TAB 9

2011 ABQB 214
Alberta Court of Queen's Bench

Kerr Interior Systems Ltd., Re

2011 CarswellAlta 508, 2011 ABQB 214, [2011] 10 W.W.R. 159, [2011] A.W.L.D. 2318, 200 A.C.W.S. (3d) 930, 43 Alta. L.R. (5th) 386, 517 A.R. 186, 79 C.B.R. (5th) 1

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

And In the Matter of the Plan of Compromise or Arrangement of Kerr Interior Systems Ltd. and Composite Building Systems Inc.

J.E. Topolniski J.

Judgment: March 30, 2011
Docket: Edmonton 0703-14357

Counsel: Darren Bieganek for Applicant
James Hanley for Respondent

Subject: Insolvency; Corporate and Commercial

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

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

Bankruptcy and Insolvency — Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtors obtained initial Companies' Creditors Arrangement Act order granting them usual stay of proceedings and protections — Plan of arrangement ("Plan") made pursuant to Act called for payment of $2,600,000.00 — There was favourable creditor vote, and order was made sanctioning Plan — Debtors defaulted after making first of four instalment payments due under Plan — Debtors brought application for further meeting of creditors to reconsider Plan — Application dismissed — Claiming that downturn in economy, weight of secured debt and obligations of related party precluded them from living up to their obligations under Plan, debtors wanted another chance to escape bankruptcy by presenting creditors with proposed amendment to Plan — Proposed amendment was to reduce debtors' obligation under Plan by 80 per cent, and, in essence, it was new deal — Purposive and contextual interpretation of s. 11 of Act vested court with discretion to grant relief sought — However, threshold for summoning further meeting of creditors after court sanction was high and to succeed debtor had to establish truly extraordinary circumstances — In making its determination, court should consider whether debtor's application was made in good faith and in timely fashion and whether granting relief would advance policy objectives of Act, serve and enhance public's confidence in process or otherwise serve ends of justice — Court should also consider degree of creditor support for application — Debtors did not meet high threshold required for court to exercise its discretion to order further meeting of creditors to be called at this late juncture.

Table of Authorities

Cases considered by *J.E. Topolniski J.*:

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Algoma Steel Corp. v. Royal Bank (1992), 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 11 C.B.R. (3d) 11, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

Algoma Steel Corp. v. Royal Bank (1992), 94 D.L.R. (4th) vii (note), 10 O.R. (3d) xv (note), (sub nom. *Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.)* 145 N.R. 391 (note), (sub nom. *Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.)* 59 O.A.C. 326 (note) (S.C.C.) — referred to

Avery Construction Co., Re (1942), 24 C.B.R. 17, 1942 CarswellOnt 86, [1942] 4 D.L.R. 558 (Ont. S.C.) — 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

Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 2004 CarswellQue 810, 48 C.B.R. (4th) 205 (C.S. Que.) — considered

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139, 1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List]) — considered

Comptoir coopératif du combustible Ltée, Re (1935), 1935 CarswellQue 22, 17 C.B.R. 124, 74 Que. S.C. 119 (C.S. Que.) — considered

Daon Development Corp., Re (1984), 26 B.L.R. 38, B.C. Corps. L.G. 78,261, 10 D.L.R. (4th) 216, 1984 CarswellBC 175, 54 B.C.L.R. 235 (B.C. S.C.) — referred to

First Treasury Financial Inc. v. Cango Petroleums Inc. (1991), 1991 CarswellOnt 170, 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Gen. Div.) — considered

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Kerr Interior Systems Ltd., Re (2008), 91 Alta. L.R. (4th) 202, 70 C.L.R. (3d) 46, 449 A.R. 185, [2008] 12 W.W.R. 355, 2008 ABQB 286, 2008 CarswellAlta 661, 42 C.B.R. (5th) 293 (Alta. Q.B.) — referred to

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Northland Properties Ltd., Re (1989), 74 C.B.R. (N.S.) 231, 1989 CarswellBC 348 (B.C. S.C. [In Chambers]) — considered

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

Ontario v. Canadian Airlines Corp. (2001), 2001 CarswellAlta 1488, 98 Alta. L.R. (3d) 277, 306 A.R. 124, 2001 ABQB 983, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373 (Alta. Q.B.) — considered

Placer Dome Canada Ltd. v. Ontario (Minister of Finance) (2006), 2006 D.T.C. 6532 (Eng.), 348 N.R. 148, 210 O.A.C. 342, 2006 SCC 20, 2006 CarswellOnt 3112, 2006 CarswellOnt 3113, (sub nom. *Ontario (Minister of Finance) v. Placer Dome Canada Limited)* 266 D.L.R. (4th) 513, [2006] 1 S.C.R. 715 (S.C.C.) — followed

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Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 475, 245 A.R. 138, 11 C.B.R. (4th) 217, 1999 ABQB 425 (Alta. Q.B.) — referred to

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

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Statutes considered:

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Generally — referred to

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

s. 4 — considered

ss. 4-7 — referred to

s. 5 — considered

s. 6 — considered

s. 6(1)(a) — considered

s. 7 — considered

s. 10(2) — considered

s. 11 — considered

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

s. 23(1)(b) — considered

s. 23(1)(i) — considered

APPLICATION by debtors for further meeting of creditors to reconsider plan of arrangement made pursuant to *Companies' Creditors Arrangement Act* after court sanction and part performance.

