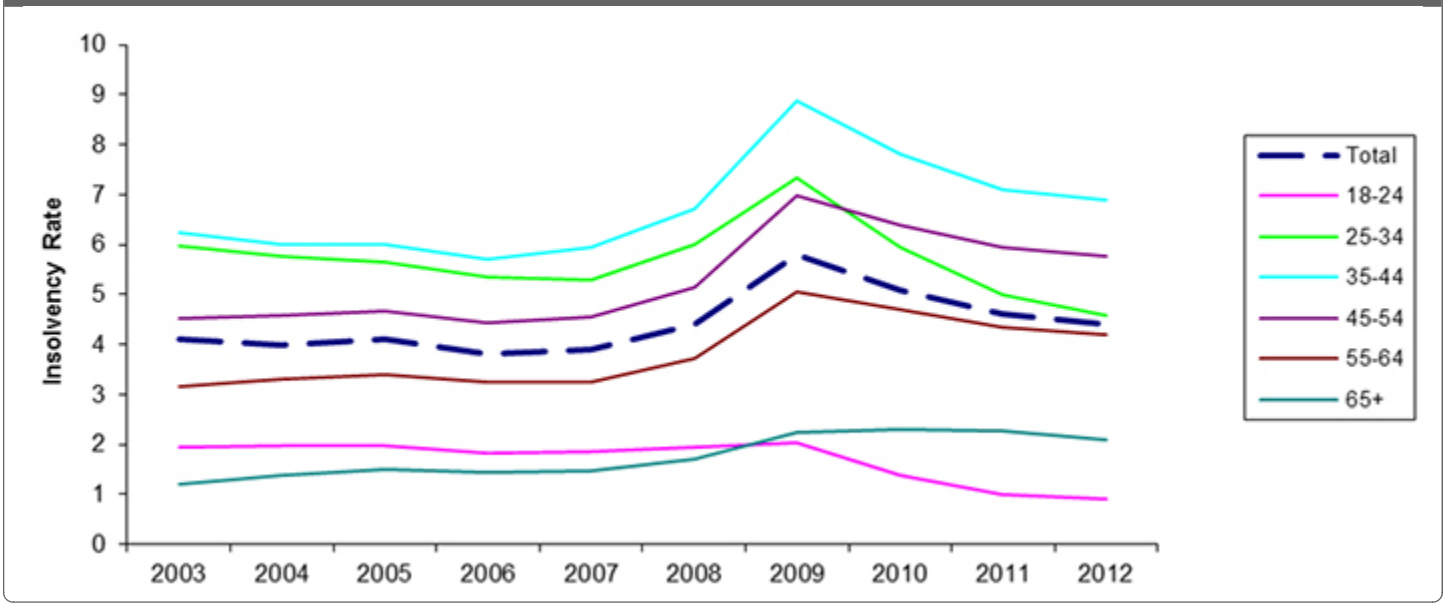
Consumer Insolvency Rate - by Age and Regional Breakdowns

Insolvency does not affect all segments of society equally. Variations in the rates of insolvency by age cohort and by geographic region provide important information regarding insolvency trends in Canada.

Figure 2 shows the national consumer insolvency rate by age cohort. During the past decade, younger Canadians (those between 18 and 34) became significantly less likely to commence insolvency proceedings. On the other hand, Canadians aged 35 and older become more likely to enter insolvency proceedings. This demographic trend is consistent with anecdotal reports that delayed transitions to adulthood among younger Canadians may be placing a greater financial burden on the parents of adult offspring.[7]

It is also important to note that while the insolvency rate of individuals over the age of 65 has increased over the past decade, it still remains well below the national average.

Figure 2: Insolvency Rates by Age Group



There is also significant regional variation in consumer insolvency rates. Between 2000 and 2012, the consumer insolvency rate has increased in Atlantic Canada, Quebec, and Ontario. There has been a better experience in Western Canada as the insolvency rates in Alberta and British Columbia have remained relatively constant while in Saskatchewan and Manitoba they have decreased slightly. Furthermore, the Atlantic Provinces, Quebec, and Ontario continue to have insolvency rates that are higher than the national rate, while the Western provinces and the Prairie provinces have rates that are lower than the national average.

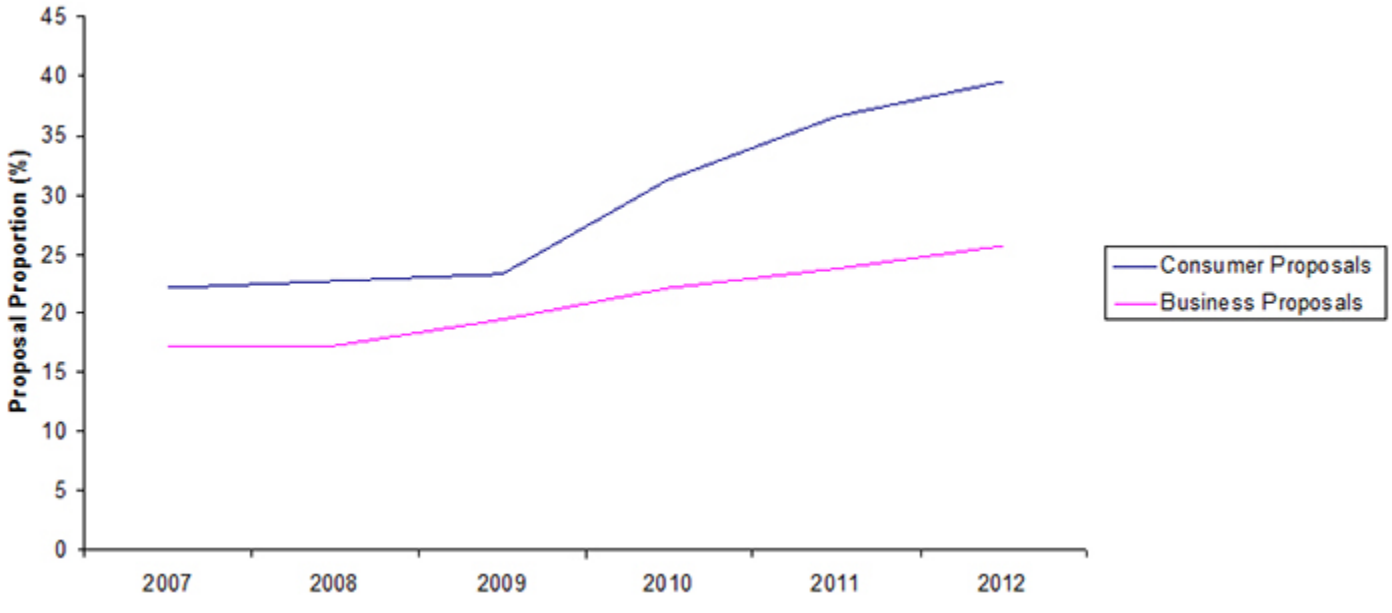
The higher insolvency rates in Atlantic Canada, Quebec, and Ontario may reflect the underlying economic conditions compared to Western Canada. There is empirical support for the hypothesis that unemployment rates and the growth rates are significant in explaining the variation in insolvency filings.[8] For example, in recent years economic growth rates in Alberta, Saskatchewan, and Manitoba have been higher than the national average, while growth rates in Ontario, Quebec, and Atlantic Canada have been lower.[9] Additionally, Western Canada's unemployment rates are lower than the national average, while Atlantic Canada's unemployment rate is higher.[10]

Figure 3: Consumer Insolvency Rates of Insolvency by Region

Growth in Consumer Proposals and Business Proposals

In recognition of the benefits of proposals for insolvent Canadians and their creditors, the 2008-2009 reforms were intended to encourage their use. Figure 4 illustrates the growth in consumer and business proposals under the BIA, as a percentage of total insolvency filings, since 2007. During the same period, the proportion of business proposals as a percentage of total business insolvency filings increased from 17.3% to 25.7%.

Figure 4: Proposal Growth - Consumer and Business Insolvencies



Conclusion

Insolvency laws touch on all aspects of economic life, both for consumers and businesses. They affect the ability of borrowers to access credit, the decisions of investors, and the level of disruption produced by the exit of inefficient firms from the marketplace. They also provide over-indebted consumers with an opportunity to obtain a fresh start and renewed financial health. As a result, it is important to Canada's overall economic performance that its insolvency legislation remains modern, effective and efficient.

In the consumer insolvency context, growing consumer debt levels and changes in demographic insolvency trends – which show that younger Canadians are less likely, and those between the ages of 45 and 54 are more likely, to become insolvent – suggest potential areas for policy focus. Emerging trends in commercial debt markets, including the growth in distressed debt trading and the use of derivatives to hedge economic risk, also suggest areas for policy consideration.

As Canada reviews its insolvency legislation, the overarching objectives of maximizing value, providing a balanced and equitable regime, and ensuring efficient and effective processes will form a base for the policy discussion.

Consumer Issues

Introduction

Individuals who encounter financial distress and are unable to service their debts may resort to insolvency proceedings (*i.e.*, bankruptcies or proposals) under the BIA. The consumer insolvency provisions are aimed at balancing the interests of debtors and their creditors.

In bankruptcy, the debtor's property, subject to certain limitations,[11] is liquidated by a trustee and the proceeds are distributed to his or her creditors. In return, a bankrupt is released from most types of debts.[12] Where the bankrupt has the financial means to contribute a portion of his or her income towards the outstanding debts ("surplus income"), the legislation requires them to do so. First-time bankrupts without surplus income are eligible for discharge from bankruptcy after nine months. The period before being eligible for discharge is longer for those bankrupts with surplus income and for those who have previously been bankrupt.[13]

Alternatively, the BIA provides insolvent debtors with the option of making a proposal to their creditors to repay, over a period of up to five years, all or a portion of what is owed. Proposals have the advantage of allowing the debtor to achieve financial rehabilitation while permitting them to retain assets that would otherwise be liquidated in a bankruptcy. For creditors, successful proposals typically offer a greater recovery than would be available in a bankruptcy.

Protection of Consumer Interests

Consumer Deposits

A retailer may receive payment before providing the contracted goods or services to the consumer. Questions of fairness arise if that retailer then becomes insolvent. The rights of buyers of prepaid goods and services are regulated to some extent by provincial consumer protection legislation, but in the absence of an insurance fund or other compensation, the consumer may become an unsecured creditor in the retailer's bankruptcy.

A consumer lien on the assets of insolvent retailers may protect consumers who have provided deposits or pre-payments. The Senate Committee in 2003 considered the merits of adding consumer liens to the BIA but recommended that the issue should continue to be governed by provincial legislation.[14] In the United States, consumer deposits are treated as preferred claims in bankruptcy for up to approximately US$2,250. The claims rank ahead of unsecured creditors' claims but behind secured claims.

Advocates for consumer liens assert that it is not possible for consumers to determine the financial condition of a retailer before making a deposit and that a consumer lien would provide protection similar to that given to unpaid suppliers. However, a preferred claim may not result in any meaningful recovery for the consumer as

the retailer's assets may be subject to an existing secured charge. If the consumer lien ranked ahead of secured creditors, it would be more effective but lenders would likely react by reducing the availability, or increasing the cost, of credit to retailers to take into account the possibility of such liens ranking ahead of their security.

Stakeholders are invited to make submissions regarding whether, and how, Canada could enhance protection for consumer deposits either through consumer liens or, alternatively, through other mechanisms within the insolvency regime.

Responsible Lending

The BIA provides that debtors' conduct can be subject to scrutiny in order to ensure fairness and integrity of the system. However, creditor behaviour may also contribute to financial difficulty for some Canadians. For example, credit granting practices such as extending credit on onerous terms to individuals who are unable to meet their existing financial obligations can lead to higher rates of insolvency. This may impact on existing creditors, whose recovery would likely be reduced due to the increased claims.

In the wake of the 2008 financial crisis, there have been increased calls for legislative intervention in the United States and other countries for "responsible lending" regimes that would impose certain duties on creditors before they extend credit and restrict the insolvency remedies available to those who did not meet these duties. Possible responses could include empowering the trustee or court to disallow the claim of a creditor where credit was extended improvidently or on unconscionable terms. Additionally, the lender could be required to disgorge payments made on such loans in the period leading up to a bankruptcy or proposal, similar to the treatment of preferences.

Stakeholders are invited to make submissions regarding whether, and how, the BIA could take into account creditors' conduct that has contributed to the financial difficulties or insolvency of a debtor.

The "Fresh Start" Principle

One of the key objectives of the BIA is to enable an honest but unfortunate debtor to obtain a discharge from his or her debts, subject to such conditions as the court may see fit to impose. This is referred to as the "fresh start" principle. Limiting the fresh start principle are specified classes of debt that are not released by an order of discharge.[15] The exceptions are based on overriding public policy concerns[16] because the nature of the debt outweighs the benefit of the bankrupt being relieved of them.

Licence Denial Regimes

Licence denial regimes are used by certain creditors to continue collection efforts even though the debt was stayed and then released through the insolvency process.[17] For example, the regimes may permit a creditor to deny a driver's licence or vehicle registration unless full payment is received. The regimes relate almost exclusively to claims arising from the use of motor vehicles.[18] Creditors that rely on these regimes include insurance companies, provincial insurance regimes, electronic toll-highway operators and rental car companies.

Proponents of these regimes argue that they only encourage voluntary payment since driving is not a right and that debtors may choose to forgo the privilege of driving should they not be able to pay the debt in full. On the other hand, it has been argued that once insolvency proceedings are commenced these special collection tools are replaced with those available through the collective insolvency process. They may no longer be used as they interfere with the insolvency process and frustrate the debtor's ‘fresh start'.

There is greater clarity in the United States as the *Bankruptcy Code* expressly bars the use of these special collection tools to collect released debts.[19] In Canada, it has been left up to the courts.[20] In order to ensure consistent national treatment, Industry Canada is interested in the views of Canadians regarding this issue.

Submissions are invited as to whether amendments are required to the BIA to address the apparent conflict between the "fresh start" principle and the objectives of licence denial regimes.

Reaffirmation Agreements

Reaffirmation agreements between a bankrupt and a creditor are those where the bankrupt agrees to pay a debt that was or will be released by a bankruptcy. Courts have recognized that bankrupts may reaffirm an obligation in one of two ways: 1) by conduct, where the bankrupt continues to make payments to a creditor under an agreement, or 2) by express agreement where the bankrupt enters into a written agreement with the creditor to repay an otherwise released debt.

There is no statistical evidence regarding the extent to which reaffirmation is taking place in Canada or whether the practice is being abused. Some commentators have called for greater regulation of reaffirmation on the grounds that it undermines the "fresh start" principle in insolvency. Reaffirmation by conduct (*i.e.*, continued payments) is of particular concern since bankrupts may reaffirm an agreement without realizing he or she is doing so. On the other hand, there may be compelling reasons why a bankrupt may want to voluntarily continue to pay a debt obligation (a common example is a car lease agreement, where the bankrupt requires the use of a car).

Reaffirmation of debts was raised during the last statutory review. The Personal Insolvency Task Force (PITF) in its 2002 report[21] recommended that reaffirmation agreements in respect of unsecured transactions be prohibited because they offend the "fresh start" principle and have the effect of giving one creditor preference over other creditors. However, the PITF recommended that reaffirmation be permitted for secured transactions on the ground that it allows the bankrupt to retain the assets covered by the security agreement and the secured creditor would be in the same position as they would have been if they had to enforce the security. Other stakeholders indicated the need for greater study into the scope and frequency of reaffirmation agreements before making any legislative changes on this issue.

> *Stakeholders are invited to make submissions regarding whether reaffirmation agreements should be regulated under the BIA, either through the mechanisms discussed above or through other mechanisms within the insolvency regime.*

Consumer Exemptions

Registered Savings Products

Successive governments have created initiatives intended to encourage Canadians to create long-term savings for various purposes. For example, Canadians may save for retirement through registered retirement savings plans (RRSPs), for children's post-secondary education expenses through registered education savings plans (RESPs) or for disabled persons' future financial security through registered disability savings plans (RDSPs).

In 2009, RRSPs were exempted from seizure in bankruptcy, subject to a clawback of contributions made in the 12 months before the filing. The goal was to protect retirement savings in a similar way to the protections afforded to registered pension plans, which are exempt from seizure in the event of bankruptcy of the holder of the pension. The exemption of RESPs was also examined in the last review. The Senate Report recommended that the BIA be amended to exempt RESPs from seizure in bankruptcy if: the RESP is locked in; and, RESP contributions in the one-year period prior to bankruptcy are paid to the trustee for distribution to creditors.[22] Largely because these conditions could not be met, which created a significant potential for abuse, RESPs were not exempted from seizure in an insolvency proceeding.

An RDSP is a long-term savings plan intended to assist Canadians with disabilities and their families to save for the future. Eligible parties may contribute any amount per year up to a lifetime contribution limit of $200,000. Government matching grants and bonds are also available to supplement the RDSP, depending on the amount contributed and the family income of the beneficiary.

RDSPs serve the public interest by encouraging savings for the support of people with disabilities. As a result, it has been suggested that they could be exempted from creditor claims in bankruptcy, similar to the protection provided to RRSP funds. Supporters of an exemption for RDSPs note that there are significant differences between RESPs and RDSPs that reduce the potential for abuse in bankruptcy. Unlike an RESP, only individuals who claim the disability tax credit under the *Income Tax Act* qualify for an RDSP and there can only be one account for that person. Furthermore, only a parent, legal guardian or trust institution may open and

contribute to the RDSP and only the beneficiary can access the funds. It is possible, however, that exempting RDSPs could create the potential for abuse that adversely impacts other creditors' interests.

Stakeholders are invited to make submissions regarding the treatment of registered savings products in bankruptcy.

Federal Exemption Lists

Generally, a bankrupt's property is liquidated by a trustee and the proceeds are distributed among the creditors according to the distribution scheme set out in the BIA. Certain property is, however, exempt from distribution to creditors. The exemptions are set by provincial/territorial law.

Stakeholders have questioned whether it would be more appropriate to have a federal exemption list that would apply to all personal bankruptcies regardless of the bankrupt's province of residence or, alternatively, would permit the bankrupt to choose between the federal and provincial exemption list.

In the last statutory review, the Senate Report and the PITF Report recommended that there be a federal exemption list that the debtor can select in preference to the otherwise applicable provincial or territorial exemptions. The issue of whether to develop a federal exemption list was not addressed in the 2008 and 2009 insolvency reforms.

A federal exemption list could create a minimum standard available to all bankrupts. On the other hand, if it varies significantly from existing provincial/territorial exemption lists, it could create uncertainty for creditors who would not know which list a bankrupt would select.

Submissions are invited as to whether the introduction of a federal list of exemptions should be considered.

Protecting Families

Equalization Claims

Marriage breakdown and insolvency are often closely linked as marriage breakdown can often be a trigger for insolvency proceedings.[23] The special nature of some family law debts has been recognized in insolvency law. Under the BIA, a specified portion of unpaid child and spousal support is treated as a preferred claim and is paid ahead of the claims of unsecured creditors.[24] Also, family support obligations are not released by the bankrupt's discharge.[25]

With respect to family assets, most provinces use the "division of property" approach. Divorcing spouses are deemed to have an inchoate claim to half of the family assets which are then divided between the spouses. In the case of exempt assets, bankruptcy has no impact on such divisions as the inchoate claim is not a money claim that would be stayed or released by the bankruptcy.

Ontario, Manitoba and Prince Edward Island use an "equalization" approach under which spouses are entitled to keep property held in their own names but share any increase in the value of marital property that occurred during marriage. Usually this means one spouse must make an equalization payment to the other spouse. Under provincial law, such a payment is considered to be a debt owed by one spouse to the other and is treated as an unsecured claim in an insolvency proceeding.

In *Schreyer*[26], the Supreme Court of Canada found that if the paying spouse becomes bankrupt, an equalization payment may be released in the bankruptcy. As a result, the non-bankrupt spouse was not entitled to payment of the equalization claim while the bankrupt spouse was entitled to keep the exempt property, which was the family farm. The Court noted the apparent injustice and suggested there should be better protection for equalization payments in the event of bankruptcy to avoid such inequitable results.[27]

Submissions are invited as to whether, and how, bankruptcy legislation could be amended so as to improve the status of equalization payments in bankruptcy.

Family Support Claims and the Levy

Bankruptcy provides an efficient collection mechanism for creditors as they may rely on the collective remedies available to the trustee to satisfy their claims. In order to offset the costs of the OSB, the regulator responsible for protecting the integrity of the bankruptcy system, a levy is applied to all payments made by a trustee.[28] The levy is typically five percent of payments.[29]

Subject to certain conditions, family support claims are provable claims under the BIA.[30] This means that a creditor may file a proof of claim and receive a dividend out of the estate. Family support claimants may receive treatment that is preferential to other creditors, to a specified extent, as a portion of their claims may be paid in priority to the claims of other unsecured creditors.[31] The claims also survive the bankruptcy process, meaning that they are not released when the bankrupt receives his or her discharge.[32] The practical impact is that family support claimants can expect to receive greater recovery through the BIA process than other unsecured creditors and they are also entitled to collect the remaining indebtedness post-bankruptcy without competing with creditors whose claims have been released.

As a result of the *Cameron* decision, in which the court held that "the levy is to be shared by all creditors who benefit from the proceedings,"[33] family support creditors must give the bankrupt credit for amounts paid in respect of the levy. Some stakeholders have suggested, however, that not all section 178 creditors credit the bankrupt for the amount of the levy, resulting in an inequitable situation where some section 178 creditors obtain full payment and others do not.

> *Submissions are invited as to the treatment of section 178 creditors with respect to the Superintendent's levy.*

Vesting of Family Property Claims

Upon bankruptcy, all property of the bankrupt at that date and any property that may be acquired by or devolve on the bankrupt before his or her discharge, with certain exceptions, vests in the trustee for distribution among the bankrupt's creditors. Property can include the bankrupt's right to sue a former spouse for an equalization claim or for the division of matrimonial property.