J.E. Topolniski J.:

I. Introduction

1 This case concerns the court's jurisdiction to authorize debtors to call a further meeting of creditors to reconsider a plan of arrangement (the "Plan") made pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") after court sanction and part performance. The Plan called for payment of $2,600,000.00, including a first installment of $260,000.00 (the "Payment").

2 Kerr Interior Systems Ltd. ("Kerr") and Composite Building Systems Inc. ("Composite") (collectively the "Debtors") obtained an initial *CCAA* order granting them the usual stay of proceedings and protections on November 7, 2007 ("Initial Order"). Kerr's primary business is the supply and installation of commercial steel stud and drywall load bearing frames. Composite was in the business of fabricating the steel panels installed by Kerr, but ceased operating and transferred its assets to Kerr sometime between the fall of 2009 and the spring of 2010. It is unclear whether Composite is back in business today.

3 The restructuring followed a fairly typical course of proceedings under the *CCAA*. There was a period of time dedicated to reorganization and formulating the Plan, followed by a favourable creditor vote and an order sanctioning the Plan (the "Sanction Order"). The restructuring went sideways when the Debtors defaulted after making the first of four instalment payments due under the Plan.

4 Claiming that an unexpected downturn in the economy, difficulty collecting accounts receivable, the strain of servicing secured debt, and the obligations of a related entity (that is not part of the *CCAA* proceeding) have created insurmountable impediments to their ability to carry on in business and to satisfy their obligations under the Plan, the Debtors want to present another offer to their creditors. If successful in their bid for another creditors' meeting, they propose to ask their creditors to accept a global payment of $520,000.00 (comprised of the Payment and an additional $260,000.00 to be paid at a later unspecified date). The Debtors are cognizant that they can pursue restructuring under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 or by making a further *CCAA* filing, but they consider those avenues too expensive and unnecessary.

5 In a rather cursory report to the court, BDO Canada Limited (the "Monitor") expressed the view that the Debtors appear to be acting in good faith and their application "does not seem to be unreasonable" in light of economic conditions.

6 Two creditors oppose the application, Winroc, a division of Superior Plus LP ("Winroc"), and Descon Mechanical Protostatix Engineering. A third creditor, Kenroc Building Materials Ltd. ("Kenroc"), voiced support for Winroc's position (collectively the "Opposing Creditors"). The Opposing Creditors argue that the court does not have jurisdiction to call a further meeting of creditors at the post-sanction stage of the proceedings and, in any event, the relief sought is a collateral attack on the Sanction Order. They submit that to authorize a further meeting of the creditors would open the floodgates to such applications and result in uncertainty in *CCAA* proceedings.

7 There are no reported cases directly on point. The outcome of this application hinges on statutory interpretation and the analysis of reported cases involving analogous situations.

II. The Issues

8 The following two issues arise on this application:

1. Does the court have jurisdiction to call a further meeting of creditors following the court's sanctioning of the Plan?

2. If yes, should the court direct a further meeting of creditors on the facts of this case?

III. Factual Context

9 On January 31, 2008, the Debtors' unsecured creditors voted in favour of the Plan, which provided for a global payment of $2,600,000.00 to be paid in four instalments of varying amounts. On the application for court approval of the Plan, Kenroc and Winroc were unsuccessful in arguing that they should not be listed under the Plan as unsecured creditors but rather as secured creditors with builders' lien claims in Saskatchewan or, alternatively that they should be put in a separate voting class and, in any event, were entitled to the $150,000.00 paid into court by a third party to discharge their builders' liens. On April 4, 2008, Bielby J. (as she then was) granted the Sanction Order (2008 ABQB 286, 449 A.R. 185 (Alta. Q.B.)).

10 Kenroc and Winroc appealed the Sanction Order to the Alberta Court of Appeal, which ruled (2009 ABCA 240, 457 A.R. 274 (Alta. C.A.)) that they met the test for classification as secured creditors (by way of lien or trust) and that they were entitled to the $150,000.00 that had been paid into court. The Sanction Order and Plan otherwise remained unaffected.

11 The Debtors made the first instalment payment under the Plan, the $260,000.00 Payment, but failed to make the second instalment of $720,000.00. They have since unsuccessfully sought informal creditor approval to alter the Plan. One year later and despite the Debtors' default, no creditor has sought to vacate the stay of proceedings.

12 In November 2007, when the Debtors crafted their proposal to the creditors, their combined value was $2,700,000.00, comprised of accounts receivable ($1,900,000.00) and other assets ($800,000.00). They considered that an offer of $2,400,000.00 (or 50 cents on the dollar) was reasonable for all concerned. At the creditors' meeting, they topped up the offer by $200,000.00, offering a global payment of $2,600,000.00. The creditors agreed to that deal.

13 What is known of the Debtors' affairs since the Sanction Order includes the following:

(a) Kerr had 13 to 15 salaried employees in 2008-2009. That number increased to 50 by the fall of 2010.

(b) The Debtors' combined 2008 revenue was $14,000,000. Profits were two to three percent.

(c) Kerr's asset value in 2009 was $4,800,000.00. The Debtors' combined revenue in 2009 was $8,000,000.00. Kerr enjoyed a $167,055.00 profit, while Composite lost $571,307.00 that year.

(d) By May 31, 2010:

(i) Composite was out of business;

(ii) Kerr had revenue of $6,500,000.00, with a profit of $79,809.00;

(ii) Kerr's accounts receivable stood at $1,790,000.00, $600,000.00 to $700,000.00 of which likely was stale dated. Kerr considers all but $100,000.00 of its three major accounts receivable (totalling $585,000.00) to be potentially collectible; and

(iv) $2,200,000.00 of Kerr's accounts payables are owed to related parties, either to Composite or numbered companies owned or controlled by Kerr's shareholders.

(e) At present, Kerr has work in progress and is cautiously optimistic about future revenues. It is unclear whether Composite is operating again.

14 The Debtors point to the obligations of 1005559 Alberta Ltd. ("1005559"), a related company, as another impediment to their ability to fulfill the terms of the Plan. They submit that the following transactions are germane to the present application:

(a) 1005559 borrowed $3,900,000.00 to buy and renovate a building for the Debtors' use (the "Building"). Of that amount, $3,000,000.00 was still owing at the date of the Initial Order. 1005559 sold the Building for an unknown sum. It also created a $100,000.00 builders' lien fund for persons claiming for work done on renovations to the Building.

(b) 1005559 pledged its assets in favour of the Royal Bank of Canada under a general security agreement to secure a $1,800,000.00 loan to the Debtors (the general security agreement subsequently was assigned to a takeout financier).

(c) 1005559 granted a $2,000,000.00 mortgage to an investor group that had threatened litigation. The court was not advised as to the composition of this investor group or the party threatened by litigation.

15 Darryl Wiebe, a shareholder, director and officer of Kerr, was questioned about why Kerr wanted to reduce the Debtors' obligations under the Plan when it had saleable assets to fund the Plan and the economy was improving. His response was: "[w]ell, frankly we'd like to get it out of our hair."

IV. Legislative Context

16 Sections 4 to 7 and 11 of the *CCAA* are relevant to this application.

17 Section 4, which concerns the court ordering a meeting of creditors to consider compromises with unsecured creditors, reads:

> 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, 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.

18 Section 5 is identical except that it concerns a compromise or an arrangement between the debtor company and its secured creditors.

19 Section 6 deals with court sanction of compromises. It outlines a number of restrictions on when a plan of arrangement can be sanctioned, none of which are relevant to this inquiry. However, ss. 6(1)(a) is of relevance. It refers to modification of a proposed compromise or arrangement at a meeting of creditors, stating:

> 6(1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be - other than, unless the court orders otherwise, a class of creditors having equity claims, - present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
>
> > (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and ...

20 Section 7 concerns the adjournment of creditors' meetings when amendments to a compromise or plan of arrangement are proposed. It reads:

> 7. Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

21 Section 11, which describes the court's plenary jurisdiction, provides that:

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

V. Analysis

22 Statutes are to be interpreted purposively and contextually. The words used are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the legislation, its object and with Parliament's intention (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, (1998), 221 N.R. 241 (S.C.C.); *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 (S.C.C.) at para. 26, [2002] 2 S.C.R. 559 (S.C.C.)). Every word is presumed to make sense and to have a specific role to play in advancing the *CCAA*'s purpose (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 (S.C.C.) at para 45, [2006] 1 S.C.R. 715 (S.C.C.), citing R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 159).