In the last statutory review, the Senate Report recommended that the right to sue the bankrupt's spouse for equalization or division of property under provincial/territorial matrimonial property law be excluded from property vesting in the trustee.[34] The Senate Committee heard that the trustee often settles the claim at a significant discount. As a result, the non-bankrupt spouse retains most of the bankrupt spouse's share of the family assets and the creditors receive very little from the settled claim. Moreover, confidence in the insolvency system may be undermined.[35]

Stakeholders have recommended that the right to sue remain with the former spouse but that any proceeds obtained from the action be considered property to be distributed among the creditors.

> *Stakeholders are invited to make submissions regarding the treatment of the right to sue a former spouse for an equalization claim or the division of property as property vesting in the trustee.*

Joint Debts

Section 142 of the BIA addresses the distribution of property when partners become bankrupt. The section is intended to deal with business situations involving partnerships, not matrimonial situations. Some stakeholders have raised the concern that parties may attempt to apply s.142 in matrimonial situations which could have the effect of distorting the distribution of property that would otherwise take place.

> *Submissions are invited as to whether s.142 should be amended to restrict its application to business partnerships.*

Treatment of Student Loans in Bankruptcy

Discharge of Student Loan Provisions

The federal and provincial governments have implemented student loan programs intended to assist full- and part-time post-secondary students pay for higher education and training. Since these loans are granted on need rather than ability to repay in the event of bankruptcy they are treated differently than other debts under the BIA. In 1997, the BIA was amended to create a two-year waiting period from the time a student ceased to be a full- or part-time student before the loan could be released in bankruptcy. In 1998, the waiting period was increased to 10 years. It has been noted that students typically benefit from the educational opportunities that are facilitated by the government student loans and that the loans are eligible for interest relief, debt forgiveness and other relief under the terms of the student loan program. Accordingly, many stakeholders recognize that the release of student loans in bankruptcy should be subject to special rules, including a waiting period.

The Senate Report recommended a waiting period of five years or, in the case of hardship, a waiting period of less than five years. The Senate heard from stakeholders that the 10-year waiting period created "a period of social atrophy" as the debtor could neither afford to pay the debt, nor to move on from it through the normal means of bankruptcy.[36] In 2009, the BIA was amended to reduce the waiting period from 10 to seven years or, in the case of significant financial hardship, from 10 to five years. Some stakeholders suggest that the seven- and five-year waiting periods still impose too high of a burden.

Stakeholders are invited to make submissions regarding whether the current provisions regarding the release of student loan debts should be amended.

Hardship Discharge

Under the BIA, release of government-funded student loans can be granted on grounds of hardship if the debtor satisfies the court of good faith towards repayment of the loan and that the bankrupt is experiencing and is likely to continue to experience financial difficulty that prevents repayment of the student loan debt. An application for discharge on the basis of hardship may only be made after at least five years have elapsed from when the student ceased to be a full- or part-time student.

In an effort to assist those who demonstrate financial need, however, the Canada Student Loan Program offers several repayment assistance measures. For example, it offers eligible students relief measures such as (a) the Repayment Assistance Plan, (b) the Repayment Assistance Plan for Borrowers with a Permanent Disability, and (c) the Severe Permanent Disability Benefit.[37]

Some stakeholders have suggested that, despite relief measures available under student loan programs, the five-year waiting period in the case of hardship is unwarranted. They argue that obtaining debt relief can be difficult and that, in any event, a hardship discharge is only available if the debtor convinces a court that the hardship is a continuing event that will prevent payment in the future. In their view, this removes the need for a waiting period.

Stakeholders are invited to make submissions regarding the current hardship discharge provisions.

Partial Release of Debts

Under the hardship discharge provision,[38] the courts have found that they do not have the authority to order a release of part of the student loan debt; either all or none of the debt is to be released by court order. Some stakeholders have suggested that it may be appropriate to give the courts more discretion to release a portion of debt where warranted.

Stakeholders are invited to makes submissions regarding possible flexibility for court-ordered partial discharges on hardship grounds, including any factors the court should consider in exercising its discretion.

Commercial Issues

Introduction

In the commercial insolvency context, debtors and creditors have numerous options for dealing with severe financial distress. The BIA provides a rules-based framework for bankruptcy and proposals (e.g. restructuring) by businesses of any size. The CCAA provides a more flexible court-driven framework for reorganizations by companies with at least $5 million in debt. Secured creditors may also opt to put in place a receivership in many circumstances. Corporations have also increasingly been turning to arrangement provisions under corporate legislation, such as the *Canada Business Corporations Act*.

The 2008-2009 reforms were designed to encourage restructurings of viable but financially-distressed firms because the benefits of a successful reorganization include the likelihood of greater returns to creditors than in bankruptcy, preservation of jobs and relationships with suppliers and lenders, and ensuring that assets remain productive to the overall benefit of the Canadian economy.

The Sarra Report

During summer 2011, Dr. Janis Sarra[39] conducted eleven public hearings regarding Canada's commercial insolvency regime. This work was supported by the Canadian Insolvency Foundation. Based on the hearings, Dr. Sarra published a report titled "Examining the Insolvency Toolkit: Report of the Public Meetings on the Canadian Commercial Insolvency Law System"[40] (the "Sarra Report").

Industry Canada greatly appreciates the contribution made to the Canadian public policy debate by Dr. Sarra and all of those who participated in the public hearings.

Encouraging Innovation through Intellectual Property Rights

Creating an economic climate that encourages innovation is considered a vital component of a country's long-term competitiveness. Intellectual property (IP) rights, such as patents and copyrights, play an important role in promoting innovation. IP statutes promote innovation through the incentive of a temporary monopoly and at the same time ensure reasonable access to users, and preserve marketplace integrity (e.g. trade-marks). IP laws focus on the rights of creators and licensees, while insolvency laws focus on the interests of debtors and creditors. However, as economic framework legislation, both IP law and insolvency law can promote innovation and marketplace integrity by mitigating entrepreneurial risks. Insolvency law can provide investors with commercial certainty in the case of default, which facilitates investment in the development of innovative ventures, as well as businesses that rely on the authorized use of IP through licences.

Copyright and Patented Items

There are existing provisions in the BIA regarding rights of holders of patents[41] and copyrights.[42] It has been suggested that these provisions should be modernized, to better reflect the importance of IP rights in the Canadian economy. For example, the provisions related to copyright speak of "manuscripts" that have been "put into type". The archaic language creates difficulties when the copyright in question is software, for example.

Additionally, some stakeholders have called for greater rights for IP producers and creators in insolvency proceedings, enhancing the limited rights that currently exist. For example, it has been suggested that the protection for patentees could be extended to other IP, such as trade-marks. It has also been suggested that the bankruptcy provisions be extended to CCAA restructurings and receiverships.

2009 Amendments – Rights of IP Licensees

Effective licensing rights are essential to a robust IP marketplace, as licensing gives innovators a way to monetize their works and release the innovation into the marketplace during the IP's period of statutory protection. Legislative amendments in 2009 were aimed at reducing the uncertainty faced by IP licencees in an insolvency restructuring. The reforms expressly permit the disclaimer of IP licences, in order to give debtors

and the courts the flexibility to restructure. However, IP licencees may preserve their rights to use the IP as long as they continue to perform their obligations under the licence.

The reforms were viewed as a positive step forward but some commentators have observed that there are outstanding issues regarding IP licences in insolvency. For example, the licencee protection only applies if the licensor restructures but not in bankruptcy or receivership. Others have noted that the new provisions only refer to the licensee's "right to use" the IP in question and do not require the licensor to provide upgrades or maintenance of the technology that may have been included in the IP licencing agreement. It has been noted that, while the amendments protect a licensee against a disclaimer, an insolvent licensor could sell IP free and clear of current licenses. Some commentators have called for additional legislative guidance to assist in this judicial balancing of interests.

> *Submissions are invited regarding how to improve the existing rules to support the objective of encouraging innovation, while also balancing the competing interests in an insolvency proceeding.*

Encouraging Restructuring

Streamlining *Companies' Creditors Arrangement Act* Proceedings

The CCAA sets out a court-driven insolvency proceeding. In order to commence a CCAA proceeding, an initial court order is required. Typically, the order provides for a stay of proceedings against the debtor company, appoints a monitor and sets out the rights and powers of the debtor company during the proceeding, including the ability to carry on business, sell assets and terminate employees. It may also provide for interim financing in order to provide liquidity to fund operations during the proceedings. The debtor company typically returns to the court for approval of various steps in the restructuring process, such as the sale of assets, settling contentious claims or dealing with out-of-the-ordinary-course transactions. Finally, court sanction of a plan of arrangement and distribution of assets to creditors is required.

Concerns have been expressed by stakeholders regarding the complexity and cost of CCAA proceedings. The following issues have been raised as areas of concern in existing practice.

Initial Orders

Some stakeholders have expressed the concern that initial orders can be too broad, which can negatively affect creditors since it may be difficult to successfully challenge decisions that have been acted upon (*e.g.*, where interim financing has been accessed by the debtor). Some stakeholders have suggested that a short automatic stay period (*i.e.*, five to 15 days) followed by an initial court appearance may provide more creditors with the opportunity to appear before the court. The automatic stay could provide limited authority to ensure the debtor company is able to "keep the lights on". Alternatively, the statute could restrict an initial order to what is necessary to allow the debtor to carry on business for a short period until there is a court hearing or notice to creditors.

> *Stakeholders are invited to make submissions regarding the breadth of initial orders and potential options for streamlining the process.*

Claims process

In CCAA restructurings, the time and cost associated with resolving claims can be prohibitive. Some stakeholders have suggested that a default mechanism for determining claims may be appropriate, particularly in smaller CCAA proceedings. The Sarra Report notes that in Alberta the monitor or a court-appointed claims officer determines the amount of claims owing and that amount is accepted unless the creditor objects within a specified period.[43]

> *Stakeholders are invited to make submissions regarding the existing claims process and whether consideration should be given to a default process.*

Court Applications

Significant resources can be dedicated to court applications in many larger CCAA proceedings. The consequence is increased cost for all parties and potentially reduced recovery for creditors. Some stakeholders have suggested that the debtor company could be statutorily authorized to take specified actions or the monitor could be authorized to approve certain actions by the debtor without requiring court sanction. It has also been suggested that the monitor could be granted more authority to mediate or settle disputes.

> *Stakeholders are invited to make submissions regarding the existing role of court appearances in CCAA proceedings and whether consideration should be given to possible approaches to reduce the number and cost of such court appearances.*

Balancing Competing Interests

Role of Unsecured Creditors

Unsecured creditors can be diverse and unorganized, making it difficult for them to have an effective voice in a corporate restructuring. Some stakeholders have suggested that a mandated committee, with professionals paid for by the debtor, could create a more balanced playing field. Other stakeholders, however, have suggested that unsecured creditors' committees would simply create further delays and increase costs (see, for example, Professional Fees in CCAA proceedings below). Some view the existing provisions, which authorize the court to appoint professionals to represent specific creditors, as sufficient.

> *Stakeholders are invited to make submissions regarding the effectiveness of the existing provisions and other potential mechanisms to ensure an effective voice for unsecured creditors in restructuring proceedings.*

Acting in Good Faith

The Sarra Report suggests that since there is no obligation on parties in a CCAA proceeding to act in good faith, creditors may take positions during the bargaining process that they know have little chance of being approved but that will improve their position relative to other creditors. It is suggested that such strategies have the potential to undermine the integrity of the insolvency system and a constructive bargaining process.[44]

> *Stakeholders are invited to make submissions regarding whether the CCAA should expressly address whether parties to proceedings have a duty to act in good faith.*

Eligible Financial Contracts

Under the BIA and CCAA, eligible financial contracts (EFCs) enjoy "safe harbour" provisions that permit them to be terminated, netted and have collateral realized despite the stay of proceedings that may be ordered by the court. These "safe harbours" were implemented in order to ensure a proper functioning derivatives market and to reduce systemic risk. Protections were also put in place in the BIA and CCAA to prevent an insolvent debtor from terminating or assigning an EFC as they could potentially do with other contracts.

The Insolvency Institute of Canada issued a report on derivatives[45] that recommended several actions be taken with respect to EFCs. First, it was recommended that the insolvent party, the trustee, the receiver or the liquidator be permitted to terminate or assign EFCs, subject to certain restrictions. It was also recommended that "walk-away" clauses, which permit a solvent counterparty to refuse to make net termination payments owing to the insolvent party in the event of an insolvency, should be rendered ineffective. The report also recommended that financial collateral securing an EFC be exempted from the existing deemed trusts (e.g. for employee withholdings) and super-priorities (e.g. for unpaid wages, pension contributions). At the same time, the report recommended that financial collateral should be limited to assets that are no longer under the control of the insolvent party, either through assignment or pursuant to a title transfer credit support agreement. The report also recommended that similar rules be applied in receiverships.

On this issue, the Sarra Report suggested EFCs, such as credit default swaps (CDS), may lead to an uncoupling of legal and economic interests and may change creditor behaviour. The Sarra Report also suggests

that consideration be given to new types of derivatives that have emerged in recent years that do not fit within the original intention of the EFC safe harbour provisions.[46] The Sarra Report noted that derivatives could be made subject to the CCAA stay of proceedings, except with leave of the court, and that a process could be put in place to determine whether particular EFCs should be stayed or disclaimed.[47]

> *Stakeholders are invited to make submissions regarding eligible financial contracts, and their impacts on insolvency and restructuring proceeding, as well as potential policy responses.*

Professional Fees in CCAA Proceedings

The issue of professional fees in large corporate insolvencies has received increased attention from stakeholders and insolvency professionals in Canada and elsewhere. Reliable data regarding professional fees in Canadian insolvency proceedings are not currently available. Concerns have been raised that the expense of CCAA proceedings has been growing and may deter businesses use of insolvency proceedings in favour of alternatives that may not properly protect the interests of all creditors and stakeholders. Some stakeholders have also raised concerns that elevated professional fees can harm creditors' recoveries.

Under the CCAA, the court is responsible for reviewing fees charged to the debtor company to ensure they are "fair and reasonable". Parties to the proceeding are entitled to challenge fee applications and the court may reduce or reject fees where warranted. There is no obligation to report professional fees to the OSB or other parties, although they are available in the court record.

Other countries are examining the impact of professional fees on their respective insolvency systems, and the potential role of regulators and professional bodies. For example, in the United States, a guideline regarding attorneys' fees in larger Chapter 11 cases came into force on November 1, 2013.[48] Among other things, legal firms must disclose their non-bankruptcy blended hourly rate, hours and fees per task, and make their billing data available to the court, the U.S. Trustee and major parties to the proceeding. The guideline also sets out approaches for examining fees to ensure they are appropriate. The United Kingdom[49] and Australia[50] are also examining this issue.

> *Stakeholders are invited to make submissions regarding the impact of professional fees on insolvency proceedings, including the utility of greater disclosure practices.*

Enhancing Transparency

Creditor Lists

Currently, the CCAA requires the monitor, within five days after an initial order is made, to prepare a list of creditors and to make it publicly available.[51] The Sarra Report raised the idea of requiring the debtor company to continuously maintain and disclose a creditor list in order to provide more transparency regarding interested parties in the proceeding.[52] Unsecured creditors, such as trade creditors and suppliers, may be able to use the information to better organize. It could also provide information about creditors that can assist in formulating bargaining positions. However, some stakeholders noted that developing and updating a creditor list can be time consuming and expensive, especially if there is active debt trading. This could have the effect of distracting the debtor company from its primary objective of achieving a successful restructuring.

> *Stakeholders are invited to make submissions regarding imposing an obligation on the debtor company to maintain a creditors' list during a CCAA proceeding.*

Empty Voting and Disclosure of Economic Interests

Under the CCAA, creditors have the right to vote on a plan of arrangement or compromise, based on the expectation that they have an economic interest in the success of the restructuring. Stakeholders, however, have raised concerns that as a result of changes in the marketplace, not all creditors may have the same incentives to support a restructuring. In particular, stakeholders have raised concerns regarding the impact of the trading in distressed debt and the potential effects of credit default swaps on creditor incentives and decision making.

Distressed debt trading, in which existing debt is sold at a discount by initial creditors to speculative purchasers, has played an increasingly prominent role in CCAA restructurings. On a positive note, the distressed debt market gives initial creditors an opportunity to fix their losses at an early stage and exit the insolvency proceeding. On the other hand, through purchases of debt at a discount, the purchaser can acquire a more significant voting position than warranted by their economic exposure. At the same time, distressed debt purchasers may hold short-term objectives that run counter to the objective of restructuring the debtor.

Credit derivatives are a form of financial instrument that allow creditors to hedge against credit exposure and that may allow speculators to bet against a particular firm. Credit default swaps (CDS) are a common form of derivative to protect against credit loss, in which a buyer obtains protection from the seller in case of a "credit event", such as default, restructuring or bankruptcy, for a fixed period. Unlike traditional credit insurance, the amount of compensation that can be claimed under a CDS is not limited to the actual loss suffered, there is no automatic right of subrogation and the CDS buyer or seller is not required to hold an actual interest in the hedged debt. It has been suggested that given these characteristics of a CDS, a creditor who holds CDS positions may have disincentives to support a workout or restructuring. Alternatively, a CDS holder may have different incentives in a restructuring proceeding than an unhedged creditor. The lack of transparency with respect to CDS holdings can mean that the restructuring company and unhedged creditors may be unaware of the motives of hedged creditors and their incentives with respect to the outcome of the restructuring process.

It has been suggested that the potential for misalignment of creditors' interests caused by distressed debt trading and credit derivatives, including CDS, may be mitigated by empowering the court to take account of actual economic interests when considering approval of a restructuring plan. Additionally, increased disclosure requirements could provide other creditors with vital information to understand and respond to the incentives of hedged creditors. Others have stated that disclosure and consideration of true economic interests instead of nominal debt holdings could lead to potential negative repercussions in the distressed debt and credit derivative markets.

> *Stakeholders are invited to provide input on whether courts should be empowered to require greater disclosure of creditors' actual economic interests or to take account of those interests.*

Role of the Monitor

Under the CCAA, an insolvency professional is appointed to monitor the business and financial affairs of the debtor (the "monitor").[53] As described in the Sarra Report:[54]

> *"Monitors are relied on by the courts and the parties to provide information and their views on the financial condition of the debtor, the efficacy and fairness of sales processes or DIP financing arrangements, and their impartial opinion on a host of other issues that arise during the proceeding. Integrity and independence are hallmark attributes of a good monitor."*

In 2009, the role of the monitor received statutory clarification, with particular focus on the duty to provide notice to stakeholders and informed guidance to the court.[55] The Superintendent of Bankruptcy also became the regulator for monitor conduct, and a detailed professional conduct regime was added to the CCAA.[56] As noted in the Sarra Report, the role of the monitor is continuing to evolve.[57]

Pre-Filing Reports

A relatively new development is the monitor's "pre-filing report", which is a description of the debtor company's affairs up to the date of a CCAA filing. The report is prepared for the purposes of the initial application and, hence, prior to the monitor's appointment. Pre-filing reports have been found by the courts and insolvency professionals to be beneficial, as they provide timely information to the court. It has been suggested, however, that the monitor's ability to exercise the requisite attribute of independence, prior to receiving a court appointment, is debatable. It has also been suggested that monitors be precluded from introducing evidence in pre-filing reports.

> *Stakeholders are invited to make submissions regarding whether pre-filing reports should be permitted and, if so, in what circumstances.*

Conflict of Interest

The court, creditors, and other stakeholders rely on the monitor to maintain an impartial perspective when providing information on the restructuring process. However, in some CCAA restructurings, the monitor has a pre-existing relationship with the debtor company, for example having acted as the debtor company's financial advisor, which can raise questions as to the monitor's independence.[58] In larger CCAA cases, the debtor company often has separate financial advisors who act independently of the monitor, thereby reducing the potential for real or perceived conflicts of interest. In small- to medium-sized CCAA cases, however, the monitor has often acted as the debtor company's financial advisor pre-filing, raising concerns as to the monitor's impartiality. Some commentators have suggested that such a pre-filing relationship can facilitate a successful restructuring and reduce costs, as the monitor already has knowledge of the debtor company's financial situation. Further, the risks of conflicts are mitigated by the fact that monitors are professionals that are subject to various forms of oversight: they must comply with professional codes of conduct,[59] are subject to appointment restrictions,[60] and are also subject to oversight by the OSB and the court.[61] Others have noted that while a monitor that has acted as a financial advisor to the debtor company may improve the efficiency and reduce the costs of a CCAA restructuring, further measures such as disclosure of the monitor's relationship with the debtor company may be necessary in addition to OSB and court oversight.

> *Stakeholders are invited to make submissions regarding whether additional measures are necessary to address the potential for conflicts of interest where a monitor has a pre-filing relationship as financial advisor to a debtor company.*

Asset Sales

Credit Bidding

Credit bidding refers to the ability of a creditor to use a claim as a form of currency during asset sales in an insolvency proceeding. Canadian legislation is silent regarding credit bidding, but courts have permitted it.[62] The *United States Bankruptcy Code* specifically provides that a lien holder may bid its allowable claim in a sale of the property unless the court orders otherwise.[63]

The Sarra Report notes concerns inherent to credit bidding, particularly with respect to imbalances of power in favour of, and information available to, secured creditors. Such imbalances could reduce the likelihood of competing bids, thereby reducing the potential value of the assets being sold.[64]

> *Stakeholders are invited to comment on whether credit bidding should be permitted and, if so, what limitations may be appropriate.*

Stalking Horse Bids

A stalking horse bid is an initial bid that sets a minimum floor for the eventual sale of assets. While insolvency legislation is silent regarding such bids, Canadian courts permit this type of sales process regularly.