23 The *CCAA* is remedial legislation. Its goals include the following:

(i) permitting debtors to continue in business and, where possible, avoid the social and economic costs of liquidation (*Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para. 15 [hereinafter Century Services Inc.]);

(ii) balancing stakeholder interests (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (Ont. C.A.); *Air Canada, Re* (2004), 47 C.B.R. (4th) 189 (Ont. S.C.J. [Commercial List]); and

(iii) protecting creditors' interests and permitting an orderly administration of the debtor's affairs (*Meridian Development Inc. v. Toronto Dominion Bank* (1984), 53 A.R. 39, 52 C.B.R. (N.S.) 109 (Alta. Q.B.)).

(iv) rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation (*Century Services Inc.* at para. 18).

24 In this vein, Parliament is said to have understood in adopting the *CCAA* that liquidation of an insolvent company is harmful for most of those it affects, notably creditors and employees. Corporate reorganization under the *CCAA* serves the public interest by facilitating corporate survival (*Century Services Inc.* at paras. 17 and 18).

25 Proceedings under the *CCAA* are designed to be flexible and responsive, with a view to providing fairness, certainty and stability for the stakeholders. The *CCAA* is to be liberally interpreted to achieve those ends.

26 *CCAA* jurisdiction is conferred on superior courts vested with inherent and equitable jurisdiction. The present jurisprudential trend is for courts to employ their inherent and equitable jurisdiction only as a tool of last resort when the language of the *CCAA* cannot be interpreted to anchor an intended measure to be taken in the *CCAA* proceedings (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41 at 42, cited in *Century Services Inc.* at para. 65).

27 Extensive amendments to the *CCAA* in 2008 (2007, c. 36) codified various measures previously undertaken by the court through the exercise of what was referred to in *Century Services Inc.*, at paras. 62 and 63 as "creative use of authority" and "judicial innovation;" for example, imposing priority charges for critical suppliers or debtor in possession ("DIP") financing (now termed "interim financing") and releasing claims against third parties.

28 With these contextual considerations and directives in mind, I now turn to an analysis of ss. 4 to 7 and 11 of the *CCAA* and the relevant authorities in order to assess whether this court has the discretion to call a further meeting of the Debtors' creditors and, if it does, whether the court should exercise that discretion in the circumstances of this case.

29 Calling a meeting of creditors pursuant to s. 4 or 5 is discretionary. A refusal to summon a creditors' meeting often is attributable to the court's determination that the compromise or plan of arrangement is contrary to the creditors' interests (*Avery Construction Co., Re*, [1942] 4 D.L.R. 558, 24 C.B.R. 17 (Ont. S.C.)), it is doomed to failure due to a lack of creditor support (*Fracmaster Ltd., Re*, 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), aff'd 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.)), or there is no reasonable chance the debtor will be able to continue in business (*First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 78 D.L.R. (4th) 585, 3 C.B.R. (3d) 232 (Ont. Gen. Div.)).

30 The court's sanction of a compromise or plan of arrangement under s. 6 also is discretionary. A compromise or plan of arrangement is enforceable only if and when sanctioned by the court (*Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (C.S. Que.)), although court sanction is not necessary to bind the parties to an inter-creditor agreement in a compromise or plan of arrangement (*Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6).

31 Section 6 expressly permits court sanction of a compromise or plan of arrangement amended at the creditors' meeting, so long as the required majority of those voting in person or by proxy at the creditors' meeting agreed to the amended plan. It is clear from this section that amendments to the plan may be proposed at the meeting and the plan as amended may be put to a vote.

32 Pursuant to s. 7, where an amendment to the plan is proposed after the creditors' meeting has been scheduled, the meeting may be adjourned on such term as to notice or otherwise as directed by the court, presumably to allow the creditors more time to consider the proposed amendment. Use of the term "adjourned" implies that the creditors' meeting has not yet been held or that the vote has not yet been taken as otherwise there would be nothing to adjourn.

33 If the court is of the opinion that the proposed amendment does not adversely affect a particular class of creditors, the court has the discretion under s. 7 to direct that the meeting of that class need not be adjourned or a further meeting of that class need not be convened. Again, the reference to adjournment implies that the meeting of and voting by the creditors or class of creditors have not yet occurred, whereas use of the phrase "convene any further meeting" suggests that the meeting and vote of the creditors or particular class of creditors have taken place. It is not clear whether the provisions of s. 7 relating to proposed non-prejudicial amendments apply once the court has sanctioned the plan.

34 Section 7 does not address whether the court can convene a further meeting of creditors to consider a proposed substantive amendment once the creditors' meeting and vote have taken place. Further, the section is silent as to whether the court can convene a further meeting of the creditors to consider such a proposal once the plan has received court sanction - the issue which arises on this application.

35 A review of case law relating to amendments made under s. 7 is instructive as to the nature and timing of permissible court intervention after the creditors' vote has taken place.

36 Section 7 has been interpreted as allowing substantive (i.e prejudicial) amendments only at the pre-vote stage. In *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List])), Farley J. commented (at para. 11):

> ... In ***Algoma Steel Corp. v. Royal Bank of Canada*** (1992), 8 O.R. (3d) 449, the Court of Appeal determined that there were exceptional circumstances (unrelated to the Plan) which allowed it to adjust a Plan where no interest was adversely affected. The same cannot be said here. FSTQ aside from s. 11(c) of the *CCAA* also raised s. 7. I am of the view that s. 7 allows an amendment after an adjournment — but not after a vote has been taken.

37 Section 7 also has been interpreted as permitting judicial amendments of a technical non-prejudicial nature at the sanction stage (*Wandlyn Inns Ltd., Re* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.)). Even then, the court's jurisdiction to allow a judicial amendment must be exercised sparingly, in exceptional circumstances, and only if permitted by the *CCAA* (*Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.), at 15; *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at para. 6). The court's jurisdiction does not extend to modifying plans of arrangement simply because a person is dissatisfied with the existing plan (*Daon Development Corp., Re* (1984), 10 D.L.R. (4th) 216 (B.C. S.C.) at para. 9.

38 In Houlden and Morawetz's *Bankruptcy and Insolvency Law of Canada*, 4th ed., vol. 4 (Toronto: Carswell, 2009) at p. 11-69, N§48, the authors observe that: "[a]lthough it would seem that once the plan has been sanctioned by the court, the court has no power to make any alterations or modifications in it, there are cases where orders have been made altering or modifying a plan after it has been sanctioned." They then cite a number of authorities, including those discussed below.

39 In *Northland Properties Ltd., Re* (1989), 74 C.B.R. (N.S.) 231 (B.C. S.C. [In Chambers]), a *CCAA* debtor successfully applied five months after the sanction order to rectify a unilateral mistake made by it in electing a mortgage rate under the plan of arrangement. The court focussed its analysis on whether this type of unilateral mistake was subject to rectification. In any event, the circumstances in that case are distinguishable from the situation here of a default at the implementation stage of *CCAA* proceedings.

40 *Royal Heaters Ltd., Re* (1947), 30 C.B.R. 199 (C.S. Que.) concerned a series of post-sanction applications by a *CCAA* debtor for orders extending the time to make payments and temporarily suspending payments under the plan of arrangement. The debtor in that case, like the Debtors here, claimed that economic conditions had impaired its ability to honour its obligations under the plan. While the amendments clearly were prejudicial, the majority of the creditors in number and value consented to

at least one of the extensions. Without discussing its jurisdiction to approve the amendments, the court granted the extensions, observing that it was in the interest of the creditors to do so.

41 In *Keddy Motor Inns Ltd., Re* (1992), 13 C.B.R. (3d) 262, 113 N.S.R. (2d) 431 (N.S. T.D. [In Chambers]), a sanctioned plan of arrangement specified certain payment dates that could not be complied with because of an extant appeal. Without reference to ss. 7 or 11, the court approved a change in those dates.

42 In *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449 (Ont. C.A.), leave to appeal to S.C.C. refused (1992), 10 O.R. (3d) xv (note) (S.C.C.), the Ontario Court of Appeal considered whether the existence of a sanctioned plan of arrangement under the *CCAA* prevented the court from permitting the applicant to sue the debtor to the limited extent of certain insurance proceeds. The court determined that the power to amend the plan in the manner sought could be found, by inference, in what is now s. 11.02 (the stay provision) of the *CCAA*. It was argued in that case that having regard to the commercial realities reflected by the *CCAA*, the power to allow an action to proceed could only be exercised before the creditors' vote. The court held that, as a matter of principle, there was no reason to suggest the court's power was limited in that way, although given "the primacy accorded by the Act to agreement among the affected actors, the jurisdiction of the court is to be exercised sparingly and in exceptional circumstances only, if the result of the exercise is to amend the plan, even in merely a technical way." It commented that it would be an unacceptable exercise of jurisdiction if the effect of granting the applicant leave to sue the debtor would be to make any assets other than the insurance proceeds vulnerable to possible execution. It noted that the proposed amendment to the plan was insignificant and technical only as far as the other creditors were concerned.

43 The applicant creditor in *Ontario v. Canadian Airlines Corp.*, 2001 ABQB 983, 306 A.R. 124 (Alta. Q.B.) sought a declaration that the portion of the debt owed to it which was secured by letters of credit was not compromised by the plan of arrangement which had received court sanction. In the alternative, it asked for an order varying the plan to permit the liability secured by the letters of credit to be considered a secured claim and directing that the debtor was liable for the full amount of that liability up to the value of the letters of credit. The court dealt with the issue as one of interpretation and application of the plan, rather than its amendment.