The Sarra Report suggests that stalking horse bids deliver "the message day one to customers, suppliers, employees and other key stakeholders that the business will carry on, and that there is an informed party that has faith in and is committed to the business."[65] It also notes that courts have considered four criteria in assessing a stalking horse bid process: the degree of control exercised over the initial stage to determine the stalking horse bidder; the need for a stalking horse bid as opposed to a traditional sales process; the economic incentives (break fees and other protections) granted to the bidder; and, whether sufficient time is permitted for other bidders to consider topping the credit bid.[66]

> *Stakeholders are invited to comment on whether stalking horse bids should be expressly permitted under Canadian insolvency legislation and, if so, what limitations may be appropriate.*

Applicability of Asset Sale Test

Asset sales are subject to court approval if they are made outside of the ordinary course of business.[67] Some stakeholders have suggested that it is unclear when sales are material enough to become exposed to the court approval process. Because court approval of sales outside the ordinary course of business must take into account how the sale could impact on the payment of wage and pension claims,[68] stakeholders have suggested a materiality test should be created to ensure court approval is sought when appropriate.

> *Stakeholders are invited to comment on whether a materiality test is required to determine when asset sales will be subject to court approval.*

CBCA Arrangements

The *Canada Business Corporations Act* (CBCA) permits a corporation to undertake an "arrangement" in order to effect a corporate change that would not be feasible under any other provision of the Act.[69] Typically, an arrangement is used to conduct a series of changes to a corporation's structure, including mergers, amalgamations and divestitures. In recent years, arrangements have been used to restructure the affairs of insolvent corporations.

The reasons for choosing to restructure under the CBCA rather than insolvency legislation may include the speed and flexibility under which an arrangement can be accomplished; that the debtor's management remains in control of the corporation; that there is no oversight by an independent party such as a monitor; that there are no reporting or other requirements to creditors; and, that it avoids the stigma associated with insolvency.

The CBCA requires that the corporation effecting an arrangement be solvent. Courts have interpreted this to mean that the applicant corporation need be solvent but other affected corporations may be insolvent. As such, some corporations have bypassed the solvency requirement by creating a solvent shell company that is then used as the applicant.[70]

The Director under the CBCA has published a policy statement regarding the use of CBCA arrangement provisions by financially distressed corporations which indicates that corporations must be in compliance with the solvency provisions of the legislation.[71]

Stakeholders have expressed concern with the CBCA arrangement provision because it is skeletal, providing the court broad discretion to make "any interim or final order it thinks fit".[72] As a result, there may be insufficient protections for creditors and a general lack of safeguards compared to insolvency legislation, which strives to balance the competing interests of various affected parties. It has been suggested that insolvency-type protections could be incorporated into the CBCA arrangement provisions. Alternatively, the Sarra Report suggested that it may be appropriate to consider changes to the CCAA in order to respond to the issues that drive parties to use the CBCA.[73]

> *Stakeholders are invited to provide input regarding the practice of CBCA arrangements involving insolvent companies.*

A Streamlined Small Business Proposal Proceeding

The cost of the existing Division I proposal process may be significant and can be prohibitive in the context of small- and medium-sized enterprises (SMEs). It may be appropriate to consider creating a simplified and less expensive proposal process intended to make it easier for SMEs to restructure. Some stakeholders have suggested that certain steps in the process could take place automatically (e.g., 45-day extension of the stay of proceedings), subject to creditors' rights to object.[74]

> *Stakeholders are invited to make submissions regarding whether a simplified, less expensive proposal process for SMEs would be warranted.*

Division I Proposals Extension

A Division I proposal must be filed within six months of the filing of a notice of intention.[75] It has been suggested that the time limit may hinder the debtor's ability to obtain creditor approval, particularly in more complex commercial proceedings.[76] Some stakeholders have suggested permitting the court to extend the time limit in exceptional circumstances where clear criteria exist for granting an extension.[77] On the other hand, other stakeholders have expressed concern that it could lead to abuse of the stay if the length of proceedings is too long.

> *Stakeholders are invited to provide input on extending the time for filing a Division I proposal following the filing of a notice of intention to file a proposal.*

Liquidating CCAA Proceedings

The CCAA was originally envisioned as a restructuring tool. In recent years, courts have noted an increase in the number of liquidating CCAA filings,[78] meaning that the Act is used to sell the assets – typically as a going concern business – and proceeds are distributed among the creditors. Stakeholders have expressed concern with the appropriateness of liquidating CCAAs because there is often no opportunity for creditor approval. Additionally, there can be pressure on the court to approve sales as there is no other going-forward solution. The sales may avoid many of the checks and balances provided by the plan approval process.

Some stakeholders have expressed the view that if liquidating CCAA proceedings are to continue, the CCAA should provide protections and add principles for the court to consider in determining whether to approve the sales processes. Other stakeholders have strongly supported maintaining judicial flexibility to permit the tailoring of appropriate solutions in the particular circumstances of the case.

> *Stakeholders are invited to provide input on whether the CCAA should be amended to codify protections for stakeholders and principles for the courts to consider in liquidating CCAA proceedings.*

Enhancing Equity

Employees' Claims

Notable commercial insolvencies, including Nortel Networks and AbitibiBowater, have raised concerns about debts and obligations owed to employees, former employees and pensioners (together referred to as "employees"). Employees' claims can include unpaid wages, vacation pay, severance and termination pay, long-term disability benefits, pension obligations as well as other employment benefits, such as dental, drug and extended healthcare plans.

Currently, employees benefit from numerous legislative and regulatory protections, as well as government programs, not available to other creditors:

- In bankruptcy and receivership:
  - **Pre-filing unpaid wages and vacation pay** are granted a super-priority over cash, accounts receivable and inventory for up to $2,000 per employee,[79] plus up to $1,000 super-priority for disbursements incurred as part of their employment:[80]
    - To the extent such claims are unfulfilled by the super-priority, they are granted a preferred claim over all of the debtor's remaining property;[81]
  - **Unremitted normal cost pension contributions** are granted a priority over secured creditors without limit;[82]
- In restructuring proceedings, a proposal or plan of arrangement or compromise must provide for the payment of:
  - **Pre-filing unpaid wages and vacation pay** of up to $2,000 per employee;[83]

- **Post-filing wages, vacation pay and disbursements**;[84]
- **Unremitted normal cost pension contributions**;[85]

- The federal Wage Earner Protection Program (WEPP) pays eligible workers up to approximately $3,600 for **unpaid wages, vacation pay, and severance and termination pay**. The WEPP is subrogated to the employees' claim for up to the amount of the super-priority;
- The BIA and the CCAA both respect the **pension fund trust** created under federal or provincial pension legislation, meaning that the amounts held in that pension fund trust are only available to pensioners and are not available to other creditors;
- The federal government announced as part of Budget 2012 that federally-regulated employers that offer **long-term disability plans** will need to do so pursuant to insurance rather than self-funding, meaning that an employer's failure would not affect such benefits.

In recent years, there have been calls to increase protections for employees. For example, it has been suggested that severance and termination could be included in the definition of wages, as they are currently excluded. It has also been suggested that the existing cap of $2,000 on unpaid wages could be increased or removed entirely, permitting employees to obtain priority for the entirety of their claim. With respect to pensions, some stakeholders have suggested that defined benefit pension plan deficits be prioritized, either ahead of secured creditors (i.e. a super-priority) or ahead of unsecured creditors (i.e. a preferred claim). With respect to employee benefit plans, it has been suggested that amounts owed with respect to these plans be prioritized or that the company be barred from terminating such plans without court approval.

International comparisons are imperfect due to differences in employees' claims and how such claims are treated in insolvency proceedings. Industry Canada research[86] found that, of the member countries of the Organisation for Economic Co-operation and Development (OECD) for which information was ascertainable, most – like Canada – provide some form of priority for employees' remuneration in insolvency proceedings. In almost all cases, the insolvency priority is capped either in amount, by a specified time period, or both. Many countries also offer a wage guarantee fund similar to the WEPP. With respect to pensions, many OECD countries with private pension plans provide a preferred claim in insolvency for outstanding contributions. Canada exceeds this by providing a super-priority. Pension deficits are by and large treated as unsecured claims in OECD countries, as is the case in Canada.[87] Finally, with respect to employee benefit plans, the *United States Bankruptcy Code* provides that retiree benefit plans cannot be modified or terminated in a restructuring proceeding without court approval.[88]

Concerns haved been expressed by some stakeholders, however, that any enhancement in the existing super-priority or preferred claims could result in lenders reducing credit available to employers and change behaviour of unsecured creditors, such as suppliers who may impose more restrictive trade credit practices (e.g. shorter payment terms). Industry Canada understands that some manufacturers experienced a reduction in credit availability in 2008, when the $2,000 super-priority was first introduced. Any increase in the amount of the priorities could be anticipated to further negatively impact on credit availability, particularly for small and medium-sized enterprises which have fewer assets against which to apply the super-priority. The House of Commons Standing Committee on Industry, Science and Technology considered Bill C-501 that proposed prioritizing pension claims. The Committee heard from numerous witnesses and decided to oppose the Bill's pension-related provisions due to concerns about their potential negative impact on the Canadian economy.

> *Stakeholders are invited to make submissions regarding whether, and how, Canada could enhance protection of employee claims in insolvency proceedings.*

Employees' Claims in Asset Sales

Under the CCAA, a plan of arrangement or compromise may not be sanctioned by a court unless it provides for the payment of unpaid wages of up to $2,000 per employee and all unremitted normal cost contributions owed to a pension plan.[89] In recent years, however, the Act has been used more often to affect a liquidation of the debtor company (see discussion of "Liquidating CCAAs" above). In these circumstances, there is no plan of arrangement or compromise. In order to ensure that the asset sales that occur in a liquidation scenario do not

defeat the requirement that these claims be paid, the Act provides safeguards.[90] As noted above at "Asset Sales", however, not all sales are conducted under the safeguard provisions, and for those that are it may be difficult to determine if they satisfy the safeguard provisions.

Stakeholders are invited to make submissions regarding whether the existing provisions adequately protect the employees' claims.

Hardship Funds

The BIA permits the payment of interim dividends.[91] The CCAA, on the other hand, is silent on the matter. Courts have exercised their discretion to order interim distributions to vulnerable creditors in certain CCAA cases, however, it is done on a case-by-case basis.

Stakeholders are invited to make submissions regarding whether express authorization for interim dividends in certain circumstances is required and, if so, any potential limitations on the courts' discretion.

Third Party Releases

A "third party release" refers to the discharge of a claim or claims against someone other than the debtor, or a director of a debtor, as part of an insolvency proceeding. The Acts are silent regarding such releases but courts have exercised their discretion "to compel the implementation of a release of the claims against third parties as part of the compromise."[92]

According to the Sarra Report, the criteria for permitting a third party release include: (1) there are special circumstances warranting the release; (2) the release is reasonably connected to the restructuring; (3) the third parties are essential to the restructuring; (4) the arrangement cannot succeed without the releases; (5) the third parties are offering a tangible, realistic contribution to the arrangement; (6) creditors generally must benefit from the arrangement; (7) creditors approve of the plan knowing the nature and effect of the releases; and, (8) the releases are fair and reasonable (*i.e.* not overly broad or offensive to public policy).[93]

Stakeholders are invited to make submissions regarding whether third party releases are appropriate and, if so, whether the identified criteria are sufficient to prevent potential abuse.

Key Employee Retention Bonuses

The CCAA is silent regarding the payment of employee retention bonuses during insolvency proceedings but courts have exercised their discretion to approve bonuses on a case-by-case basis.

The payment of bonuses may be merited in some circumstances, for example, where the employees' contributions during the course of the insolvency proceedings serve to produce beneficial results for stakeholders such as encouraging restructuring, retaining valuable employees, and increasing asset recovery for creditors. On the other hand, it may be perceived as inequitable should certain employees – particularly executives and management – receive bonuses while other employees are dismissed and/or do not receive full compensation for their unpaid wages, severance and termination or pension benefits.

The Sarra Report noted concerns that bonus programs created early in a CCAA proceeding may not be properly monitored or evaluated.[94] It also suggested that some practitioners have concerns that managers may be improperly proposing such programs to benefit from their "information capital".[95]

The *United States Bankruptcy Code*[96] permits the payment of bonuses if the bonus plan was in place prior to the commencement of insolvency proceedings, the employee has an alternative employment offer, he or she is required for the restructuring and the bonus would have the effect of retaining that employee.

Stakeholders are invited to make submissions regarding whether employee bonuses should be permitted in an insolvency proceeding and, if so, whether terms and conditions should be codified.

Stakeholders are also invited to make submissions regarding whether director and officer liability could be imposed for bonus programs created during an insolvency proceeding.

Oppression Remedy

Corporate statutes provide for an 'oppression remedy' to protect complainants from oppressive conduct by a corporation or its directors.[97] Some stakeholders have suggested that in insolvency scenarios the oppression remedy is sometimes used for improper purposes, such as venue shopping or to skew negotiations, and therefore there needs to be clearer direction as to when the remedy is available in an insolvency context.[98]

Stakeholders are invited to make submissions regarding whether restrictions on the availability of the oppression remedy should be imposed in the insolvency context.

Interest Claims

Stakeholders have raised concerns about the treatment of interest claims in insolvency proceedings. Although some guidance may be taken from the treatment of post-filing interest claims in bankruptcy, no clear rule exists for the treatment of such claims in CCAA proceedings.[99]

Stakeholders have suggested that interest stop accruing upon the commencement of insolvency proceedings (e.g. CCAA proceedings) in the event there is a subsequent bankruptcy. It has also been suggested that it be consistent across all insolvency legislation that no creditor be entitled to recovery post-filing interest unless all other creditors have received full payment on their claims. Finally, it has been suggested that the applicable interest rate should be the prime rate proclaimed by the Bank of Canada on the commencement of insolvency proceedings.

Stakeholders are invited to make submissions regarding the existing rules regarding interest claims.

Unpaid Suppliers

The BIA provides a supplier of goods with the right to repossess those goods, subject to certain conditions.[100] In the 2008-2009 reforms, the provision was amended to provide suppliers a longer period in which to make their claim to repossess goods. The provision remains contentious, however, because the conditions have been strictly interpreted by the courts, making it difficult to use this remedy successfully.

The *United States Bankruptcy Code* grants suppliers a repossession right[101] or an administrative priority for goods delivered in the 20 days prior to commencement of insolvency proceedings.[102]

Stakeholders have suggested that s. 81.1 of the BIA be repealed as it runs contrary to the general rule that unsecured stakeholders be treated similarly. However, other stakeholders view the provision as the only protection for suppliers.

Stakeholders are invited to make submissions regarding the treatment of supplier claims for goods delivered in the period immediately prior to insolvency proceedings.

Fruit and Vegetable Suppliers

On February 4, 2011, the Canada-United States Regulatory Cooperation Council (RCC) was created to better align the two countries' regulatory approaches, where possible. The RCC Joint Action Plan included a commitment to "develop comparable approaches to financial risk mitigation tools to protect Canadian and U.S. fruit and vegetable suppliers from buyers that default on their payment obligations."

In the United States, the *Perishable Agricultural Commodities Act* creates a number of financial risk mitigation tools specific to the fruit and vegetable marketplace, including information services, arbitration, temporary restraining orders and a statutory trust over the debtor's assets that were obtained from trading in produce. The statutory trust is available to any participant in the market, including farmers, packers, dealers, and wholesalers.

The BIA provides that farmers in Canada, fishers and aquaculturalists are entitled to a super-priority over all of the inventory of a bankrupt for unpaid amounts related to farming, fishing or aquaculture products delivered within 15 days of a bankruptcy or the appointment of a receiver.[103]

Under the RCC auspices, efforts were made to find solutions that would enhance the comparability between the Canadian and U.S. systems of financial risk mitigation in the fresh produce industry. For example, market-based solutions, such as credit insurance and bonding, were studied. Many fresh produce industry participants instead advocated for a legislative solution so that fresh produce claims would be paid ahead of most other creditors, including secured creditors (i.e. a super-priority). The proposed super-priority was to be paid out of any property of the bankrupt that was obtained from trading in fresh produce.

Industry Canada is interested in stakeholder views regarding the existing super-priority, including potentially expanding it to benefit U.S.-based fresh produce farmers and extending the delivery period from 15 days to 30 days, which is more consistent with practices in the marketplace.

> *Stakeholders are invited to make submissions regarding the existing farmers' super-priority in section 81.2 of the BIA.*

Deterring Fraud and Abuse

Director Disqualification

Given their key role in corporate governance, misconduct by directors both before and during insolvency proceedings attracts considerable attention. Various statutory restrictions and obligations are placed on directors to prevent, reduce and remedy misconduct (e.g. corporate, tax, environmental and employment legislation). Further, insolvency law imposes liability on directors for repayment of corporate dividends paid before bankruptcy.[104] In corporate restructuring proceedings, their misconduct or negligence is not covered by the protective indemnification charge,[105] claims against them personally for wrongful conduct may survive,[106] and they can be removed from their positions if they are unreasonably impairing or acting inappropriately with respect to the proceeding, or are likely to do so.[107] The concern about directors using 'quick flips' to strip a company of valuable assets is addressed by mandated court scrutiny of purchases of corporate assets by directors.[108] Finally, if a corporation commits a bankruptcy offence – for example failing to comply with its duties as a bankrupt[109] – a director may be fined or jailed.[110]

However, directors are not disqualified from being a director of, or from incorporating another business, even if guilty of misconduct. The issue has been addressed in various reports, articles and proposed bills, but a disqualification regime has never become law in Canada.[111] This is in contrast with the United Kingdom, where a detailed disqualification regime is in place.[112]

The concept of a disqualification regime raises interesting questions regarding the need for and efficacy of such a regime. Important issues regarding the manner of implementing, the costs of implementing and maintaining, its constitutionality, and the impact on both directors' decision making and retention both before and during an insolvency proceeding must be considered.

> *Stakeholders are invited to make submissions regarding whether directors of a corporation that has become subject to insolvency proceedings should be disqualified from acting as a director due to misconduct.*

Related Party Subordination and Set-Off

Stakeholders have suggested that the legislation be amended to allow debts among related parties to be subordinated, particularly with respect to those parties from the same corporate group. Similarly, stakeholders have suggested that the legislation be amended to prohibit set-off of debts among related parties.

> *Stakeholders are invited to provide input as to whether debts of related parties should be allowed to be subordinated, and whether set-off among related parties should be expressly prohibited.*

Cross-Border Insolvencies

Foreign Claims under "Long-Arm" Legislation

Foreign jurisdictions, including the United States and the United Kingdom, have implemented legislation that imposes liabilities on corporate group members for the pension deficits of companies located within those jurisdictions.[113] This long-arm pension legislation has the potential to put the assets of Canadian corporations at risk if an associated corporate entity cannot meet its pension obligations in that foreign jurisdiction.

In order to protect the assets of Canadian corporations from long-arm pension legislation, some stakeholders have suggested amending Canadian insolvency legislation to provide that claims from foreign long-arm legislation, unless based on claims in Canada, are not enforceable in Canada.[114]

Alternatively, stakeholders have suggested that Canada should adopt long-arm legislation similar to that in the United States and the United Kingdom that would allow Canadian creditors to pursue the assets of corporate group members in foreign jurisdictions.[115]

Submissions are invited regarding an appropriate response to long-arm legislation.

Set-Off for Claims in Multiple Jurisdictions

The BIA and CCAA contain provisions regarding cross-border insolvencies that state that payments made to creditors in foreign proceedings must be taken into account by the Canadian court in determining the payment that may be made in the Canadian proceeding.[116] Some stakeholders have suggested these provisions should be more prescriptive. In situations where a creditor has claims in multiple jurisdictions for the same debt, and that creditor has successfully recovered amounts for post-filing interest in the foreign jurisdiction, such amounts should be deducted from amounts owing on account of principal from the Canadian estate.

Stakeholders are invited to make submissions regarding the set-off of interest claims from another jurisdiction against principal.

Allocation of Proceeds

It has been suggested that insolvency professionals face a myriad of challenges where assets and creditors of an insolvent entity are located in multiple jurisdictions. Stakeholders have recommended that Canadian insolvency legislation be clarified in order to provide insolvency professionals with guidance as to how to access and convey assets in cross-border insolvencies, as well as to clarify how to equitably allocate the liquidated value of assets among interested parties and jurisdictions.[117]

Submissions are invited regarding access to, and conveyance and allocation of, assets in cross-border insolvencies.

Treatment of Enterprise Groups

Stakeholders have raised concerns that the current insolvency legislation does not sufficiently address enterprise groups. The result is that the processes and procedures undertaken during the course of an insolvency proceeding may be driven by the most sophisticated parties.[118] The United Nations Commission on International Trade Law (UNCITRAL) has made recommendations regarding the treatment of enterprise groups in insolvency.[119] Stakeholders have suggested that Canadian insolvency legislation build on the work of UNCITRAL.

Stakeholders are invited to provide input regarding the treatment of enterprise groups in insolvency.

"Centre of Main Interests"

Concerns have been raised that Canadian courts have been quick to recognize foreign jurisdictions, particularly the United States, as a debtor's centre of main interest (COMI). This may have the effect of reducing the

ability of smaller creditors from effectively participating in the proceeding.[120]

Some stakeholders have suggested that Canadian courts should ensure that Canadian creditors have been given sufficient notice, disclosure and the opportunity to make submissions where an application has been made to recognize a U.S. or other foreign jurisdiction as the COMI of a Canadian debtor.[121]

> *Stakeholders are invited to make submissions regarding the need for procedural protections in cross-border recognition matters.*

Unsecured Creditors' Committees

Canadian insolvency legislation is silent regarding unsecured creditors' committees (UCCs). Nonetheless, UCCs from the United States are increasingly using cross-border protocols to gain standing in Canadian insolvency proceedings leading to increased costs for Canadian creditors who find themselves before the court on a greater number of motions and contested positions.[122]

Stakeholders have suggested that the courts should be authorized to limit the participation of UCCs in Canadian insolvency proceedings. This may be accomplished by developing principles and criteria for the recognition of a UCC and by defining the scope of participation of a UCC in order to ensure better alignment with the objectives of Canadian insolvency legislation.[123]

> *Stakeholders are invited to provide input as to whether it is appropriate to develop principles and criteria for the recognition of foreign UCCs and to define the scope of UCC participation in Canadian insolvency proceedings.*

Administrative Issues

Renaming the *Bankruptcy and Insolvency Act*

Some stakeholders have expressed concern that the term "bankruptcy" in the title of the legislation and for "trustee in bankruptcy" may create an unintended social stigma that may prevent some Canadians from seeking much needed professional assistance to obtain debt relief. As a result, these debtors may suffer greater economic and social consequences than would otherwise be the case. It has been suggested that the term "bankruptcy" be removed from use.

> *Stakeholders are invited to make submissions regarding the potential social stigma associated with "bankruptcy" and whether Canadians may be better served if that term is downplayed in the legislation.*

A Unified Insolvency Law

The federal government has constitutional jurisdiction over bankruptcy and insolvency, and has exercised this mandate through several statutes targeting different entities:

- The BIA governs liquidations and proposals for individuals and businesses;
- The CCAA applies to corporations with debts exceeding $5 million;
- The *Winding-up and Restructuring Act* (WURA) applies to financial institutions as well as certain corporations;
- The *Canada Transportation Act* (CTA) contains provisions relating to insolvent railroads.

This fragmented approach has led to criticism that it creates uncertainty for both debtors and creditors, and that a merger of some or all of the statutes or relevant provisions into one comprehensive insolvency Act could increase transparency, fairness, consistency and efficiency. Others have noted that the separate insolvency statutes provide debtors and creditors with additional flexibility to achieve a successful solution to an insolvency.

Merger of the BIA and CCAA

It has been suggested that the BIA and CCAA could be merged into a single Act, similar to the *United States Bankruptcy Code* that contains various insolvency proceedings under a single statute. This would reduce the potential for "statute-shopping". It has been stressed, however, that the flexibility of the CCAA should be maintained in such a case.

Winding-up and Restructuring Act

WURA is the primary insolvency statute available for financial institutions. It applies, however, to some non-financial enterprises as well.[124] Part I of WURA, which provides the general insolvency regime, is under the mandate of the Minister of Industry. It has not been modernized recently and stakeholders have expressed concerns that it contains a large number of outdated provisions. Parts II and III, which provide specialized rules relating to insurance companies, are under the mandate of the Minister of Finance.

There are at least two options available for dealing with WURA. First, WURA could be amended to apply only to financial institutions. In such an event, the criticisms relating to uncertainty would be addressed as all non-financial corporations would be limited to the BIA or CCAA. The stakeholder concerns regarding Part I would remain. Alternatively, WURA could be merged into a unified insolvency Act while maintaining the specialized rules relating to insurance companies.

Canada Transportation Act

The CTA includes provisions for schemes of arrangements to be made by insolvent railway companies.[125] Neither the BIA nor the CCAA apply to "railway companies".[126]

Courts have, however, permitted companies that operate a railway to commence insolvency proceedings under the BIA and the CCAA.[127] The courts have, for example, differentiated between a company, incorporated under ordinary corporate legislation, that happens to operate a railway and a company incorporated specifically for the purpose of carrying on a railway.

It has been suggested that the policy rationales for a separate, railway companies legislative regime under the CTA should be re-examined.

> *Stakeholders are invited to make submissions regarding a unified insolvency statute.*

Restricting Consumer Proposals

The BIA provides for proposals to be made by consumer debtors.[128] In 2009, the debt threshold for consumer proposals was increased from $75,000 to $250,000, excluding any debts secured by the individual's principal residence. Stakeholders have raised the concern that, with this increase, it is more likely that business debt will be captured under consumer proposals. It has been proposed that the consumer proposal provisions be further restricted to ensure that business debt is dealt with under Division I proposals.

> *Submissions are invited as to whether the consumer proposal process should be amended to ensure that it is not used with respect to business debt.*

Special Purpose Entities

Special purpose entities (e.g. corporations, limited partnerships, trusts) are used by corporations for specific, limited business purposes. For example, assets could be transferred to a special purpose entity to achieve a particular objective while insulating the parent corporation from risk. If the special purpose entity is created as a corporation or partnership, it could qualify to commence proceedings under the BIA and CCAA. Neither the BIA nor the CCAA, however, apply to a special purpose entity created as a trust

It has been suggested that trusts operating as special purpose entities should qualify for relief under the BIA and CCAA. There may, however, be issues with defining what constitutes a special purpose entity and the proposed change may trigger other consequences.

Stakeholders are invited to provide input on whether to expand the application of the BIA and CCAA to trusts used as special purpose entities.

Receiverships

Codification of Receiverships

Part XI of the BIA allows a court to appoint a receiver with the power to act nationally over all, or substantially all, of the property of an insolvent person or bankrupt. Although stakeholders have suggested that receiverships are generally an effective tool in insolvency proceedings, further codification of the rules relating to receivers appointed under insolvency legislation may improve the receivership process.[129]

Other stakeholders have suggested that standardization of the rules regarding the authority of a receiver to act under the BIA, CCAA and provincial receivership legislation, including the creation of a standard set of appointment and engagement letters for receivers, would provide greater clarity and certainty in the insolvency process.[130]

Stakeholders are invited to provide input as to whether it is appropriate to amend the insolvency legislation to clarify the role and authority of a receiver appointed under s. 243 of the BIA; and whether it is appropriate to standardize a set of rules regarding the authority of a receiver to act across all insolvency statutes.

No Action against Receivers without Leave of Court

Some stakeholders have suggested that the reduction in the authority of interim receivers that resulted from the 2009 legislative amendments has led to an increase in the number of receivers appointed under s. 243 of the BIA. As such, these receivers face increased liability and therefore actions against them should not be allowed without leave of the court under s. 215 of the BIA.

Stakeholders are invited to provide input as to whether it is appropriate to amend the insolvency legislation to require leave of the court before taking any action against a receiver.

Marshalling of Charges

The doctrine of marshalling is an equitable concept that allows courts to arrange the assets of a debtor to ensure that all creditors are paid to the greatest extent possible. For example, where a senior creditor has recourse to two or more assets from which to satisfy its debt, and a junior creditor has access to only one asset, the senior creditor would be required to satisfy its debt first out of the asset in which the junior creditor has no interest.

The BIA does not currently include the concept of marshalling. It has been suggested that it may be beneficial if the Act expressly provided for marshalling of charges to ensure greater fairness and efficiency.

Stakeholders are invited to provide input as to whether it would be appropriate to amend the insolvency legislation to codify the doctrine of marshalling charges.

Tax Issues

The following tax-related issues have been raised by stakeholders in the insolvency context. The issues are included to solicit information regarding the nature of concerns and the extent to which such issues potentially affect insolvency proceedings:

- Whether a restructured tax debtor with prior tax obligations should be allowed "fresh start accounting" for tax purposes – specifically those resulting from debt forgiveness – being dealt with as "pre-filing claims";
- Whether tax authorities should be required to send a notice in accordance with section 244 of the BIA before issuing enhanced requirements to pay;
- Whether account receivables that are the object of pre-filing enhanced requirements to pay should "re-vest" in the estate; and
- Whether debt forgiveness rules should apply in consumer proposals.

Technical Issues

Bankruptcy and Insolvency Act

Section 197 - Costs Against the Debtor

Sometimes the conduct of the debtor with respect to his or her discharge hearing creates unnecessary expenses for the trustee or creditors. Stakeholders have suggested that one remedy for this could be granting the court the explicit authority to order costs against the debtor in the appropriate circumstances.

> *Submissions are invited as to whether subsection 197(6.1) should be amended to permit costs to be awarded against the debtor.*

Section 204.3 – Losses Due to Bankruptcy Offences

Section 204.3 provides a mechanism for persons convicted of an offence under the BIA to provide compensation for the loss they have caused, but only where that loss is as a result of damage to property. Stakeholders have suggested that this be extended to all losses, not just those relating to damage to property.

> *Submissions are invited as to whether s.204.3 should be broadened to capture all losses resulting from the BIA offence.*

Disallowance of Claims

One of the roles of a trustee is to assess creditor claims. If the claim cannot be supported, the trustee will disallow it. The impact is that the creditor may no longer participate in the BIA process and will receive no dividend out of the estate. This may be a significant impact on the creditor. The existing provision permits 30 days to appeal a disallowance or to seek an extension of the 30-day period.[131] Stakeholders have suggested that the court be granted the authority to permit an appeal beyond the 30-day period in appropriate circumstances.

> *Submissions are invited as to whether it is appropriate to provide the court with the authority to extend the period for appealing the disallowance of a claim.*

Securities Firms Bankruptcies

Part XII of the BIA provides a streamlined procedural framework for the administration of the bankruptcies of securities firms. Stakeholders have noted that Part XII does not empower securities regulators or customer compensation bodies to petition insolvent securities firms into bankruptcy, and have called for BIA amendments to provide for this power and clarify the conditions under which it may be exercised.

> *Submissions are invited as to whether securities regulators or customer compensation bodies should be able to apply for a bankruptcy order.*

Preview of Proposals by the Trustee

There have been anecdotal reports that proposal trustees, after having accepted an engagement, discover that the debtor's financial situation is worse than expected. It has been suggested that a trustee should have the right to examine the size and complexity of a BIA proposal file before accepting an engagement.[132]

> *Submissions are invited as to whether proposal trustees should be provided with a mechanism to preview the size and complexity of a BIA proposal file before they accept it.*

Section 173 - Facts for Which Discharge Will be Suspended

Section 173(1) of the BIA sets out a list of facts for which the discharge of the bankrupt may be refused, suspended, or granted conditionally by the court. Some stakeholders have questioned whether the list of facts is out of date and needs to be updated.

> *Stakeholders are invited to make submissions regarding whether the list of facts for which a bankrupt's discharge will be refused, suspended or granted conditionally needs to be updated.*

Treatment of RRSPs in Bankruptcy

In 2008, the BIA was amended to exempt registered retirement savings plans (RRSPs) from seizure in bankruptcy, subject to a clawback of contributions made in the 12 months immediately prior to a bankruptcy.[133] Some stakeholders criticized the measure because it creates a potential for abuse since a bankrupt may put funds into the RRSP prior to a bankruptcy and then have access to the funds immediately following their discharge for non-retirement purposes.

Stakeholders have suggested that a lock-in mechanism, which would require the bankrupt to keep the funds in the RRSP until retirement, would fulfill the policy intent of the measure.

> *Stakeholders are invited to make submissions regarding the treatment of RRSPs in bankruptcy and potential mechanisms to protect the integrity of the insolvency regime.*

Secured Creditors Calling Proposal Meetings

The administrator of a consumer proposal must call a meeting of creditors in two circumstances: (1) where directed to do so by the official receiver or (2) where, at the expiration of the 45-day period following the filing of the consumer proposal, creditors having in the aggregate at least 25 percent in value of the proven claims have requested a meeting.[134] If neither of these circumstances arises the administrator is not obliged to call a meeting of creditors and the consumer proposal is deemed to be accepted by the creditors.[135]

In situations where the claims of unsecured creditors do not amount to at least 25 percent in value of the proven claims, the unsecured creditors would not be able to ensure that a meeting of creditors is called. As such, some stakeholders have advised that whether the consumer proposal is accepted or not in these situations can be controlled by secured creditors who may have little or no economic interest in the outcome of the proposal since they maintain their right to realize their security.

> *Stakeholders are invited to make submissions regarding the basis upon which a meeting of creditors may be called in the case of a consumer proposal.*

Footnotes

1 *Husky Oil Operations Ltd.* v. *Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 SCR 453, at paragraph 7.

2 *Schreyer* v. *Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605.

3 R.J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law Book, 2009) at page 4 (referring to UNCITRAL Legislative Guide on Insolvency Law at page 14).

4 Allan Crawford and Umar Faruqui, "What Explains Trends in Household Debt in Canada?" in *Bank of Canada Review* (Winter 2011) find that the aggregate debt-to-income ratio of Canadian households has trended upward over the past 30 years utilizing data collected from Ipso Reid's *Canadian Financial Monitor*. This trend has been documented by a 2011 TD Bank study "Assessing the Financial Vulnerability of Households Across Canadian Regions" and by Statistics Canada.

5 Bailliu *et al*. "Household Borrowing and Spending in Canada," in *Bank of Canada Review* (Winter 2011) find that the sizable increase in the ratio of household debt to income in Canada over the past decade has coincided with a period of sustained strong growth in house prices. They conclude that the main driver of the rise in household debt has been home-equity extraction—household borrowing against equity in existing homes through increases in mortgage debt and draws on home-equity lines of credit. The authors speculate that home equity may serve as a substitute for other types of consumer debt.

6 Source: The Office of the Superintendent of Bankruptcy. The consumer insolvency rate is defined as the number of consumer insolvencies per one thousand residents aged 18 years or above. The business insolvency rate is defined as the number of business insolvencies per one thousand businesses.

7 In recent years, economists and social scientists have found that the transition to adulthood is taking longer to complete. For example, using Statistics Canada survey data, Clarke (2007) finds that in "the transition to adulthood is now delayed and elongated. It takes today's young adults longer to achieve their independence: they are leaving school later, staying longer in their parents' home, entering the labour market later, and postponing conjugal unions and childbearing" (pp. 14). It is important to note that the implications of this trend for the financial situations of older cohorts and for insolvency trends have not been demonstrated conclusively. Clark, Warren. "Delayed transitions of young adults." *Canadian Social Trends 84 (2007)*: 14-22.

8 David Fieldhouse, Igor Livshits and James MacGee (2012), "Income Loss and Bankruptcies over the Business Cycle." Office of the Superintendent of Bankruptcy. The authors investigate factors that drive cyclical fluctuations in consumer insolvency filings, using an aggregate analysis using historical data at the national, provincial and city levels, and micro-level analysis which makes use of a unique dataset of Canadian filers.

9 In 2012, the GDP growth rate among the Atlantic Provinces ranged from negative to low (4.4 percent in Newfoundland and Labrador, to -1.1 percent in New Brunswick, and -0.1 percent in Nova Scotia), while Alberta (3.8 percent), Manitoba (2.6 percent) and Saskatchewan (1.9 percent) saw the highest levels of economic growth.

10 According to Statistics Canada, in 2012, Canada's unemployment rate was 7.2 percent. Newfoundland and Labrador had the highest unemployment rate in the country at 12.5 percent. Prince Edward Island and New Brunswick had the second and third highest unemployment rates at 11.3 percent and 10.2 percent, respectively. Alberta (4.6 percent) and Saskatchewan (4.7 percent) had the lowest unemployment rates. See Provincial and Territorial Economic Accounts, 2012 (Accessed on January 10, 2014).

11 Provincial exemption regimes are respected in the BIA, permitting bankrupts to keep certain property as set out in provincial legislation (e.g., work tools, a vehicle, personal belongings).

12 Section 178(1) of the BIA contains a list of debts that are not released upon discharge. Corporate bankrupts do not receive a discharge unless all debts are paid in full.

13 Section 168.1 of the BIA.

14 Standing Senate Committee on Banking, Trade and Commerce, 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the* Bankruptcy and Insolvency Act *and the* Companies' Creditors Arrangement Act.

15 Classes of non-releasable debts include fines or penalties related to criminal or quasi-criminal offences, debts owed in respect of fraud, embezzlement or misappropriation of funds, and alimony or family support orders. See BIA s.178(1) for the full list.

16 For example, see *Simone* v. *Daley*, 1999 CanLII 3208 (ON CA).

17 For a review of the issues raised by these regimes, see: "Section 270 of the *Highway Traffic Act*," Manitoba Law Reform Commission, 1997.

18 E.g., *Traffic Safety Act*, R.S.A. 2000, C. T-6, ss 102(1); *Highway Traffic Act*, R.S.O. 1990, c. H.8, ss.198(1); *Highway 407 Act*, 1998, S.O. 1998, c.28, s.22.

19 *Bankruptcy Code,* 11 U.S.C. §525(a).

20 For example, see *Canada (Superintendent of Bankruptcy)* v. *407 ETR Concession Company Limited*, 2013 ONCA 769; *Gorguis* v. *Saskatchewan Government Insurance*, 2011 SKQB 132, *Moloney* v. *Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2012 ABQB 644, and *Ontario (Finance)* v. *Clarke and Superintendent of Insurance for Ontario,* 2013 ONSC 1920.

21 Personal Insolvency Task Force: Final Report (2002).

22 Senate Report, *supra* note 22.

23 Janis Sarra and Susan B. Boyd, "Competing Notions of Fairness: A Principled Approach to the Intersection of Insolvency Law and Family Property Law in Canada," in J. Sarra ed., *Annual Review of Insolvency Law* 2011 (2012), 207 at 208 – citing a study that marital breakup accounts for approximately 10 percent of individual bankruptcies each year.

24 Section 136(1)(d.1) of the BIA.

25 Section 178(1)(b) and (c) of the BIA.

26 *Schreyer* v. *Schreyer*, 2011 SCC 35.

27 In the case, the non-bankrupt spouse successfully had the bankrupt spouse's discharge annulled and she received payment from the exempt assets.

28 BIA ss.60(4), 66.26(3) and s.147.

29 In summary administration bankruptcies, the levy is capped at $200 in accordance with Rule 123(3) of the BIA General Rules.

30 BIA ss. 121(4).

31 BIA paragraph 136(1)(d.1).

32 BIA paragraphs 178(1)(b) and (c).

33 *Re Cameron* 2003 CarswellAlta 624 (Alberta Court of Appeal).

34 Senate Report, *supra* note 22 at p. 86.

35 Senate Report, *supra* note 22 at p. 84.

36 *Ibid*., at p. 52.

37 Repayment Assistance.

38 Section 178(1.1) of the BIA.

39 Dr. Janis Sarra is the Director of the Peter Wall Institute for Advanced Studies and Professor of Law, Faculty of Law, University of British Columbia.

40 Examining the Insolvency Toolkit: Report of the Public Meetings on the Canadian Commercial Insolvency Law System.

41 BIA section 82 permits a patent holder the right to repurchase patented goods from a trustee for the original invoice price, less any depreciation.

42 BIA section 83 provides limited protection to copyright authors.

43 Sarra Report at p. 23.

44 Sarra Report at p. 12.

45 Insolvency Institute of Canada, Report of the Task Force on Derivatives (Nov. 2013).

46 Sarra Report at pp. 58-60.

47 *Ibid*.

48 U.S. Department of Justice, Appendix B: Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under United States Code by Attorneys in Larger Chapter 11 Cases. *Federal Register*, Vol. 78, No. 116, June 17, 2013.

49 See Elaine Kempson, "*Review of Insolvency Practitioner Fees Report to the Insolvency Service*," July 2013.

50 See "*Proposal paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia*," Australian Government, December 2011.

51 Section 23(1)(a)(ii)(C) of the CCAA.

52 Sarra Report, p.13.

53 CCAA s.11.7.

54 Sarra Report, p. 73.

55 CCAA s.23-25.

56 CCAA s.25 and 28 to 31.

57 Sarra Report, p. 74.

58 Sarra Report, p. 76.

59 E.g., CCAA s.25.

60 CCAA subparagraph 11.7(2)(a)(iii).

61 CCAA sections 11.7, and 28 – 30.

62 *Re White Birch Paper Holding Co.*, 2010 CarswellQue 1780 (Que. S.C.J.); *Re Canwest Global Communications Corp.* (2009), 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]).

63 *United States Bankruptcy Code*, 363 k.

64 Sarra Report, p. 26.

65 Sarra Report, p. 32.

66 Sarra Report, pp. 31-32.

67 CCAA s.36.

68 BIA s.65.13(8); CCAA s.36(7).

69 CBCA s.192.

70 Sarra Report, p. 69.

71 Policy Concerning Arrangements Under Section 192 of the CBCA.

72 CBCA subsection 192(4).

73 Sarra Report, p. 71.

74 Sarra Report, p. 115.

75 Subsection 50.4(9) of the BIA.

76 Sarra Report, page 112.

77 Sarra Report, page 123.

78 Sarra Report, page 16.

79 BIA, s.81.3 and s.81.4.

80 E.g. section 81.3(3).

81 BIA, s.136(1)(d).

82 BIA, s.81.5 and s.81.6.

83 BIA, s.60(1.3); CCAA, s.6(5)(a)(i).

84 BIA, s.60(1.3); CCAA, s.6(5)(a)(ii).

85 BIA, s.60(1.5); CCAA, s.6(6).

86 Departmental researchers relied significantly on "Employee and Pension Claims During Company

Insolvency: A Comparative Study of 62 Jurisdictions," by Dr. Janis Sarra, June 2008.

87 Many OECD countries, including the United States, the United Kingdom and Germany, provide pension benefit guarantee funds that will pay pensions (capped) in the event the employer is not able to do so. Ontario is the only jurisdiction in Canada that offers a pension benefits guarantee fund.

88 Section 1114 sets out detailed requirements that must be met prior to the court being permitted to modify or terminate such plans.

89 CCAA ss.6(5) and (6); See also BIA 60(1.3) and (1.5).

90 CCAA ss.36(7); See also BIA ss.65.13(8).

91 BIA ss.136(2) and ss.148(1).

92 Sarra Report, p. 90.

93 Sarra Report, p. 92.

94 Sarra Report, p. 105.

95 Sarra Report, p. 105-106.

96 *Bankruptcy Code* 11 USC §503(c).

97 E.g. CBCA s.241.

98 Sarra Report, p. 108.

99 Carfagnini, J.A. and C. Costa, *Claims for Post-Filing Interest and Prepayment Premiums in a CCAA Proceeding*, Annual Review of Insolvency Law 2011 (J. Sarra, Editor)

100 BIA section 81.1.

101 USBC section 546(c)(1).

102 USBC section 503(b)(9).

103 BIA section 81.2.

104 BIA s.101.

105 BIA ss.64.1(4); CCAA ss.11.51(4)

106 BIA ss.50(14) and (15); CCAA ss.5.1(2) and (3)

107 BIA s.64; CCAA s.11.5.

108 BIA ss.30(4), ss.30(5), ss.65.1(5), ss.65.1(6); CCAA ss.36(4), ss.36(5)

109 BIA ss.198.

110 BIA s.204.

111 Tasse Report; Bill C-60 (1975); Bill C-17 (1976); Colter Committee; Girgis, Jasmine, "Corporate Directors' Disqualification: The New Canadian Regime?" (2009) Alberta Law Review 46:3.