44 However, in *obiter dicta*, Madam Justice Romaine expressed the view (at para. 61) that the court retains jurisdiction at the post-sanction stage to direct amendment to the plan, reasoning that:

> The *CCAA* authorizes the court to amend a plan in appropriate circumstances, where there are compelling reasons to do so. Although the Act does not expressly state that such amendment could take place after the Plan is sanctioned, as pointed out in ***Algoma***, *supra* there is no reason to suggest that the *CCAA* "contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial" (p.103). While the circumstances justifying an amendment after a sanction hearing ought to be truly exceptional, in recognition of the potential violence done to the laudable goal of commercial certainty, there is no reason why subsequent amendments should be conclusively foreclosed in every case, without examination of the particular circumstances.

45 Romaine J. commented at para. 56 that ss. 6 and 7 offer no guidance on whether a court-sanctioned plan may subsequently be amended. However, at para. 57, she noted:

> As mentioned, the *CCAA* confers broad discretion on the court and is to be afforded a large and liberal interpretation: ***Re Canadian Airlines Corp.***, *supra* at para 95 (Q.B); ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 51 B.C.L.R. (2d) 84 (C.A.). It is silent, however, on many procedural issues. Given the lack of legislative guidance, the courts have used the basic purpose of the *CCAA* as a guide to its application and the exercise of its discretion in disposing of applications under the Act: ***Re Canadian Airlines Corp.***, *supra* at para. 95. The keynote concepts of fairness and reasonableness have been recognized as the driving force behind the *CCAA* and the court's interpretation and application of the Act: ***Re Canadian Airlines Corp.*** at para. 95, ***Re Canadian Airlines Corp.***, *supra* at p. 9.

46 In concluding that amendment of the plan would recognize the concepts of fairness and reasonableness to a greater extent than would interpreting the plan in the manner advocated by the debtor, Romaine J. took into consideration that the claims

procedure in that case had been unique in that it allowed the debtor to unilaterally categorize its creditors and required that any creditor which did not agree with the classification file a dispute note. She also considered that the applicant creditor had not become aware that the debtor was rejecting its claim as being out of time until the last day and that no evidence of the creditor's position was presented to the court at the sanction hearing. In addition, she noted that no creditor or debtor prejudice would result from the sought after amendment.

47 As the proposed amendment in *Ontario* was non-prejudicial to the debtor and creditors, the court's jurisdiction to make the amendment might have been based on s. 7 or the court's plenary jurisdiction as set out in s. 11.

48 Madam Justice Romaine again was asked to consider amending a plan of arrangement at the post-sanction stage in *Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.*, 2005 ABQB 324, 382 A.R. 383 (Alta. Q.B.). In refusing the application, she commented (at para. 21) that a post-sanction amendment should be limited to truly exceptional circumstances as such an amendment has the potential to do violence to the goal of commercial certainty.

49 In *Century Services Inc.*, the first case in which the Supreme Court of Canada was asked to directly interpret the provisions of the *CCAA*, Deschamps J., for the majority, discussed the source of the court's authority during *CCAA* proceedings and the boundary between the court's statutory authority under the Act and the residual authority under its inherent and equitable jurisdiction when supervising a reorganization. She noted that appellate courts were of the view that while lower courts might be purporting to rely on their inherent jurisdiction, in fact they were simply construing the authority supplied by the *CCAA* itself, citing *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.) at paras. 45-47 and *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at paras. 31-33. She affirmed that the appropriate approach for a court to take is to rely first on a purposive and liberal interpretation of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding. She accepted (at para. 66) that in most cases the issuance of an order in a *CCAA* proceeding should be considered to be an exercise in statutory interpretation, given the expansive interpretation the language of the statute is capable of supporting. The example she referred to was s. 11 of the *CCAA*, which was amended to make explicit the discretionary authority of the court under the *CCAA* and to endorse the broad reading of *CCAA* authority developed by the jurisprudence.

50 Deschamps J. instructed (at paras. 69 and 70) that while the *CCAA* explicitly provides for certain orders, the general language of the Act should not be read as being restricted by the availability of more specific orders. She indicated that the court should take into consideration appropriateness, good faith, and due diligence when exercising *CCAA* authority, explaining that:

> Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

51 Given a plain and contextual reading of the *CCAA*, augmented by guidance provided by the case law, I conclude that:

> (a) The courts' supervisory function ends only when the plan has been fully implemented or has failed. Parliament must have intended that the court retain jurisdiction to address issues that could arise during implementation of the plan, including whether to summon a further creditors' meeting after the creditors' vote or court sanction. Section 7 does not grant that jurisdiction. However, the court's discretionary authority under s. 11 is broad enough to encompass such a direction.
>
> (b) In accordance with *Century Services Inc.*, the court's general discretionary authority under s. 11 should not be interpreted as being restricted by the more specific authority set out in s. 7.
>
> (c) When exercising its authority under s. 11, the court must consider the good faith of the applicant, whether due diligence has been exercised and the appropriateness of making the order sought. In regard to the latter, the court should consider whether the relief sought advances the objectives of the *CCAA* and all relevant policy concerns.