112 *Company Directors Disqualification Act 1986* (U.K.), 1986, c. 46.

113 Sarra Report, pp. 40, 42.

114 Sarra Report, p. 42.

115 Sarra Report, p. 45.

116 BIA s. 283; CCAA s. 60.

117 Sarra Report, p. 23.

118 Sarra Report, p. 48.

119 UNCITRAL Legislative Guide on Insolvency Law—Part three: Treatment of enterprise groups in insolvency.

120 Sarra Report, p. 47.

121 Sarra Report, p. 51.

122 Sarra Report, p. 50.

123 Sarra Report, p. 51.

124 See section 6, WURA, R.S.C., 1985, c. W-11.

125 CTA sections 106-110.

126 BIA section 2, definition of "corporation"; CCAA section 2(1), definition of "company."

127 Cases in which the courts have accepted the filing involving a "railway" include: Quebec Southern Railway Co. (2001), Quebec C.A. 500-11-017184-017, Kelowna Pacific Railway Ltd. (2013), and Montreal, Maine & Atlantic Canada Co. (2013).

128 BIA s.66.12.

129 Sarra Report, p. 132.

130 Sarra Report, p. 132-133.

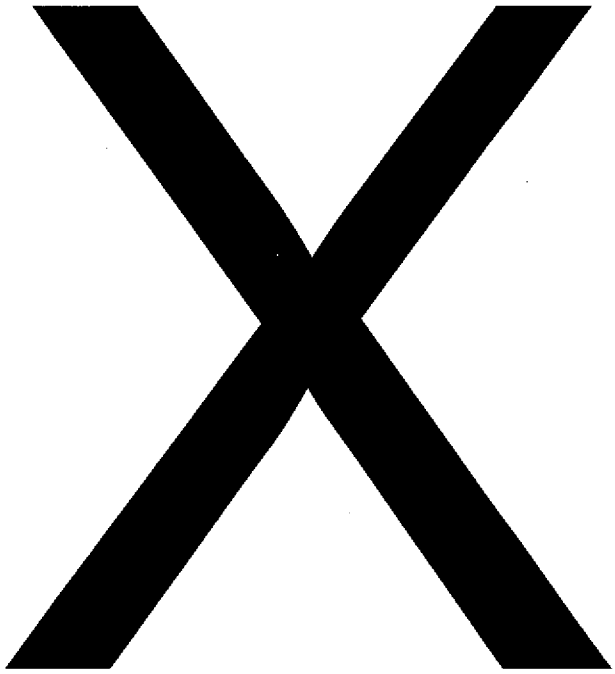
131 BIA subsection 135(4).

132 Sarra Report, p. 130-132.

133 BIA subsection 67(1)(b.3).

134 BIA section 66.15(2).

135 BIA section 66.18.



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1999 CarswellBC 2673, [1999] B.C.J. No. 2754, [2000] B.C.W.L.D. 114, 12 C.B.R. (4th) 144, 22 B.C.T.C. 268, 93 A.C.W.S. (3d) 411

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

In the Matter of the Company Act R.S.C. 1996, c. 62

In the Matter of United Used Auto & Truck Parts Ltd., VECW Industries Ltd., Seiler Holdings Ltd., United Used Auto Parts (Storage Div.) Ltd., Petitioners

Tysoe J.

Judgment: November 19, 1999
Docket: Vancouver A992950

Counsel: *William E.J. Skelly*, for Petitioners, United Group of Companies.
Douglas I. Knowles, for Ernst & Young LLP.
Martin L. Palleson, for Canadian Western Bank.
Shelley C. Fitzpatrick, for Century Services Inc.
E. Jane Milton, for Royal Bank of Canada.
John I. McLean, for Aziz Group.
Bonita Lewis-Hand, for Clarica Life Insurance Company.
R.G. Hildebrand, for City of Surrey.
Donnaree G. Nygard, for Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada (Revenue Canada).
Michael W. Watt, for International Union of Operating Engineers, Local 115.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Petitioners owned large amounts of land and operated auto-wrecking business — Petitioners were granted ex parte stay order under Companies' Creditors Arrangement Act — Stay order allowed conduct of sale by bank and C to continue and granted charge, up to $500,000, for professional fees of monitor and its legal counsel and petitioners' legal counsel — Petitioners brought application for authorization of debtor-in-possession financing and priority charge against lands — Secured creditors brought application to set aside stay order — Petitioners' application dismissed and secured creditors' application granted in part — It was not demonstrated that financing was critical for business to continue to operate or for petitioners to successfully restructure affairs — It was not clear that benefit of financing clearly outweighed potential prejudice to secured lenders — Stay order was not to be set aside in its entirety — Petitioners met realistic standard of disclosure and stay order was not to be set aside on basis of non-disclosure — Petitioners acted in good faith — Stay order was to be amended to stay conduct of sale by bank and C and to direct monitor to list lands and to receive and

negotiate all offers for lands while considering input and interests of petitioners and security holders — It was appropriate for monitor to be given priority charge for its fees and disbursements, including legal fees — It was also appropriate to create priority charge in respect of petitioners' legal fees, to extent that expenses were reasonably incurred in connection with restructuring — Amount of administrative charge to be reduced to $200,000.

The petitioners owned or had agreements for sale of 32 contiguous parcels of land totalling 150 acres. The petitioners operated an auto-wrecking business on part of the lands and employed 75 people. The petitioners experienced financial difficulties, and the petitioners entered into a series of forbearance agreements with the principal secured creditors. The agreements expired and a number of foreclosure actions were commenced. The bank and C obtained an order for conduct of sale with the consent of the petitioners. The parcels were listed for sale at a price in excess of the amount of the debt secured against the land. The petitioners made arrangements for debtor-in-possession financing and proposed that the financing be charged against the lands in priority ahead of all secured creditors except the Federal Crown and the holders of agreements for sale. The financing was alleged to be necessary to allow the petitioners to acquire new inventory for the auto-wrecking business and to retain professionals required for restructuring and bringing the operating business back to life. The court granted an ex parte stay order in favour of the petitioners under the *Companies' Creditors Arrangement Act*. The court allowed the conduct of sale to continue but directed the listing agents to deal with the petitioners or the monitor appointed under the stay order. The stay order also granted a charge, up to $500,000, for the professional fees and disbursements of the monitor and its legal counsel and the petitioners' legal counsel. The court declined to deal on an ex parte basis with the petitioners' application for authorization of the debtor-in-possession financing and the charge on the financing. Notice was given to the affected creditors and the petitioners requested that the court proceed with the application. A group of secured creditors brought an application to set aside the ex parte order.

Held: The petitioners' application was dismissed and the secured creditors' application was granted in part.

The inherent jurisdiction of the court to subordinate existing security should be exercised only in extraordinary circumstances. It must be shown that the benefit of the debtor-in-possession financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated. While the financing in the circumstances at the time would have a beneficial effect on the operating business, it was not demonstrated that it was critical for the business to continue to operate or for the petitioners to successfully restructure their affairs. It was not clear that the benefit of the financing clearly outweighed the potential prejudice to the secured lenders.

The provisions in the forbearance agreements by which the petitioners purportedly contracted out of the provisions of the Act were ineffective in view of s. 8 of the Act. The petitioners' failure to disclose the true status of refinancing efforts or restructuring advice that they had received, was not a material omission. The petitioners met a realistic standard of disclosure and the stay order was not to be set aside on the basis of non-disclosure. The petitioners acted in good faith. The petitioners' failure to abide by the terms of the forbearance agreements and the fact that they obtained restructuring advice did not demonstrate a lack of good faith in bringing the proceedings. The petitioners had substantial land holdings and an operating business. The petitioners had a legitimate concern that an en bloc sale of the lands in the foreclosure proceedings could bring an end to the operating business. It was not an act of bad faith for the petitioners to seek the protection of the Act in order to attempt to save the operating business. The stay order was not to be set aside in its entirety.

The secured creditors did raise legitimate concerns that the petitioners might thwart any sale of the lands unless the price met with their approval and that the petitioners might not act reasonably in that regard. The evidence suggested that the petitioners had not acted reasonably in the attempts to sell the lands over the preceding two years. The stay order was to be amended so that the conduct of sale was also stayed and the listing agreement could not be acted upon by the bank and C. The amendment was to direct the monitor to list the lands on the same basis as the existing listing agreements, and the monitor was to receive and negotiate all offers for the lands or any part of the lands. The monitor was to consider the input of the petitioners and the security holders and to take into account the interests of the parties, but the petitioners and holders were not to interfere with any negotiations undertaken by the monitor. The offers were to be subject to court

approval. The monitor was an officer of the court and had an obligation to act independently and to consider the interests of all parties. The potential continuation of the operating business was one of the considerations to be taken into account by the monitor in assessing offers on the land.

It was appropriate for the monitor to be given a priority charge for its fees and disbursements, including legal fees. The monitor acted on behalf of the court to provide information and monitoring for the benefit of all parties. It was also appropriate for the court to create a priority charge in respect of the petitioners' legal fees. The cash-flow projections of the petitioners did not provide for the payment of any legal expenses if there was no injection of working capital by way of the debtor-in-possession financing. The petitioners required legal advice in order to successfully restructure their affairs. A priority charge was to be given in respect of the petitioners' legal expenses, but only to the extent that the expenses were reasonably incurred in connection with the restructuring. The $500,000 maximum amount of the administrative charge in the stay order was too high and was to be reduced to $200,000.

Table of Authorities

Cases considered by *Tysoe J.*:

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

Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (B.C. C.A.) — referred to

Mooney v. Orr (1994), 33 C.P.C. (3d) 31, [1995] 3 W.W.R. 116, 100 B.C.L.R. (2d) 335 (B.C. S.C.) — considered

Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321, 11 C.P.C. (3d) 352, 57 O.A.C. 241 (Ont. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) — applied

Royal Oak Mines Inc., Re (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — considered

Starcom International Optics Corp., Re (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) — applied

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) — considered

Statutes considered:

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

s. 8 — referred to

APPLICATION by petitioners for authorization for debtor-in-possession financing and priority charge against lands; APPLICATION by secured creditors to set aside stay order.

***Tysoe J.*:**

1 *THE COURT*: On November 8, I granted an ex parte stay Order under the *Companies' Creditors Arrangement Act* (the "CCAA") in favour of the Petitioners. In granting the Order, I indicated that I was not creating any burden on creditors who wished to apply to set aside the Order. I declined to deal on an ex parte basis with the request of the Petitioners that I authorize debtor-in-possession ("DIP") financing in the amount of $1.1 million and create a charge for such financing in priority to all existing security except the charge in favour of the Federal Crown and the holders of agreements for sale.

2 After giving notice to the affected creditors, the Petitioners are now asking me to deal with the request for the DIP financing. One of the groups of the secured creditors has concurrently applied to set aside the November 8 Order, in whole or in part, and all of the other secured creditors support the application.

3 The Petitioner, VECW Industries Ltd., commenced business in 1958 in Victoria as the seller of English car parts. The business grew and VECW established an auto wrecking business in Surrey in 1963. The Victoria operation was closed in 1990. Over the years the Petitioners acquired additional land in Surrey and they now own or have agreements for sale on 32 contiguous parcels aggregating approximately 150 acres. At the present time, the auto wrecking business operates on approximately 40 acres of land and employs approximately 75 people.

4 The Petitioners first ran into financial difficulty in 1989 when they suffered significant losses. The Petitioners have only been profitable in two or three years since that time, the most recent profitable year being 1996. The accumulated losses have essentially been financed by mortgaging of the real estate. The gross revenues of the auto wrecking business have decreased from $14 million in 1996 to $6.5 million in 1998, and the projected revenue figure for 1999 is $3 million.

5 The Petitioners entered into a series of forbearance agreements with the principal secured creditors, but when they expired a number of foreclosure actions were commenced in late 1998 or early 1999. Orders Nisi were granted and redemption periods ran their course. On July 28, 1999, an order for Conduct of Sale was granted to Royal Bank of Canada and Century Services Inc. The Order was granted with the consent of the Petitioners. The 32 parcels were listed for sale with Colliers Macaulay Nicholls Inc. and J.J. Barnicke Vancouver Ltd. by a listing agreement dated October 12, 1999. The parcels are individually listed at an aggregate price of $49.6 million and an en bloc price of $32 million.

6 The aggregate amount of the debt secured against the real estate is approximately $24 million.

7 There is disagreement as to the appraised value of the real estate. There have been two recent appraisals conducted by Burgess Austin, which was commissioned by the Royal Bank and Century Services, and by Grover Elliot, which was commissioned by the Petitioners. The range of the two appraisals for the sale of the land on a lot-by-lot basis, before making any allowance for carrying costs, selling expenses and developer profit, is $44.4 million to $48.5 million. The selling period for the land on a lot-by-lot basis has been estimated from 3 to 4 years to 7 to 8 years. Grover Elliot did not provide an en bloc valuation for the land. The final en bloc valuation of Austin Burgess was $23 to $25 million but an earlier draft of its appraisal valued the land on an en bloc basis at $30 million.

8 The Petitioners have made arrangements for DIP financing in the amount of $1.1 million, with $200,000 being withheld for fees and an interest reserve. It is proposed that the financing be charged against the real estate in priority ahead of all of the secured creditors except the Federal Crown which is owed monies for unremitted source deductions and GST and except for the holders of agreements for sale. The President of the Petitioners had deposed that the DIP financing is essential for the purpose of allowing the Petitioners to acquire new inventory for the auto wrecking business, retain the professionals required for the restructuring and to generally bring the operating business back to life. The Petitioners have provided cash flow statements showing the effect of this injection of working capital.

9 In granting the stay Order, I allowed the conduct of sale to continue but I directed that the listing agents were to deal with the Petitioners or the Monitor appointed under the stay Order, rather than dealing with the Royal Bank and Century Services. The stay Order also granted a charge, up to $500,000, for the professional fees and disbursements of the Monitor and its legal counsel and the Petitioners' legal counsel.

10 The secured creditors attack the stay Order on two main grounds. First, they say that the Petitioners did not make full and frank disclosure when obtaining the ex parte order. Second, they say that the Petitioners are not acting in good faith and are abusing the CCAA by using this proceeding to delay a sale of the real estate.

11 Numerous non-disclosures were alleged but I need only address the three main complaints. First, it was asserted that the Petitioners did not disclose the existence of provisions in the forbearance agreements by which the Petitioners purportedly contracted out of the provisions of the CCAA. As I advised during the course of submissions, these provisions were disclosed to me on November 8 and I was of the view that they were ineffective in view of s. 8 of the CCAA.

12 Second, it is said that the Petitioners failed to disclose the true status of the refinancing efforts of Remington Financial Group, Inc. If there was any non-disclosure in this regard, I do not consider it to be material. In granting the stay Order, I did not rely on any imminent prospect of refinancing.

13 Third, the secured creditors point to the non-disclosure of the fact that the Petitioners sought advice from Deloitte & Touche Inc. in February 1998 and were provided with a report advising them to consider a restructuring. I do not consider this omission to be material. Knowledge of this report would not have affected my decision to grant the stay Order.

14 As was pointed out in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (B.C. S.C.), the standard of disclosure must be realistic. In my view, the Petitioners met a realistic standard of disclosure and I decline to set aside the stay Order on the basis of non-disclosure.

15 I am also not persuaded by the submissions of the secured lenders that the Petitioners are not acting in good faith. The facts that the Petitioners failed to abide by the terms of the forbearance agreements and that they obtained restructuring advice from Deloitte & Touche Inc. in February 1998 does not, in my view, demonstrate a lack of good faith in bringing these proceedings.

16 The Courts have consistently recognized the broad public policy objectives of the CCAA. The purpose of the legislation was described in the following passage from *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.):

> 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.

17 In the present case, the Petitioners have substantial land holdings and an operating business. It is their intention to reorganize their affairs in order to save the auto wrecking business. They have a legitimate concern that an en bloc sale of the lands in the foreclosure proceedings could bring an end to the operating business. In my view, it is not an act of bad faith to seek the protection of the CCAA in order to attempt to save the operating business. The arguments of the secured lenders in this regard would have been more persuasive if the only business of the Petitioners was land holdings, but the Petitioners do have an active business which must be considered.

18 Accordingly, I decline to set aside the stay Order in its entirety.

19 As I indicated during the course of submissions, I appreciate the concerns of the secured creditors that the Petitioners may thwart any sale of the lands unless the price meets with their approval and that the Petitioners may not act reasonably in this regard. There is evidence to suggest that the Petitioners have not acted reasonably in the attempts to sell the lands over the

past two years. I also agree with Mr. McLean's comment that the Court probably does not have the jurisdiction to amend the current listing agreement. Therefore, I set aside paragraph 33 of the stay Order and I order the following in its place:

(a) the stay of proceedings contained in paragraph 2 of the stay Order applies to the foreclosure proceedings, with the result that the Order for Conduct of Sale dated July 28, 1999 is also stayed and the listing agreement cannot be acted upon by the Royal Bank and Century Services;

(b) the Monitor is directed to list the lands with Colliers Macauly Nicholls Inc. and J.J. Barnicke Vancouver Ltd. on the same basis as the current listing agreement, provided that the Monitor may apply for further directions if it believes that there should be any changes in the listing arrangements;

(c) the Monitor is to receive and negotiate all offers for the lands or any part thereof;

(d) the Monitor is to provide copies of all offers to the Petitioners and the holders of the mortgages and agreements for sale and is to consider their input with respect to any offers, provided that the Monitor may accept an offer or make a counter-offer one full business day after providing a copy of the offer to these stakeholders;

(e) the Petitioners and the secured creditors are not to interfere with any negotiations undertaken by the Monitor and while they may answer any unsolicited inquiries from prospective purchasers, they are not to initiate contact with them;

(f) all offers are subject to court approval in this proceeding;

(g) in dealing with offers, the Monitor is directed to take into account the interests of the Petitioners and the interests of the secured creditors, as well as the unsecured creditors, and the Monitor is to give consideration to en bloc offers while weighing the viability of the continued operation of the auto wrecking business;

(h) in the event that any of the secured creditors believe that the Monitor is acting unreasonably in dealing with offers, there is liberty to apply to replace the Monitor with another party with respect to the sale of the lands or to seek directions with respect to any offer not accepted by the Monitor.

20 When I suggested during submissions that the Monitor be given conduct of the sale of the lands, counsel for the secured creditors argued that another chartered accounting firm be appointed as the party designated to have conduct of the sale. They submitted that the Monitor is seen to be in the camp of the Petitioners and that the party having conduct of the sale should give no consideration to the continuation of the operating business. I do not accept these submissions. The Monitor is an officer of the Court and has an obligation to act independently and to consider the interests of the Petitioners and its creditors. If the secured lenders can satisfy the Court that the Monitor is not performing its functions independently, there is liberty to apply for a replacement. With respect to the second point, it is my view that the potential continuation of the operating business is one of the considerations to be taken into account when assessing offers on the lands.

21 I now turn to the Petitioners' request for a priority charge in respect of the proposed DIP financing.

22 The first case in which a court in Canada created a charge against the assets of a company in CCAA proceedings was *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), where the Court created a charge to secure credit extended by suppliers of Westar Mining Ltd. during the period of the stay. The Court created the charge against unencumbered assets and it was not necessary to postpone any existing security.

23 In the *Westar Mining Ltd.* case, Macdonald J. distinguished the CCAA situation from the situation where a receiver-manager requests the Court to exercise its inherent jurisdiction to create a charge, such as occurred in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 52 C.B.R. (N.S.) 271 (B.C. C.A.)

24 While I agree with Macdonald J. that there are considerations in a CCAA situation which do not exist in relation to a receivership, it is my view that the inherent jurisdiction of the Court to subordinate existing security should only be exercised in extraordinary circumstances.

25 A somewhat similar situation arises when a request is made for a charge against trust assets. The jurisprudence suggests that the Court's jurisdiction to create such a charge should be sparingly exercised: for example, see *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 14 C.B.R. (3d) 6 (Ont. C.A.).

26 The extraordinary nature of superpriority for DIP financing in the context of CCAA proceedings was acknowledged by Blair J. in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at paragraph 24:

> It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances - as opposed, for instance, to a receivership or bankruptcy - and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

Those comments continue to have force on an application for priority financing after the initial Order.

27 Farley J. expressed his views in the subsequent application in the same proceedings at item 22 of paragraph 6 of *Re Royal Oak Mines Inc.* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]):

> Aside from the question of the lienholders who have registered liens which but for the Initial Order granted by Blair J. (but subject to the comeback clause) would have priority over the DIP financing, I see no reason to interfere with this superpriority granted. It would seem to me that Blair J. engaged properly in a balancing act as to the $8.4 million of superpriority DIP financing as authorized. I am in accord with his views as expressed in *Re Skydome Corporation* released Nov. 27, 1998 where Blair J. stated at p. 7:
>
> > This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors - in the exercise of balancing the prejudices between the parties which is inherent in these situations - have been asked to make such a sacrifice. Cases such as ***Re Westar Mining Ltd.*** (1992), 14 C.B.R. 88 (B.C.S.C.) are examples of the flexibility which courts bring to situations such as this. See also ***Re Lehndorff Gen Partner*** (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); ***Olympia & York Developments Limited v. Royal Trust Co.*** (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).
>
> Implicit in his analysis and part of the equation is the reasonably anticipated benefits for all concerned which derive from these sacrifices. It would seem to me that Holden J.A. in his endorsement in ***Re Dylex Limited*** released January 23, 1995 implicitly engaged in this balancing of prejudices act where he observed:
>
> > I do not believe that the Bank of Montreal will be adversely affected by the making of this order. As a result of the bridge financing, new receivables will be generated which will assist in re-paying or securing the bridge financing.
>
> Better and more timely information will be of assistance in minimizing the momentum effect in the future. My conclusion as to the appropriateness of the superpriority granted the DIP financing is of course limited to the Initial Order $8.4 million amount and is based upon the conditions now determined to be prevailing as of the authorization date. Each subsequent DIP financing authorization and the priority to be attributed to it will have to be determined on the merits and circumstances then existing.

28 While I do not disagree that it is an exercise of balancing interests, it is my view that there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated. For example, in *Westar Mining Ltd.*, the charge was necessary to keep the business in operation and there was no prejudice to any secured lenders.

29 In the present situation, while the DIP financing would obviously have a beneficial effect on the operating business, I am not satisfied that it is critical for the business to continue to operate or for the Petitioners to successfully restructure their affairs. Nor do I have sufficient confidence in the cash flow projections and the appraised values of the realty that I can conclude that the benefit of the DIP financing clearly outweighs the potential prejudice to the secured lenders.

30 In the result, I dismiss the Petitioners' application for a priority charge to secure DIP financing.

31 The secured lenders also object to the priority charge for the professional fees and disbursements of the Monitor, its legal counsel and the legal counsel for the Petitioners. The jurisdiction of the Court in this regard was considered in the case of *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]), where Saunders J. said the following at paragraphs 48 and 49:

> This court, in previous cases which postdate ***Fairview Industries Ltd., Re***, has acted to give priority for payment of accounts. For example, in ***Westar Mining Ltd., Re*** (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.) Mr. Justice Macdonald exercised his discretion to create a "first charge" to secure monies advanced to permit operations to continue. Considering this authority, and the genesis of the office of monitor, I conclude that this court does have jurisdiction to create a priority for fees charged by the monitor.
>
> Further, in my view the order sought is appropriate. The monitor acts on behalf of the court to provide information and monitoring for the benefit of all parties. An order protecting the fees, as first granted in the *ex parte* order, shall continue.

32 I agree with these comments and I believe that it is appropriate for the Monitor to be given a priority charge for its fees and disbursements, including disbursements incurred for legal counsel. I will return shortly to the appropriate amount of the charge.

33 In *Starcom International Optics Corp.*, Saunders J. concluded that the Court had the jurisdiction to create a priority charge in respect of other professional fees but she declined to do so because the evidence was that they could be paid from cash flow. In this case, the cash flow projections prepared by the Petitioners do not provide for the payment of any legal expenses if there is no injection of working capital by way of the DIP financing.

34 I am satisfied that some priority should be given at this stage for the Petitioners' legal expenses because they will require legal advice in order to successfully restructure their affairs. However, in the event that the restructuring is not successful and there is a shortfall in the recovery for the secured lenders, it would not be fair to require those lenders to bear all of the burden of the expense of the lawyers for the Petitioners in acting against them. The secured lenders should not be expected to underwrite the expenses of lawyers who act unreasonably or who act on unreasonable instructions to frustrate them in the recovery of the monies owed to them.

35 Hence, I am only prepared to give a priority charge in respect of the Petitioners' legal expenses to the extent that they are reasonably incurred in connection with the restructuring. As an example, if the Court were to conclude that the position of the Petitioners' on an application was unreasonable, the Petitioners' counsel would not have the benefit of the priority charge and would have to look to other sources for payment.

36 After hearing full submissions on this matter, I have also concluded that the $500,000 maximum amount of the administrative charge in paragraph 30 of the November 8 stay Order is too high without a requirement for further justification. I reduce the amount to $200,000, subject to further order of the Court.

37 Two creditors asked to be excluded from these proceedings because of their unique situation. Both R.I.C. Lands Ltd. and Western Canadian Bank submitted that their security relates to isolated parcels and there is no reason why they should be part of the CCAA proceeding. I do not agree because the parcels of land against which they hold security form part of the collective land holdings of the Petitioners. There is no principled reason to exempt them from the stay Order.

38 Subject to the variations which I have ordered, the stay Order is to continue in force pending further Court application. When these applications initially came before me on November 15, I directed that the Monitor was not to take any steps under the stay Order except answering inquiries from creditors until further order. I now direct the Monitor to act under the stay Order.

Order accordingly.

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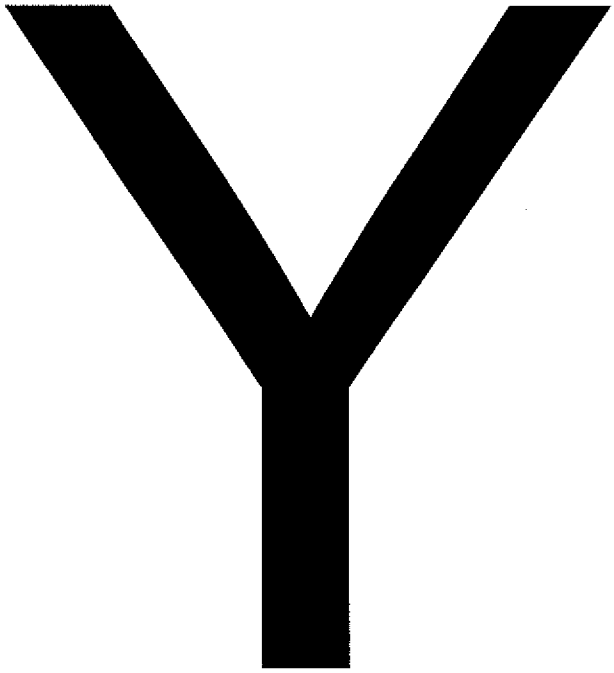

2011 ABQB 399
Alberta Court of Queen's Bench

Winalta Inc., Re

2011 CarswellAlta 2237, 2011 ABQB 399, [2011] A.J. No. 1341, [2012] A.W.L.D. 737, 521 A.R. 1, 84 C.B.R. (5th) 157

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

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

J.E. Topolniski J.

Heard: March 21, 2011
Judgment: June 24, 2011
Docket: Edmonton 1003-06865

Counsel: Kentigern Rowan for Deloitte & Touche Inc.
Darren Bieganek for Winalta Group

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Fees and conduct of monitor — Monitor acted for debtor in proceedings under Companies' Creditors Arrangement Act — Monitor was appointed at behest of principal creditor and shared certain reports with principal creditor, who provided interim financing — After receiving report, principal creditor ceased to provide interim financing, although this may have been coincidence — Monitor brought application to be paid fees — Monitor found to have acted improperly and given 60 days to make further submissions on fees — No presumption of regularity exists regarding fees — Insolvency monitor generally was appropriate comparator for judging fees, not chartered accounts generally or legal profession — Monitor charged separately for IT staff, administration and secretarial staff — Monitor required to provide more evidence regarding billing practices for IT staff, administration and secretarial staff — Use of subordinate staff did not constitute duplication of work, despite cursory descriptions of some items — CCAA proceedings moved quickly, restructuring involved multiple entities, including publicly traded parent, liabilities far outweighed asset values, intensive sales campaign was initiated to shed redundant asset, and there were numerous claims and disallowances — No evidence that subordinate staff were not thorough and diligent — No evidence, despite extensive questioning, that duplication of services existed among partners — Administrative charge of 6 per cent of total fees in lieu of disbursements was not reasonable, and monitor required to prepare documentation of disbursements — Parties agreed that fees for internal review were not proper — Provisions of s. 23 of Act did not allow monitor to provide principal creditor with report — Initial order gave authority for monitor to aid in required reports of debtor, but not to deliver them to principal creditor — Monitor was not transparent in actions regarding report, and ignored line between impartial court officer and consultant for principal creditor — No quantifiable loss or evidence of damage to estate was shown, but failure to scrupulously avoid conflict of interest negatively impacted integrity of insolvency system — Appropriate remedy was to reduce fees by amount associated with preparation of report.

Table of Authorities

Cases considered by *J.E. Topolniski J.*:

Afton Food Group Ltd., Re (2006), 18 B.L.R. (4th) 34, 2006 CarswellOnt 3002, 21 C.B.R. (5th) 102 (Ont. S.C.J.) — followed

Agristar Inc., Re (2005), 2005 ABQB 431, 2005 CarswellAlta 841, 12 C.B.R. (5th) 1 (Alta. Q.B.) — considered

Bank of Montreal v. Nican Trading Co. (1990), 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397, 43 B.C.L.R. (2d) 315 (B.C. C.A.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — followed

Belyea v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27, 46 C.B.R. (N.S.) 244 (N.B. C.A.) — followed

Columbia Trust Co. v. Coopers & Lybrand Ltd. (1986), 76 A.R. 303, 49 Alta. L.R. (2d) 93, 1986 CarswellAlta 259 (Alta. C.A.) — followed

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 8 C.B.R. (5th) 34, 2005 SKQB 24, 2005 CarswellSask 22 (Sask. Q.B.) — considered

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 68, 2005 SKQB 252, 2005 CarswellSask 410 (Sask. Q.B.) — referred to

Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd. (2003), 2003 CarswellOnt 1104, 40 C.B.R. (4th) 10 (Ont. S.C.J.) — considered

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Hess, Re (1977), 23 C.B.R. (N.S.) 215, 1977 CarswellOnt 68 (Ont. S.C.) — followed

Hickman Equipment (1985) Ltd., Re (2002), 2002 CarswellNfld 154, 34 C.B.R. (4th) 203, 214 Nfld. & P.E.I.R. 126, 642 A.P.R. 126 (Nfld. T.D.) — considered

Laidlaw Inc., Re (2002), 2002 CarswellOnt 790, 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List]) — considered

Nelson, Re (2006), 2006 CarswellOnt 4198, 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) — referred to

Northland Bank v. G.I.C. Industries Ltd. (1986), 1986 CarswellAlta 426, 45 Alta. L.R. (2d) 70, 60 C.B.R. (N.S.) 217, 73 A.R. 372, [1986] 4 W.W.R. 482 (Alta. Master) — considered

Peat Marwick Ltd. v. Farmstart (1983), 1983 CarswellSask 66, [1984] 1 W.W.R. 665, 30 Sask. R. 31, 51 C.B.R. (N.S.) 127 (Sask. Q.B.) — referred to

Prairie Palace Motel Ltd. v. Carlson (1980), 1980 CarswellSask 25, 35 C.B.R. (N.S.) 312 (Sask. Q.B.) — referred to

Sally Creek Environs Corp., Re (2010), (sub nom. *Sally Creek Environs Corp. (Bankrupt), Re)* 261 O.A.C. 199, 2010 CarswellOnt 2634, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) — distinguished

Siscoe & Savoie v. Royal Bank (1994), 1994 CarswellNB 14, 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42, 404 A.P.R. 42 (N.B. C.A.) — referred to

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, 205 D.L.R. (4th) 94, [2001] 10 W.W.R. 204, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

843504 Alberta Ltd., Re (2003), 30 Alta. L.R. (4th) 91, 4 C.B.R. (5th) 306, 351 A.R. 222, 2003 CarswellAlta 1786, 2003 ABQB 1015 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 13.5 [en. 1992, c. 27, s. 9(1)] — considered

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

s. 23 — considered

s. 23(1)(h) — considered

s. 23(1)(i) — considered

s. 25 — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
R. 34 — considered

R. 35-53 — referred to

R. 39 — considered

R. 44 — considered

Regulations considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Companies' Creditors Arrangement Regulations, SOR/2009-219

s. 7 — referred to

APPLICATION by monitor for approval of fees.

***J.E. Topolniski J.*:**

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

1 Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

2 The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about $9.5 million, while its liabilities exceeded $73 million.

3 The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

4 Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for $1,155,206.05 (Fee) and is asking for a $275,000.00 adjustment for alleged overcharging. It complains about the following:

> (i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);
>
> (ii) duplication;
>
> (iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);
>
> (iv) mathematical errors ($47,979.39); and
>
> (v) charges for internal quality reviews described as something "required to be independent from the engagement" ($10,000.00).

5 The Winalta Group also seeks a $75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

6 Deloitte & Touche Inc. has agreed to deduct its $10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

7 A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

8 The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

9 In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of $47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

10 The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

11 Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

> (i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;
>
> (ii) HSBC would be unaffected by the *CCAA* proceedings;
>
> (iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and
>
> (iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

12 On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

13 HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

14 The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

15 There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

16 The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of

the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

17 In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

18 There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

19 In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

> Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

20 At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

> (i) approval of Canadian and American counsel fees in a cross-border insolvency (*Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]); or
>
> (ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

21 In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 (Sask. Q.B.) at para. 10, (2005), 8 C.B.R. (5th) 34 (Sask. Q.B.), Kyle J. commented in the context of opposed applications to extend a stay under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

22 On a different application in the same proceeding (2005 SKQB 252 (Sask. Q.B.)), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

23 In *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83, additional reasons at2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) , Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

24 Given the paucity of judicial commentary on the fees of *CCAA* monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

25 One of the cases most often cited is *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at paras. 3 and 9, (1983), 44 N.B.R. (2d) 248 (N.B. C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

> ...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...
>
> ...The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

26 In *Agristar Inc., Re*, 2005 ABQB 431, 12 C.B.R. (5th) 1 (Alta. Q.B.) , Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a *CCAA* monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

27 Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

28 In *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

> (a) allowing the trustee a fair compensation for his services;
>
> (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
>
> (c) encouraging efficient, conscientious administration of the estate.

29 Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

30 In my view, the appropriate focus on an application to approve a *CCAA* monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the *CCAA* process. As with any inquiry, the evidence proffered will be important in making those determinations.

31 The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

33 The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and

senior management positions, with (discounted) hourly billing rates ranging from $65.89 per hour (clerical services) to $460.79 per hour (senior management services).

34 The Winalta Group urges that the (discounted) hourly rate of $588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) Clerical, administrative, and IT staff

35 In *Peat, Marwick Ltd.* at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

36 Referee Funduk in *Northland Bank* refused to follow that aspect of the *Peat, Marwick Ltd.* decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

37 The Alberta Court of Appeal weighed in on the topic in *Columbia Trust Co. v. Coopers & Lybrand Ltd.* (1986), 76 A.R. 303 (Alta. C.A.), Stevenson J.A. stating at para. 8:

> ... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

38 In the result, the court in *Columbia Trust Company* elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

39 In *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.), at 93, (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court, observed that *Columbia Trust* qualified but did not overrule *Northland Bank* as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

40 The law is no different as it concerns a *CCAA* monitor. While the court should avoid microscopic examination of the Monitor's work, the *Columbia Trust* requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in *Northland Bank* that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

41 In the present case, the Initial Order specified that: "[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

42 Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish that the service should

be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

43 The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

44 The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) Professional staff (non-partner)

45 The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

46 Like Hall J. in *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.) at para. 20, (2002), 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.), I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

47 Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

48 Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (*Hickman Equipment (1985) Ltd.* at para. 26).

49 Consideration of the factors articulated in *Belyea* supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

50 There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

51 I am mindful that the Winalta Group was a co-operative debtor.

3. Duplication of work by partners

52 The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

53 HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

54 It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriquez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main raison d'être was to liaise with and provide comfort to HSBC.

55 Both Messrs. Rodriquez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriquez and Keeble.

56 The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriquez ($127,000.00) and for Mr. Keeble ($209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

57 The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriquez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

58 The Winalta Group contends that the Monitor's $50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

59 The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

60 Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as *CCAA* Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

61 A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

62 The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a *CCAA* debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

63 The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

64 The disbursement account will be prepared at the Monitor's own cost.

5. Mathematical errors

65 The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

66 At the hearing of this matter, the Monitor quite properly conceded that the $10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

67 A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

68 Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

69 The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

70 The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

> (1) the bank appoints a receiver for all companies on September 7, 2010;
>
> (2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriquez and Keeble the next day.

71 Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

72 The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it lead to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a *CCAA* monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

73 Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

> 1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.
>
> 2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.

3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:

(a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and

(b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

Step 1: Reviewing the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation

(a) The monitor's fiduciary and ethical duties

74 Section 25 of the *CCAA* provides that:

25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

75 Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

(a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment (Rule 44).

76 In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

77 A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.), at 8; *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) at para. 2; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 20; and *843504 Alberta Ltd., Re*, 2003 ABQB 1015 (Alta. Q.B.) at para. 19, *843504 Alberta Ltd., Re* (2003), 351 A.R. 222 (Alta. Q.B.)). The following observations made by Farley J. in *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.), at 247 about a bankruptcy trustee's duty of impartiality resonate:

The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

78 In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996) 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

79 Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

80 Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

81 Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

82 Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) The Monitor's legislated and court ordered duties

83 One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

84 Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

85 The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

86 HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

87 Clause 28(d) of the Initial Order reads, in part, as follows:

> 28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:
>
> (d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender.
>
> [Emphasis added.]

88 Clause 30 of the Initial Order states:

> The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential,

> the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

89 The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) Principles of interpretation

90 The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

91 In *Smoky River Coal Ltd., Re*, 2001 ABCA 209, 299 A.R. 125 (Alta. C.A.), the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

92 The issue in *Smoky River Coal Ltd.* was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

93 The provision at issue in *Afton Food Group Ltd., Re* (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the *Smoky River Coal Ltd.* considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

> (i) assume that the parties carefully drafted the terms of the order;
>
> (ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and
>
> (iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

94 The different approaches employed by the courts in *Smoky River Coal Ltd.* and *Afton Food Group Ltd.* are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

95 In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

96 I adopt the reasoning in *Afton Food Group Ltd.* that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

97 The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(b) Interpreting the relevant provisions of the Initial Order and the CCAA

98 The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

99 Section 23 of the *CCAA* sets out certain reporting requirements for a court- appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

100 Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

101 If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

102 I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

103 This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

104 Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBS, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

105 Finally, this interpretation is supported by reference to the object of the *CCAA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

106 The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

107 Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare

to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

108 However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

109 The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

110 The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

111 Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

112 The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

113 Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that theMonitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

114 In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

115 HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

116 No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, *Sally Creek Environs Corp., Re*, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) is informative, although distinguishable on its facts.

117 *Murphy* concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

118 On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from $240,000.00 to $1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

119 These directives apply equally to a court-appointed *CCAA* monitor.

120 In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

121 There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (*Nelson, Re* (2006), 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) at para. 31 (Ont. S.C.J.)).

122 Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (*Murphy* at para. 112; *Nelson, Re* at para. 31).

123 Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

124 Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

125 The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

126 The Monitor exceeded it statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed *CCAA* monitor and a private monitor.

127 In the result:

> (i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.
>
> (ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.
>
> (iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.
>
> (iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

• +

(v) The $10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Order accordingly.

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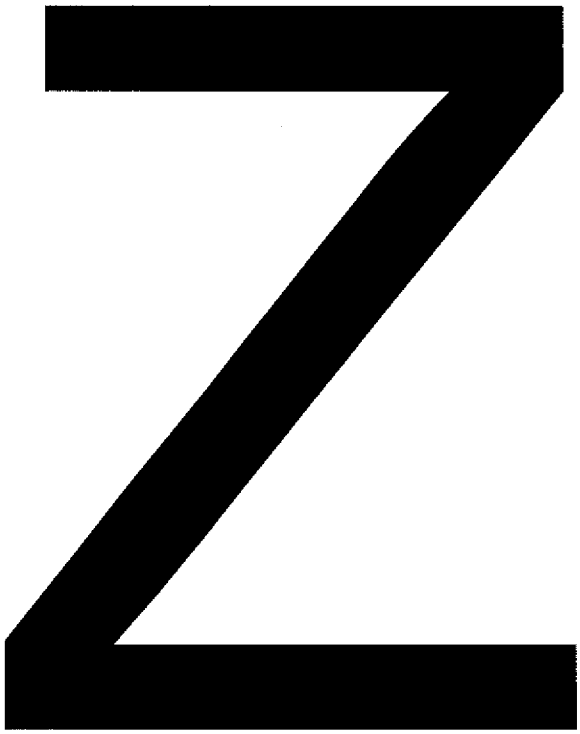

2010 BCSC 957
British Columbia Supreme Court

HSBC Bank Canada v. Bear Mountain Master Partnership

2010 CarswellBC 1779, 2010 BCSC 957, [2010] B.C.W.L.D. 8397, [2010] B.C.J. No. 1346, 190 A.C.W.S. (3d) 1015

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 BEAR MOUNTAIN MASTER PARTNERSHIP, BEAR MOUNTAIN DEVELOPMENT HOLDINGS LTD., 18 ON 18 DEVELOPMENTS LTD, AND BEAR MOUNTAIN RESORT MANAGEMENT CORP.

HSBC Bank Canada (Petitioner) and Bear Mountain Master Partnership Bear Mountain Development Holdings Ltd., 18 on 18 Developments Ltd., Bear Mountain Resort Management Corp., 391043 Alberta Ltd. as trustee of the Vernon Family Trust, Kory Les Rasmus Gronnestad as trustee of the Gronnestad Family Trust, Leonard Greig Barrie as trustee of the Barrie Family Trust, 624583 B.C. Ltd., Bear Mountain Developments Corporation as trustee of Bear Mountain Realty Fund, Vulpine Enterprises Ltd., Jackson Penney, Afrt Bear Mountain Investment Corp., Wildhorse Management Ltd., 670513 B.C. Ltd., Grappler Development Ltd. (Respondents)

D.M. Masuhara J.

Judgment: July 5, 2010
Docket: Vancouver S102120

Counsel: John Grieve for Petitioner
Steven Golick for Chief Restructing Officer
Colin Emslie for Monitor
Alan Freydenlund, Scott Stephens for Romspen
Jane Milton for Bear Mountain Master Partnership
Ken Lenz for Len Barrie
Neva Beckie for Canada Revenue Agency
Stephanie Jackson for Ministry of Attorney General

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Debtors were related companies involved in construction and sale of large development consisting of two golf courses and residential and commercial areas — Creditor H was bank that was primary financier of development — Creditor R was secured creditor that had loaned debtors $16 million secured by commercial properties at development — Debtors successfully applied for protection under Companies' Creditors Arrangement Act — Chief restructuring officer (CRO) was appointed pending appointment of new chief executive officer (CEO) for debtors — Creditor H brought application for order extending stay of proceedings, authorizing CRO to file consolidated plan of arrangement, and approving appointment of new CEO for debtors — CRO brought cross-application for order approving its accounts and activities and approving its solicitors' accounts — Application granted; cross-application granted — Proposed plan would not affect creditor R's

interests — Creditor R was at liberty to file competing plan if it wished — Appointment of CRO had always been regarded as temporary arrangement pending appointment of new CEO — Appointment of new CEO would provide financial savings — Creditor R's concerns about new CEO were alleviated by fact that monitor would remain in place — Creditor R was at liberty to bring to attention of court any improprieties on part of CRO that might be discovered.