(d) Parliament's intention could not have been to introduce uncertainty and instability to the process. On the contrary, stability, certainty and fairness for all are the recognized goals of the *CCAA*. The effect of the sanction order is relevant as it binds the parties and cements commercial certainty. Once sanctioned, creditors can take their contract with the debtor "to the bank" (for all that may be worth where, as in the present case, plan implementation is staged). In balancing the policy objectives of the *CCAA*, Parliament must have intended that while calling a further meeting of the creditors should remain an option, under certain circumstances, at any stage of the proceedings, once the creditors have voted and the plan has been sanctioned, the court should do so only in exceptional circumstances - circumstances well beyond foreseeable risks such as ordinary business risks.

(e) While each case must be determined on its unique facts, at a minimum, the court should consider the following non-exhaustive list of considerations (many of which overlap and all of which rest on the applicant to establish) before summoning a further meeting of the creditors at the post-sanction stage to vote on a proposed amendment to the plan:

(i) Is the plea for relief made in good faith?

(ii) Has it been made in a timely fashion?

(iii) Would granting the relief advance the policy objectives underlying the *CCAA*?

(iv) Would granting the relief enhance the public's confidence in the *CCAA* process?

(v) Would granting the relief otherwise serve the ends of justice?

(vi) What is the level of creditor support?

VI. Application to the Present Case

A. Is the Plea for Relief Made in Good Faith?

52 There was a lack of cogent evidence establishing that the Debtors have no hope of meeting their obligations under the Plan unless the creditors' meeting is allowed and the proposed amendment is passed.

53 It appears that the Debtors banked on a steady flow of work and the payment of certain receivables to fund the second installment due under the Plan. Neither transpired. However, since the fall of 2010, Kerr has experienced an increase in its work. It is unclear whether Composite is back in business today.

54 Mr. Weibe indicated that he is "cautiously optimistic" about the Debtors' future and, as evidenced by his answers given during cross-examination on his affidavit, the Debtors want matters with their pre-*CCAA* creditors to end; they want to get it "out of [their] hair." Doubtless, this is a common sentiment for any company in the process of restructuring.

55 While I accept that the Debtors have suffered some negative effects from a downturn in the economy, nevertheless I find it curious, and indeed troubling, that:

(i) since formulating the Plan their workforce has more than quadrupled;

(ii) they chose to rely (at least in part) on the impact of 1005559's debts to support their plea for relief;

(iii) the evidence fails to show that they have taken all reasonable steps to fund the Plan, including downsizing and selling non-essential assets.

56 In the result, despite the Monitor's comment (as stated in its fifth report to the court) that it is "... unaware of any facts to suggest that the Management of the Companies are not acting in good faith with respect to their creditors...", I am not so

certain. In this regard, I am mindful that the Monitor's comment preceded the cross-examination on affidavit of Mr. Weibe that fleshed out much of the evidence that I have referred to in relation to this factor.

B. Is the Application Timely?

57 There is no suggestion that the Debtors delayed in bringing this application. The real concern is whether it is premature.

C. Would Granting the Relief Advance the Policy Objectives Underlying the CCAA?

58 The facts of this case reveal a tension between the objectives of facilitating restructuring and providing stability, certainty and fairness for all of the stakeholders. Avoiding a second, costly insolvency proceeding by allowing the Debtors to present a revised compromise, proposal, or plan of arrangement is a laudable goal. However, this would involve a tradeoff. The creditors voted on the Plan. Their agreement was cemented by the Sanction Order. They were entitled to rely on the deal and may have altered their own circumstances as a result of it. The Plan amendment proposed by the Debtors would see an eighty percent reduction in the amount the creditors originally accepted. So radical is this proposed change that it is more reasonably viewed as a completely new deal rather than an amendment.

59 While granting the relief would permit the creditors the opportunity to say whether the Debtors' proposed new deal is acceptable, other considerations also must be weighed. A non-exhaustive list of those considerations includes:

> (i) the creditors' right to receive current financial information prepared in accordance with the requirements of s. 10(2);
>
> (ii) meaningful compliance with the Monitor's duty to review the Debtors' s. 10(2) financial information as to its reasonableness (s.23(1)(b));
>
> (iii) meaningful compliance with the Monitor's duty to report to the court about the fairness and reasonableness of the proposal (s. 23(1)(i));
>
> (vi) the court's consideration of whether the proposal is workable (see *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), confirming *Royal Bank v. Fracmaster Ltd.*, 1999 ABQB 425, 245 A.R. 138 (Alta. Q.B.) in relation to a ss. 4 or 5 application).