Table of Authorities

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

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

Pope & Talbot Ltd., Re (2008), 2008 CarswellBC 1726, 46 C.B.R. (5th) 34, 2008 BCSC 1000 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

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

APPLICATION by creditor for order extending stay of proceedings, authorizing chief restructuring officer (CRO) to file consolidated plan of arrangement, and approving appointment of new chief executive officer for debtors; CROSS-APPLICATION by CRO for order approving its accounts and activities and approving its solicitors' accounts.

***D.M. Masuhara J.*:**

1 This is a CCAA proceeding, in which the petitioner, HSBC Bank of Canada ("HSBC") has sought relief over Bear Mountain Master Partnership, Bear Mountain Development Holdings Ltd., 18 on 18 Developments Ltd. and Bear Mountain Resort Management Corp. (the "Bear Mountain Respondents") These entities were involved in the construction and sale of a golf course resort/residential development known as Bear Mountain Golf Resort and Properties (the "Development"), located near Victoria, B.C. The Development has proceeded over a number of years and now includes two golf courses, a Westin hotel, several condominium structures, a shopping and commercial area, and thousands of existing or pending residential building lots and commercial space. The Bear Mountain Respondents currently employ some 350 individuals, which expands during the golf season.

2 The petitioner is the primary financier of the Development and is owed in excess of $250 million. The Bear Mountain Respondents have been in default of their obligations to the petitioner since 2008.

3 The petitioner has supported the Bear Mountain Respondents through various forbearance agreements and by funding more than $25 million in additional loans since default.

4 The petitioner has brought on applications for the following:

a) That the stay of proceedings be extended to September 30, 2010;

b) That the Chief Restructuring Officer be authorized to file on behalf of the debtors a consolidated plan of arrangement (the "Plan") and to present the Plan to the creditors of each of the debtors substantially in the form provided to me in the hearing before me;

c) That the appointment of Mr. Gary Cowan as Chief Executive Officer of Bear Mountain Master Partnership, Bear Mountain Development Holdings Ltd., 18 on 18 Developments Ltd. and Bear Mountain Resort Management Corp. be approved;

5 The Chief Restructuring Officer, Prowis Inc., has brought on an application for the approval of its accounts; approval of the accounts of counsel for the CRO -Osler Hoskin & Harcourt; and the approval of the activities of the CRO as set out in its first report, fourth report and affidavit #2 of Robert Holmes, the chair of Prowis.

6 The Monitor supports the applications brought on by the Petitioner and the CRO as does Bear Mountain Respondents. The Canada Revenue Agency and Mr. Barrie do not oppose the applications.

7 Romspen opposes the extension of the stay to September 30; opposes the filing of the Plan; opposes the appointment of the CEO; opposes the substitution of the transfer of responsibilities from the CRO to the CEO as proposed by the CRO; and opposes the approval of the activities of the CRO. Romspen however, does not oppose the passing of the CRO's accounts.

8 Romspen is a secured creditor who agreed to provide $16 million of financing to the Resort. Its security extends over several commercial properties at the Resort, including a first registered mortgage and assignment of rents over certain properties called "Jack's Place," a facility out of which an English pub style family restaurant and a sushi restaurant are operated; and the Mountainside Athletic Club a fitness facility otherwise known as the "MAC" used by resort guests and members. The tenant of these two facilities is Bear Mountain Resort Management Corp. The leases require the tenant to pay $29,850/month ($356,660 annually) for the restaurant and $17,550/month ($210,606) for the fitness centre. In order for the Romspen loan to be secured as a first charge on the properties, priority agreements in its favour were obtained from the petitioner over its charges of $250 million and Carevest Capital over its charges of $40 million against the Development.

9 Since the outset of these proceedings, the petitioner and Romspen have been engaged in discussions to resolve their differences. To date they have been unsuccessful. HSBC has continued to fund the operations of the Resort.

10 Romspen has since March 2010 had an application to obtain occupational rents from Jack's Place and the MAC. I would note that no actual rents have been paid since the lease was entered into by Bear Mountain. In response the petitioner seeks to have Romspen brought within the stay of these CCAA proceedings.

11 The bases of the Romspen position includes:

12 That there is no urgency for any of the matters sought. Moreover, it submits that the June 30, 2010 hearing date was only to seek an extension of the stay and not the several other applications referred to above which it adds were served on it only very late in the day.

13 In terms of the CEO, Mr. Roitman, the managing general partner of Romspen, deposes that he does not know Mr. Cowan and has not had a chance to meet with him to assess his abilities. Mr. Roitman expresses the concern that Mr. Cowan will have responsibilities over Romspen's assets. Romspen submits that Mr. Cowan is simply a cheaper CRO substitute and that Mr. Cowan does not come with the qualifications of a licensed trustee. Romspen says that Prowis should continue on.

14 In terms of the Plan, Romspen says that if approved now it may lead to Romspen being 'primed' over its secured position. In this regard, Romspen argues that its application for an order that it is entitled to receiving $50,000/month rent from Jack's Place and the MAC which was set to be heard in late June but was adjourned due to my unavailability due to a criminal trial should be heard first. As well, Romspen argues that the HSBC application to have Romspen subject to the stay should also be heard in advance. It submits that there is enough time to have the issues determined prior to the Plan being filed.

15 Romspen is also critical of the CRO and Monitor.

16 In terms of the CRO, Mr. Roitman asserts that the CRO's evidence regarding the Romspen assets are tainted by a conflict of interest given the long standing business relationship that it has with HSBC.

17 Mr. Roitman assets that the CRO and Monitor have treated Romspen's assets with insufficient regard for Romspen's interest and failed to properly distinguish between HSBC's and Romspen's interests. More specifically, Mr. Roitman asserts that there is a lack of independence between the Petitioner, CRO and Monitor.

18 Romspen asserts that this disregard is shown by the disproportionate share of Bear Mountain's total operating expenses to Romspen's assets. As an example, Romspen says that "although MAC and Jack's comprise less than 16% of Bear Mountain's total estimated area, the CRO allocated 42.41% of Bear Mountain's total utility expenses to MAC and Jack's.

19 Mr. Roitman also questions the hiring of Mr. Twa as manager of Jack's by the CRO. He cannot understand why Mr. Twa was required to sign a confidentiality agreement with the petitioner. He takes exception to the CRO's view that Jack's Place and the MAC are essential and integral to the Resort and points to the Priority Agreements entered into by HSBC with Romspen.

20 Mr. Roitman further takes exception to the statement that it is only the petitioner who is supporting the development for the benefit of all and asserts that Romspen has been maintaining and preserving the unoccupied Romspen Assets at the insistence of the petitioner and CRO. Counsel for Romspen produced a work sheet that shows property taxes, insurance and strata fees being paid by Romspen for properties at the Development.

21 Romspen also complains that the CRO has restricted its access to Bear Mountain accounting staff and says the CRO has understated revenues generated by Romspen Assets.

22 Romspen also complains that the CRO has failed to properly maintain some of the MAC facilities such as, repairing the pool and deteriorating exterior paint.

23 The assertions of Romspen are harsh. Perhaps they can be explained by the relatively short notice of the number of matters raised in the motions brought before me; or, perhaps they arise from the general discontent with the state of affairs that Romspen finds itself. In any event, the assertions are not particularly well developed or founded relative to the seriousness of the assertions.

24 I am satisfied that the responding affidavits of Mr. Holmes for the CRO and Mr. Elliott for the petitioner, meet the negative assertions of Romspen. I note that the CRO has deposed that its analysis of the allocation of expenses and utility expenses were provided to Romspen, but that Romspen, despite requests, has not provided it analysis; that the confidentiality clause for Mr. Twa is a standard confidentiality provision common to consulting agreements and no one from Romspen has asked the CRO to speak to Mr. Twa; that the sale of Jack's was only a preliminary discussion and the CRO is not prepared to lose control of the Jack's business and would not allow a situation to develop in which Jack's Place would be owned by another party and compete against other restaurants owned by Bear Mountain; that there is a regular maintenance program for Jack's Place and the MAC and that both were improved and cleaned up prior to the recent Skins Games at the expense of Bear Mountain; that it has not restricted access to accounting staff and that there has been no such directive given; however, the CRO notes that it has requested Romspen to direct their enquires to Mr. Cheung an employee of the CRO because of the duplication of enquires made by Romspen to both CRO and Bear Mountain staff; that there has been no understating of revenues generated by assets charged by Romspen; and that no conflict of interest or lack of independence exists.

25 Romspen is not foreclosed from bringing forth facts that were not available or known at this time at a later date prior to the final discharge of the CRO and Monitor.

26 In regard to the Plan, the Monitor describes it in this way:

> The purpose of the Plan is to permit Bear Mountain, on a consolidated basis, to stabilize its secured liabilities and compromise its unsecured indebtedness by a current payment and a contingent future payment should realizations reach a threshold following a 3 year period after the Plans Implementation Date.
>
> The Plan is consistent with the overall restructuring strategy as set out at the start of these proceedings which contemplated the assets being transferred to a wholly owned subsidiary of HSBC (referred to as "Newco" in the Plan and realized

over a period of time in the hope that the global economic and Victoria area real estate market conditions improve. The need to transfer the assets into Newco is driven out of concern for the complex prior business dealings and intercompany transactions of Bear Mountain, notably BMDH.

The Plan, which was filed by the CRO with the consent of HSBC, calls for:

HSBC to advance up to $250,000 (the "HSBC Fund") for the benefit of General Creditors;

A potential Subsequent Distribution based on a pro-rata share to each General Creditor of an amount equal to 1/3 of the surplus over the Net recovery from the realization of the Bear Mountain assets over 3 years;

HSBC has filed a Proof of Claim with the Monitor for approximately $253 million of which $195 million was filed as a secured claim and the balance of approximately $58 million as an unsecured claim. In order to assist with the viability of a compromise with creditors, HSBC is prepared to forgo payment for its unsecured claim as well as those assigned to HSBC by Court Order of May 20, 2010 and total approximately $528,000 in the Initial Distribution. These claims would not participate in the 1/3 surplus over Net Recovery, but be settled by the retention of the remaining 2/3 of such a surplus, if any. HSBC will, however, be entitled to vote its unsecured claim and the assigned claims of pre-filing creditors at a meeting of creditors to consider and vote on the Plan.

It is hoped the value of the assets realized within 3 years will be greater than what might be the case under the immediate enforcement of HSBC's security and a liquidation of the assets.

The Plan does not address or impact the claims of the other secured creditors such as CareVest, Romspen, Quigg or BMO.

27 The Monitor's view is as stated as follows:

The value of the Bear Mountain assets is uncertain but the marketing efforts by Bear Mountain over the past two years strongly indicates [sic] that value to be less than the claims of secured creditors. The prospects for improved conditions over the coming three years are also uncertain.

The Plan, therefore, does not contemplate any payments to the partners of BMMP or to the sole shareholder of BMDH given the amount of the existing indebtedness and promises only a relatively small payment to unsecured creditors and hope of a further payment should market conditions permit.

28 The Monitor supports the proposed Plan for the following reasons:

- HSBC will fund and support the business going forward which will preserve the employment of approximately 320 employees;
- The prospect of continued development of these assets with the community is enhanced;
- All post CCAA filing creditors are to be paid in full; and
- All General Creditors, except for HSBC and Inter-Company Creditors, will be paid up to $500 per Proven Claim and may receive a potential recovery from the sale of assets over time, which otherwise would not be available.

29 Counsel for the petitioner referred to the statement of our court of appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at para. 10 as to the purpose of the CCAA:

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.

30 It was pointed out this passage was cited in the more recent *Pope & Talbot Ltd., Re* [2008 CarswellBC 1726 (B.C. S.C. [In Chambers])] CCAA proceedings before Chief Justice Brenner in 2008.

31 While I have some sympathy for the position that Romspen finds itself in terms of the compression of time, the actions it complains of were not entirely unexpected given the various interests and pressures in insolvency situations. Moreover, the Plan currently states that it does not affect the claims of Romspen and if it were to, then its avenues to oppose the Plan remain open.

32 In my view, the application to file the Plan; extend the stay; appoint the CEO, transfer the stated scope of responsibilities from the CRO to the CEO; the passing of the accounts of the CRO; and the activities of the CRO should be approved.

33 The hearing of the matter of occupational rent and the extension of the stay over Romspen as fixed this past Friday, is now July 23, 2010. If matters arise from the determination of the applications that affect the stay or the schedule for the Plan, they may be addressed then. In this regard, I note that Romspen has suggested that it may submit an alternative plan. As discussed during the course of this hearing, the orders arising from the rulings made herein will be without prejudice to Romspen to bring on applications to extend the time for the filing of a plan. I also note that Romspen has a separate cause of action that it has identified against HSBC regarding the priority agreements between the two.

34 In terms of the CEO appointment and the transfer of responsibilities, it was clear from the outset that the CRO was to be a temporary arrangement and that the hiring of a CEO was contemplated from the start. The financial savings make sense. I am sure that if Mr. Roitman wishes to speak to Mr. Cowan that it can easily be arranged. Further, insofar as any concerns Romspen may have regarding the actions of the CEO, I note that the Monitor will continue to be in place.

35 As signalled during the hearing, it is my view that the provisions the exclusions from liability afforded the CRO under this courts appointment order are not to be transferred to Mr. Cowan as he is taking on a management role and will not be acting as a court appointed officer and are to be deleted from the draft order approving the appointment. Accordingly, paras. 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, and 21. Insofar as para. 20 which stipulates that the CEO and the Advisors shall not be or be deemed to be a director, officer, or employee of the Bear Mountain Respondents, that term shall not be absolute, but rather shall be stated as being subject to any federal or provincial statute or regulations there under.

36 Further, the CEO will be required to report to all creditors on a bi-weekly basis, or more frequently as directed by the Monitor, as to his activities.

37 In terms of the approval of the activities of the CRO, if Romspen uncovers any issues regarding improprieties of this court appointed officer, or the Monitor, it is free to bring the matter to the attention of the court at anytime for review. In this regard, it will be the responsibility of Romspen to notify the court as soon as reasonably possible having regard to the necessity for it to include a proper evidentiary basis for the concerns it wishes to voice.

38 As mentioned earlier, I am satisfied that the responding materials lead me to conclude that the concerns raised by Romspen regarding a lack of independence and a conflict of interest with respect to both the CRO and the Monitor in carrying out their duties are unsubstantiated.

39 In conclusion, subject to the comments above, the stay of proceedings will be extended to September 30, 2010; the filing of the Plan is authorized; the appointment of Mr. Cowan as CEO is approved; the amendments to the powers of the CRO are approved; the activities of the CRO as applied for are approved; and the accounts of the CRO, including its counsel, are approved.

Application granted; cross-application granted.

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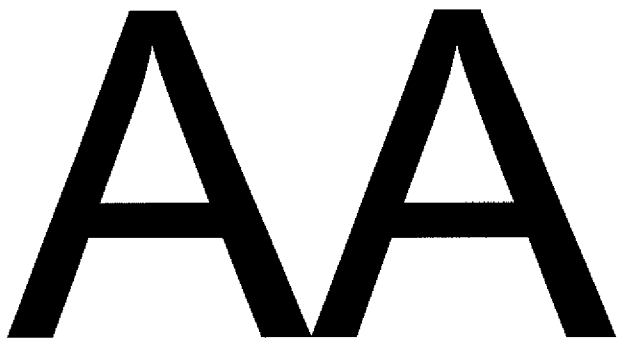
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2007 CarswellOnt 10041
Ontario Superior Court of Justice

A. Farber & Partners Inc. v. Penta TMR Inc.

2007 CarswellOnt 10041

A. Farber & Partners Trustees v. Penta TMR et al

In the matter of the Bankruptcy of Penta Farm Systems Ltd. and Penta One Limited

T.A. Heeney J.

Judgment: August 1, 2007
Docket: 54921, 35-967558, 35-967561

Proceedings: additional reasons to *A. Farber & Partners Inc. v. Penta TMR Inc.* (2007), 2007 CarswellOnt 10044 (Ont. S.C.J.)

Counsel: Harvey Chaiton, for Trustee, A. Farber & Partners Inc. ("Farbers")
Harry Van Bavel, for Secured Creditor, Libro Credit Union Limited ("Libro")
Michael Crichton, for Unsecured Creditors, JAY-LOR International Inc., JAY-LOR Fabricating Inc. ("Jay-Lor")
Lianne Armstrong, for Penta TMR Incorporated, Glenn Buurma, Angela Buurma

Subject: Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Table of Authorities

Cases considered by *T.A. Heeney J.*:

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 1068, 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 14.06 [en. 1992, c. 27, s. 9(1)] — referred to

Bulk Sales Act, R.S.O. 1990, c. B.14
Generally — referred to

Canadian Environmental Protection Act, R.S.C. 1985, c. 16 (4th Supp.)
Generally — referred to

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

s. 101 — considered

Environmental Protection Act, R.S.O. 1990, c. E.19
Generally — referred to

Mortgages Act, R.S.O. 1990, c. M.40
s. 31 — referred to

Occupational Health and Safety Act, R.S.O. 1990, c. O.1
Generally — referred to

Ontario Water Resources Act, R.S.O. 1990, c. O.40
Generally — referred to

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

Personal Property Security Act, R.S.O. 1990, c. P.10
s. 63(4) — referred to

***T.A. Heeney J.*:**

1 All parties are agreed that there should be a receiver appointed pursuant to s. 101 of the *Courts of Justice Act* of all of the assets of Penta One Limited and Penta Farm Systems Ltd. The only issue is who that receiver should be.

2 Both companies made assignments in bankruptcy on June 8, 2007, and Jackson Carson Inc. was appointed as trustee of both estates. Farbers was substituted as the Trustee in Bankruptcy with respect to both companies at the first meeting of creditors on June 26, 2007, at the instance of Jay-Lor, who appears to be the largest unsecured creditor. Farbers now seeks to be appointed as receiver as well.

3 Libro initially sought to have the court appoint PricewaterhouseCoopers Inc. as the receiver, but now requests that BDO Dunwoody Limited be appointed. This change arose from the fact that Jay-Lor previously shared some confidential information with PricewaterhouseCoopers, which would create the potential for a conflict.

4 The test for the appointment of a receiver is succinctly set out in F. Bennett, *Bennett On Receiverships*, Second Edition, Carswell, at p. 163:

> In court appointments, the practice is to appoint the nominee proposed by the security holder. However, there is no rule of law or practice that a nominee of a security holder should always be accepted or even usually accepted as a receiver. The court has an obligation to appoint a receiver who is reasonably competent to perform the duties, as well as being disinterested and impartial in order to deal fairly with the rights of all persons having an interest in the assets of the debtor. The court always gives careful consideration to the person nominated by the security holder and usually appoints the receiver proposed by the applicant security holder if such receiver possesses similar qualities proposed by the other parties. But the court will reject the security holder's nominee if it appears that such person may not deal with the debtor's assets in a fair and even-handed manner. The onus of establishing that the nominee is partial rests upon the person making the objection. If the court rejects the objection, it may nonetheless impose terms on the receiver.

5 All parties agree that both Farbers and BDO Dunwoody are fully competent to carry out the duties of a receiver. In comparing the two candidates, however, there are certain factors that give the "edge" to Farbers (to use the words of Farley J. in *Royal Oak Mines Inc., Re* (Ont. Gen. Div. [Commercial List]):

1. Farbers has already been appointed as Trustee in Bankruptcy, and as such has an obligation to impartially represent the interests of all creditors, both secured and unsecured;

2. Farbers has been involved with both companies for approximately five weeks and has acquired familiarity with their affairs;

3. The appointment of BDO Dunwoody would necessitate a duplication of costs already incurred in becoming familiar with the file. It would also add an additional layer of costs in the future, as the Trustee and receiver would be required to deal with each other on an ongoing basis and both would have independent counsel;

4. At present, the evidence indicates that there is likely to be a surplus realized from the sale of the assets such that a meaningful premium could be paid to the unsecured creditors. Thus, any additional costs incurred would, in effect, be paid entirely by the unsecured creditors, since those costs would serve to reduce the available surplus;

5. Farbers is in a position to avail itself of all of the remedies available to it as Trustee in Bankruptcy which, in combination with the rights of a receiver, would provide it with a full range of powers and remedies to ensure that the maximum value is received for all creditors.

6 Mr. Van Bavel objects to the appointment of Farbers on the basis of perceived conflict of interest. He concedes that there is no evidence of an actual conflict, but suggests that an appearance of conflict flows from the fact that Farbers was the Trustee of choice of Jay-Lor, who initiated their substitution as trustee at the first meeting of creditors.

7 If an inference could be drawn that a receiver might be partial toward the party who supported their appointment, that inference could equally apply to disqualify Libro's candidate as well. 1 am not persuaded that such an inference should be drawn. Farbers, in the five weeks that it has acted as Trustee in Bankruptcy, has conducted itself in an entirely proper manner, and this gives the court confidence that it will continue to do so if it is appointed as receiver. It also goes without saying that any sale of assets that occurs in the future must be approved by the court, so that the court will, at all times, retain a supervisory role over the actions of the receiver.

8 Accordingly, an order will go appointing Farbers as receiver, in the form of the pro forma order annexed hereto. The receiver shall not exercise its powers as receiver before August 7. 2007, to facilitate discussions with Penta TMR and Buurma with respect to the possible sale of the assets.