These deficiencies might well be addressed by imposing conditions, but the benefit of that approach should be assessed contextually.

60 The demise of the Debtors is not a certainty if the relief is not granted. They can attempt to make another deal with their creditors in alternate insolvency proceedings, whether under the *BIA* or possibly another filing under the *CCAA*. As noted in L.W. Houlden and G.B. Morawetz's *Bankruptcy and Insolvency Law of Canada* (Toronto: Carswell, 2009), 4th ed. (rev'd), vol. 4, p. 11-28, there is nothing in the statute barring a second application. While the court in *Norseman Products Ltd., Re* (1949), 30 C.B.R. 71, [1950] O.W.N. 81 (Ont. S.C.) commented that a debtor company cannot claim the benefit of the *CCAA* more than once as this would lead to abuse, relying on *Comptoir coopératif du combustible Ltée, Re* (1935), 17 C.B.R. 124 (C.S. Que.), restructuring cases such as *Algoma Steel* suggest that a subsequent filing is appropriate where the statute affords an opportunity for a company to attempt to devise a revised business plan to address its financial distress. Such proceedings come at a price, but given the Debtors' work on its propose revised deal to date and the cost of complying with conditions to address informational concerns, that price is likely less than might otherwise be incurred.

61 In the result, the Debtors have not shown that the policy objectives underlying the *CCAA* would be advanced or that the process would be served by granting them the opportunity to present their proposal to their creditors.

D. Would Granting the Relief Enhance the Public's Confidence in the CCAA Process?

62 The Debtors have experienced economic trouble which has been caused, at least in part, by a downturn in the condominium development industry. However, downturns in the condominium market, especially in the boom and bust economy of Alberta,

are a foreseeable and ordinary business risk. There has been insufficient evidence presented establishing that this downturn is truly exceptional or was unforeseeable.

63 Similarly, the impact of the Debtors' secured obligations is not a basis for finding exceptional circumstances. These obligations were known long ago when the Plan was formulated. Although 1005559 is not a part of the group which sought *CCAA* protection, it is a related entity and its performance influences that of the Debtors. Alone or in combination with the Debtors' secured obligations, the obligations of 1005559 do not constitute an extraordinary circumstance.

64 The public's confidence in the *CCAA* process is necessarily grounded in fairness and stability for all of the stakeholders. Allowing the Debtors an opportunity for what, essentially, would be a second kick at the *CCAA* can after defaulting on their obligations would not, in all of the circumstances, further this objective.

E. Would Granting the Relief Serve the Ends of Justice?

65 Assessing whether the relief sought would serve the ends of justice entails many of the same considerations as determining whether it would advance the policy objectives underlying the *CCAA*. In addition, factors such as whether a unilateral mistake has been made may be taken into account, as in *Northland Properties Ltd., Re*

66 In the present case, directing a further meeting of the creditors is not necessary to meet the ends of justice.

F. What is the Level of Creditor Support?

67 The Opposing Creditors oppose granting of the application. There is no evidence of the level of creditor support to the proposed amendment. However, I understand that the creditors were canvassed informally, an approach which presumably failed.

68 After weighing the various factors, I find that the Debtors have failed to meet the high threshold required of them on this application.

VII. Conclusion

69 The Debtors are in default of their obligations under the Plan. Claiming that a downturn in the economy, the weight of secured debt and the obligations of a related party preclude them from living up to their obligations, they want another chance to escape bankruptcy by presenting their creditors with a proposed amendment to the Plan. The proposed amendment is to reduce the Debtors' obligation under the Plan by eighty percent. In essence, it is a new deal.

70 A purposive and contextual interpretation of s. 11 of the *CCAA* vests the court with discretion to grant the relief sought. However, the threshold for summoning a further meeting of creditors after court sanction is high and to succeed the debtor must establish truly extraordinary circumstances.

71 In making its determination, the court should consider whether the debtor's application is made in good faith and whether granting the relief would advance the policy objectives of the *CCAA*, serve and enhance the public's confidence in the process or otherwise serve the ends of justice. The court should also consider the degree of creditor support for the application.

72 The Debtors in the present case have not met the high threshold required for the court to exercise its discretion to order a further meeting of the creditors to be called at this late juncture. Accordingly, the application is dismissed and the creditors are at liberty to apply to lift the stay and pursue their remedies. The parties may speak to me within 30 days if they are unable to agree on costs.

Application dismissed.

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