Appendix

Court File No. 54921

Ontario

Superior Court of Justice

THE HONOURABLE	)	WEDNESDAY, THE 1{st} DAY
	)	
JUSTICE	)	OF AUGUST, 2007

A. FARBER & PARTNERS INC., IN ITS CAPACITY AS TRUSTEE IN BANKRUPTCY OF PENTA ONE LIMITED and PENTA FARM SYSTEMS LTD.

Plaintiff

- and -

PENTA TMR INCORPORATED, PENTA ONE LIMITED, PENTA FARM SYSTEMS LTD., GLENN BUURMA and ANGELA BUURMA

Defendants

Order

THIS MOTION, made by the Plaintiff for an Order, *inter alia*, pursuant to section 101 of the *Courts of Justice Act*, R.S.O 1990 c. C.43, as amended (the "*CJA*") appointing A. Farber & Partners Inc. as receiver and manager ~~in such capacities,~~ the "*Receiver*") without security, of all of the assets, undertakings and properties of Penta One Limited, Penta Farm Systems Ltd., and Penta TMR Incorporated ~~(individually and collectively, the "Debtor")~~ was heard this day at 80 Dundas Street, London, Ontario.

ON READING the affidavit of Michael Baigel sworn My 26, 2007 and the Exhibits thereto, *the affidavit of Frank Kennes. sworn July 27, 2007 and the Exhibits thereto*, and on hearing the submissions of counsel for the Plaintiff ~~and~~ , the Defendants, *Penta TMR Incorporated. Glenn Buurma and Angela Buurma. and for Libro Credit Union Limited*, and on reading the consent of A. Farber & Partners Inc. to act as the Receiver,

Service

THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this motion is properly returnable today and hereby dispenses with further service thereof.

Appointment

THIS COURT ORDERS that pursuant to section 101 of the CJA, A. Farber & Partners Inc. is hereby appointed Receiver, without security, of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "*Property*") of Penta One Limited and Penta Farm Systmes Ltd. ("*Debtor*").

Certificate of Pending Litigation

THIS COURT ORDERS that the Plaintiff be and is hereby granted leave to issue a certificate of pending litigation against lands and premises municipally known as 8017 and 8059 Churchill Line, R.R. #7, Watford, Ontario, as more particularly described in Schedule "A" hereto.

Receiver's Powers

THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to settle, extend or compromise any indebtedness owing to the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court ~~in respect of any transaction not exceeding $_____, provided that the aggregate consideration for all such transactions does not exceed $_____; and~~

~~(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds, the applicable amount set out in the preceding clause,~~

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, [or section 31 of the Ontario *Mortgages Act*, as the case may be,] shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.

(m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and

(s) to take any steps reasonably incidental to the exercise of these powers,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

Duty to Provide Access and Co-Operation to the Receiver

THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

No Proceedings Against the Receiver

THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "*Proceeding*"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

No Proceedings Against the Debtor or the Property

THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

No Exercise of Rights or Remedies

THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health,

safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

No Interference with the Receiver

THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

Continuation of Services

THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

Receiver to Hold Funds

THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

Employees

THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction.

THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "*Sale*"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

Limitation on Environmental Liabilities

THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "*Possession*") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "*Environmental Legislation*"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

Limitation on the Receiver's Liability

THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

Receiver's Accounts

THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "*Receiver's Charge*").

THIS COURT ORDERS the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge ~~of the Commercial List~~ of the Ontario Superior Court of Justice.

THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

Funding of the Receivership

THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $ *100000* (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "*Receiver's Borrowings Charge*") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge.

THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "B" hereto (the "*Receiver's Certificates*") for any amount borrowed by it pursuant to this Order.

THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

General

THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Schedule "A"

That part of Lot 19, Concession 14, Geographic Township of Brooke, Township of Brooke-Alvinston, County of Lambton, being parts 1, 2, 3, 4, 5, 25R3294

SUBJECT to an easement in favour of the Bell Telephone Company of Canada over part of Lot 19, Concession 14, being part 1, on Plan 25R496

Schedule "B" Receiver Certificate

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that A. Farber & Partners Inc., the receiver and manager (the "*Receiver*") of all of the assets, undertakings and properties of Penta One Limited, Penta Farm Systems Ltd., and Penta TMR Incorporated appointed by Order of the Ontario Superior Court of Justice (the "*Court*") dated the 1*st* day of August, 2007 (the "*Order*") made in an action having Court file number ~~07-CL-_____~~ *54921* has received as such Receiver from the holder of this certificate (the "*Lender*") the principal sum of $_____, being part of the total principal sum of $ _____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily] [monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at ~~Toronto~~ _____, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 2007.

A. Farber & Partners Inc., solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity
Per: _____
Name:
Title:

Document comparison done by Workshare DeltaView on Tuesday, July 31, 2007 4:18:20 PM

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2007 CarswellOnt 10041

Padding cell

Statistics:

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Insertions	8
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Moved from	0
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Style change	0
Format changed	0
Total changes	16

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BB

2009 CarswellOnt 6554
Ontario Superior Court of Justice [Commercial List]

Smurfit-Stone Container Canada Inc., Re

2009 CarswellOnt 6554, 181 A.C.W.S. (3d) 854, 61 C.B.R. (5th) 92

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

AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

In the Matter of a Plan of Compromise or Arrangement of Smurfit-Stone Container Canada Inc. and other Applicants listed on Schedule "A"

Pepall J.

Judgment: October 20, 2009
Docket: CV-09-7966-00CL

Counsel: Kevin McElcheran, Heather Meredith for Moving Parties
Sean F. Dunphy, Alexander Rose for Respondents / Applicants
Robert J. Chadwick, Christopher G. Armstrong for Monitor
Kevin Zych for Official Committee of Unsecured Creditors
R. Thornton, S. Aggarwal for Manufacturers and Traders Trust Company as Indenture Trustee

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Assignments in bankruptcy — Commencement of proceeding

Related businesses including SC, American parent company and Nova Scotia company applied for protection from creditors in America and Canada — Nova Scotia company carried on no trade but issued unsecured notes guaranteed by parent company, in amount of $200 million — Funds from notes were lent to SC by way of unsecured company loan, with interest paid by shares of SC to Nova Scotia company — Creditors of Nova Scotia company were parent company, noteholders and possibly government for tax owing — Nova Scotia company and SC had overlapping directors and officers, and were represented by same counsel — Fund managers of debt notes brought motion for declaration that interests of Nova Scotia company and creditors were adverse to interests of SC Inc., and forcing Nova Scotia company into bankruptcy — Motion dismissed — Relief was requested prematurely — Unclear if claim was debt or equity and if Nova Scotia company could vote on plan — Not unusual for restructuring to address intercompany claims — Nothing to indicate plan was not being prepared in good faith while protection was in place — Lifting stay could harm debtor in possession financing.

Bankruptcy and insolvency --- Miscellaneous

Related businesses including SC, American parent company and Nova Scotia company applied for protection from creditors in America and Canada — Nova Scotia company carried on no trade but issued unsecured notes guaranteed by parent company, in amount of $200 million — Funds from notes were lent to SC by way of unsecured company loan, with interest paid by shares of SC to Nova Scotia company — Creditors of Nova Scotia company were parent

company, noteholders and possibly government for tax owing — Nova Scotia company and SC had overlapping directors and officers, and were represented by same counsel — Fund managers of debt notes brought motion for declaration that interests of Nova Scotia company and creditors were adverse to interests of SC Inc., and forcing Nova Scotia company into bankruptcy — Motion dismissed — Relief was requested prematurely — Unclear if claim was debt or equity and if Nova Scotia company could vote on plan — Not unusual for restructuring to address intercompany claims — Nothing to indicate plan was not being prepared in good faith while protection was in place — Lifting stay could harm debtor in possession financing.

Table of Authorities

Cases considered by *Pepall J.*:

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

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

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

SemCanada Crude Co., Re (2009), 2009 CarswellAlta 167, 2009 ABQB 90, 52 C.B.R. (5th) 131 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

Companies Act, R.S.N.S. 1989, c. 81
Generally — referred to

s. 135 — referred to

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

s. 3(1) — referred to

MOTION by fund managers for assignment in bankruptcy and for order of conflict of interest between related businesses in bankruptcy protection.

***Pepall J.*:**

Relief Requested

1 Aurelius Capital Management, LP and Columbus Hill Capital Management, L.P. are Fund Managers for notes issued by Stone Container Finance Company of Canada II ("Finance II") in the amount of US$200 million. Amongst other things, they request an order declaring that the interests of Finance II and its creditors are adverse to those of Smurfit-Stone Container Enterprises Inc. ("Enterprises") and Smurfit-Stone Container Canada Inc. ("Smurfit Canada") and directing the officers and

directors of Finance II to file an assignment in bankruptcy appointing a trustee in bankruptcy and discharging Deloitte & Touche Inc. as Monitor of Finance II. They are supported by the indenture trustee for the noteholders, Manufacturers and Traders Trust Company.

Facts

2 Finance II is an unlimited company formed under the laws of Nova Scotia and is a wholly owned subsidiary of Enterprises. Smurfit Canada, one of the two operating entities in Canada, is also a wholly owned subsidiary of Enterprises.

3 On January 26, 2009, Smurfit Canada, Finance II, Enterprises and others filed for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code. Later that day, Smurfit Canada, Finance II and others (but not including Enterprises) (the "applicants") were granted CCAA protection.

4 Finance II is not an operating company and carries on no trade. It is a special purpose financing entity that is subject to a series of complementary agreements entered into in 2004 to facilitate tax efficient financing. That year, Finance II raised funds in the public debt market by issuing unsecured senior notes due in 2014 in the principal amount of US$200 million. The notes are guaranteed by Enterprises.

5 Finance II then lent the proceeds to Smurfit Canada pursuant to an intercompany loan agreement dated July 20, 2004. The loan is unsecured. The obligation to pay interest on the loan is satisfied by the issuance of class C shares of Smurfit Canada to Finance II. The loan agreement states that on an event of default such as the adjudication of insolvency by the borrower, Smurfit Canada, Finance II as the lender "may exercise any and all of its rights and recourses under this agreement, provided, however, that the Borrower shall perform its obligations in this regard hereunder by the issuance to the Lender of Class B shares having a value no less than the dividend or other amount that otherwise would be received by the Lender".

6 According to the affidavit filed by the moving parties, this intercompany loan was not publicly disclosed. The prospectus pursuant to which the notes were issued confirms that Finance II has no significant assets and will depend on the guarantor to make all payments under the notes. As the sole shareholder of Finance II, Enterprises may have an obligation pursuant to section 135 of the *Companies' Act* (Nova Scotia) to contribute amounts sufficient to satisfy all creditor claims against Finance II in the event of a winding up of Finance II.

7 The assets of Finance II are:

(a) a claim against Smurfit Canada for approximately US$200 million;

(b) a claim against Smurfit Canada relating to 68,413 Class C Shares of Smurfit Canada; and

(c) a claim against Enterprises for contribution pursuant to the provisions of the Companies' Act (Nova Scotia).

8 The only disclosed obligations of Finance II at the date of filing were:

(a) the US$200 million plus accrued interest owing under the notes to the holders of the notes;

(b) an intercompany note of approximately US$66.1 million owed to Enterprises for funds advanced to Finance II to enable it to pay interest on the notes; and

(c) unspecified income tax obligations.

9 Finance II is a guarantor of the DIP facility but is not a borrower under that facility nor did it receive any proceeds under it.

10 The creditors of Finance II are the noteholders and possibly the federal government for unspecified income tax obligations. The only other disclosed creditor of Finance II as of the filing date was the sole shareholder of Finance II, Enterprises. The moving parties hold approximately 61.3% of the principal amount due on the notes. The moving parties state that they are

veto creditors with respect to Finance II, or put differently, Finance II cannot implement a plan of arrangement without their affirmative vote.

11 Finance II and Smurfit Canada have overlapping directors and officers and are represented by the same counsel. The moving parties' concerns have been raised with the respondents but only in the context of requesting cooperation and document production.

12 The CCAA and Chapter 11 proceedings are obviously ongoing. The applicants have worked diligently to stabilize their operations and have engaged in a number of restructuring efforts including negotiating the sale of non-core assets and engaging in ongoing discussions regarding their potential tax liabilities with taxation authorities at the federal and provincial government levels. At this stage, a claims procedure in the CCAA and Chapter 11 proceedings has been implemented. Both court orders treat intercompany claims as excluded claims for claims bar date purposes. Therefore, Finance II was not required to file any claim prior to the claims bar date. The applicants have presented an operational plan and preliminary plan of reorganization term sheet to the Official Committee of Unsecured Creditors ("UCC"). The indenture trustee is an ex officio member of the UCC in the US bankruptcy proceedings which in turn has standing in the CCAA proceedings by virtue of the court ordered protocol.

13 A stay was imposed as part of the Initial Order dated January 26, 2009 and there have been subsequent extensions of the stay. When the applicants were seeking an extension of the stay to December 24, 2009 and the moving parties were scheduling this motion, it was agreed that any extension of the stay was without prejudice to the rights and interests of the moving parties on this motion.

Issues

14 There are two issues to consider. Is there a conflict of interest that merits relief being granted and should the stay be lifted to appoint a trustee in bankruptcy with respect to Finance II?

Positions of Parties

15 In brief, the moving parties take the position that the Monitor, the directors of Finance II and counsel for the applicants are in a position of irreconcilable conflict the result of which is that no one is in a position to advance the interests of Finance II in the CCAA or the Chapter 11 proceedings. The interests of Finance II and the noteholders are to ensure that Finance II obtains maximum recovery from Smurfit Canada and from Enterprises and as such, Finance II is adverse in interest to those entities. The recovery of the noteholders is entirely dependent on Finance II's recovery from Smurfit Canada and Enterprises in their plans of arrangement or reorganization. The problems are compounded because there are overlapping directors and officers amongst Finance II, Smurfit Canada and Enterprises; they are represented by the same counsel; and are under the oversight of the same court Monitor as Smurfit Canada. The moving parties submit that there are conflicting fiduciary duties and there is a need for someone to advance the interests of Finance II. They argue that causing the directors and officers to make an assignment into bankruptcy will eliminate the conflict issues because such a procedure requires a bankruptcy trustee to be installed. The trustee, being an independent court officer, could assert and negotiate the claims on behalf of Finance II. In addition, the contribution claim against Enterprises would be crystallized. The assignment in bankruptcy would not impair the restructuring proceedings because while a guarantor of the DIP facility, Finance II was not an operating company and its only assets were claims against the other applicants and the contribution claim against Enterprises.

16 The indenture trustee supports the moving parties on this motion.

17 The respondents are opposed to the motion. They take the position that there is no conflict of interest and the nature of Finance II's claim has not been determined. Furthermore, one should not presume that the plan is doomed to fail. They submit that appointment of a trustee in bankruptcy is premature and significantly there would be real prejudice to the applicants in that a bankruptcy of Finance II would constitute an event of default under the DIP facility. In contrast, the prejudice to the noteholders is speculative. Furthermore, Finance II's claims are preserved and those having an economic interest will have input either before or after the plan is tabled. In addition, the indenture trustee is an ex officio member of the UCC and the noteholders are represented by those entities.

18 The Official Committee of Unsecured Creditors is also opposed to the motion.

19 The Monitor supports the position of the respondents.

Discussion

20 It is not unusual for restructurings to involve consolidated plans that address intercompany claims. Indeed, section 3(1) of the CCAA contemplates group filings. By their nature, these often involve intercompany claims. In its seventh report, the Monitor notes: "It is common in large, integrated, cross-border reorganizations for CCAA and Chapter 11 proceedings to be dealt with on a consolidated basis with a single CCAA Monitor appointed by the Court to oversee all aspects of the reorganization of an integrated group for the benefit of all stakeholders of the Canadian debtors. These restructurings will invariably include certain intercompany claims and interests which are addressed in a consolidated plan or plans."

21 The moving parties acknowledge in their factum that intercompany debts are often found in CCAA proceedings. Consistent with that fact, in the various pieces of correspondence that predated this motion, the moving parties never asked counsel for the applicants to remove themselves from the record nor did they make such a suggestion to the Monitor. Conflicts are frequently found in CCAA proceedings particularly those involving corporate groups. If one were to insist on independent counsel and an independent court officer for every instance of perceived conflict of interest, restructuring proceedings of corporate groups would become completely unwieldy and unproductive. On the other hand, there may be instances of conflicts of interest that should be addressed. The court should adopt a case by case analysis to ascertain whether there is a conflict of interest that merits the granting of relief.

22 In this case before me, there is a real issue as to whether Finance II's claims constitute debt or equity and it is unclear that Finance II has a claim entitling it to vote on any plan. This issue could be addressed in the plan itself or beforehand by way of a motion. No determination of the nature of Finance II's claims has been made yet. As such, the declaratory relief requested is premature. In the meantime, Finance II's assets consist of its intercompany claims and its ability to assert those claims has been preserved. There is no evidence that the applicants are not working on a plan in good faith for the benefit of all stakeholders including Finance II and the noteholders or that the interests of Finance II and the noteholders are not being taken into account. Indeed, there is no evidence of any breach of any duty by any of the impugned parties.

23 Even if I am wrong in this regard, I would not lift the stay of proceedings imposed in the Initial Order so that Finance II may be assigned into bankruptcy. In exercising discretion to lift the stay, the court should balance the interests of the creditors and debtors and consider the prejudice that may be suffered by each: *Canadian Airlines Corp., Re* [1] The court should also be mindful of the purposes underlying the CCAA and their application to the facts of the case. The former are described by Gibbs J.A. in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [2] *:*

> The purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to remain in business...When a company has recourse to the CCAA 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.

24 The goals of the CCAA apply not only to individual companies but to interdependent corporate groups operating as a single enterprise, particularly when the treatment of the corporate group as an integrated system will result in greater value. The court may consider the implications of the corporate group's reorganization efforts as a whole: *SemCanada Crude Co., Re* [3] and *Calpine Canada Energy Ltd., Re* [4]

25 In my view and keeping these principles in mind, the stay should not be lifted at this time. There is real prejudice to the applicants in that a bankruptcy of Finance II would constitute an event of default under the DIP facility and could upset the

applicants' ability to emerge successfully from CCAA protection. An event of default allows for termination of the commitments under the DIP facility and a declaration that outstanding amounts are due and payable. The applicants rely on the DIP facility and forecast draws of $29.4 million during the next three months.

26 Counsel for the moving parties advance seven reasons in support of their position that a bankruptcy is unlikely to cause any prejudice and they are outlined in their factum. They complain that Finance II should never have been a guarantor of the DIP loan; there is no reason to assume the DIP lenders will accelerate the loan or enforce the security; the guarantee of Finance II adds no incremental value; supervision of the restructuring should not be delegated to the DIP lenders; the applicants should seek a default waiver from the DIP lenders or refinance or repay the DIP loan. In argument counsel for the moving parties also noted the absence of counsel for the DIP lender and asked that I infer from such absence that the default under the DIP facility would be of no consequence.

27 While one may argue that Finance II should not have been a party to the DIP loan agreement, it is and certain remedies flow in the event of a default. There is no certainty that the DIP lenders would enforce the agreement but there is some risk and the absence of their counsel at the motion does not serve to eliminate that risk. While I agree that a DIP loan agreement should not be the only driver in CCAA proceedings, it is a factor to consider. Even if one were to disregard its significance, as stated by the Monitor, assigning Finance II into bankruptcy would disrupt the consolidated, cross-border restructuring efforts being undertaken. I agree with the Monitor that such a disruption is not warranted at this stage of the proceedings. In addition, the bankruptcy could upset the applicants' tax structure. There would also be the administrative burden and expense associated with the appointment of a trustee in bankruptcy and likely delay.

28 In my view the potential prejudice to the applicants outweighs that to the moving parties. Accordingly, I am dismissing the request to have Finance II assigned into bankruptcy.

29 I have no doubt that the Monitor will attend not just to the interests of the group of stakeholders but to the needs of individual creditors as well. That said, even though I am dismissing the remedy requested by the moving parties, I do accept that there is some basis to their complaint of a need for "a seat at the table". During argument, counsel for the applicants and the indenture trustee raised different means of addressing this problem. Both the applicants and the moving parties indicated that the characterization of Finance II's claims is a threshold issue. Stakeholders should with some dispatch turn their minds to an appropriate process to address that issue. If counsel require any assistance or further direction from the court in this regard, they may arrange for a 9:30 appointment before me.

Motion dismissed.

Footnotes

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

2 (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at para. 10.

3 [2009] A.J. No. 129 (Alta. Q.B.) at para. 29.

4 [2006] A.J. No. 412 (Alta. Q.B.) at para.32.

CC

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

Canwest Publishing Inc./Publications Canwest Inc., Re

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

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

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

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

Subject: Insolvency; Corporate and Commercial

Headnote

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

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.

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

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

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

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

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

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

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

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

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

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

Statutes considered:

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

s. 4 — considered

s. 5 — considered

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

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

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

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

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

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

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

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

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

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

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act* [1] ("CCAA") proceeding on October 6, 2009. [2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

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

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

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

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

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

Background Facts

(i) Financial Difficulties

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

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

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

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

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

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

(ii) Indebtedness under the Credit Facilities

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

> (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed

by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable. [3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest. [4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

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

(iii) LP Entities' Response to Financial Difficulties

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

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

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

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

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

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

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

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

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

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

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

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

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

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

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

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

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

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

Proposed Order

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

(a) Threshold Issues

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

(b) Limited Partnership

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

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

(c) Filing of the Secured Creditors' Plan

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

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

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

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

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

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

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

(D) DIP Financing

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

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

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for

various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint

and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order. [13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re* [14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re* [15] , I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re* [16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the

restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act* [17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)* [18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re* [19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522 (S.C.C.).

19 Supra, note 7 at para. 52.

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

Court File No: CV15-10961-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANTS
(Comeback Hearing returnable May 29, 2015)

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