

COURT FILE NUMBER

1601-01675

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

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  
ARRANGEMENT OF ARGENT ENERGY  
TRUST, ARGENT ENERGY (CANADA)  
HOLDINGS INC. and ARGENT ENERGY  
(US) HOLDINGS INC.

DOCUMENT

**BRIEF OF ARGUMENT**

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS  
DOCUMENT

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Special Chambers Application Scheduled for the 27<sup>th</sup> day of June, 2016 at 9:00 a.m.  
before The Honourable Mr. Justice D. B. Nixon

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## I. INTRODUCTION

1. The Applicants, Argent Energy Trust (the "Trust"), Argent Energy (Canada) Holdings Inc. ("Argent Canada") and Argent Energy (US) Holdings Inc. ("Argent US", and, together with the Trust and Argent Canada, "Argent" or the "Applicants") seek an Order, among other things:

- (a) extending the stay of proceedings granted in this Action to August 31, 2016;
- (b) approving the proposed actions of the Monitor in making further distributions of the proceeds of sale from the Transaction between Argent US and BXP Partners IV, L.P. ("BXP"), which closed on May 20, 2016; and
- (c) effective June 30, 2016, granting enhanced powers to the Monitor with respect to the Trust and directing the Monitor to assign the Trust into bankruptcy at such time as the Monitor deems appropriate.

2. Capitalized terms not otherwise defined herein shall have the meanings as defined in the Affidavits of Sean Bovingdon sworn in these proceedings.

## II. STATEMENT OF FACTS

3. As is set out in the Affidavit No. 4 of Sean Bovingdon sworn June 17, 2016, since the stay of proceedings was extended to June 30, 2016 pursuant to the Order (Stay Extension) of this Honourable Court granted May 5, 2016, Argent has acted in good faith and with due diligence to advance these restructuring proceedings. Those actions have included, but have not been limited to, obtaining an Order from the US Bankruptcy Court recognizing the Order (Sale Approval and Vesting) and the Order (Interim Distribution) granted by this Honourable Court on May 10, 2016, and closing the Transaction between Argent US and BXP.

Affidavit No. 4 of Sean Bovingdon sworn June  
17, 2016 (the "Bovingdon Affidavit No. 4"),  
paras. 7-11.

4. Argent seeks a further extension of the stay of proceedings to August 31, 2016, to allow it to attend to further post-closing matters, as further described below, and to wind up these CCAA proceedings and the Chapter 15 Proceedings in the U.S. Bankruptcy Court.

Bovingdon Affidavit No. 4, paras. 12-17.

5. The Monitor (through its Canadian and US counsel) has reviewed the Syndicate's pre-CCAA security and determined it to be valid; however, the security over the rolling stock of Argent US and over certain of its leasehold interests was not perfected by the Syndicate. In the circumstances where the Syndicate is otherwise secured with respect to those assets pursuant to the Interim Lender's Charge, in accordance with the Initial Order and the Amended and Restated Initial Order, and in accordance with the Orders granted by the U.S. Bankruptcy Court in recognition of those Orders, the Monitor intends to pay out to the Syndicate the amounts held by it in relation to the rolling stock and the said leasehold interests.

Bovingdon Affidavit No. 4, paras. 18-21, Exhibits "7" and "8".

6. As of June 30, 2016, it is expected that the directors of Argent Energy Ltd., which is the administrator of the Trust, will resign. As such, Argent seeks an Order granting certain enhanced powers to the Monitor to authorize it to act on behalf of the Trust, effective June 30, 2016, and further, a direction to the Monitor to bankrupt the Trust at such time as it deems appropriate.

Bovingdon Affidavit No. 4, para. 22.

### **III. DISCUSSION**

#### **A. Stay Extension**

##### **1. Statutory Requirements**

7. The current stay of proceedings expires on June 30, 2016. The Applicants are seeking an extension of the stay period up to and including August 31, 2016.

8. Section 11.02(2) of the CCAA gives the court discretion to grant or extend a stay of proceedings:

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph 1(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

- *CCAA*, s. 11.02(2)

[TAB 1]

9. Pursuant to section 11.02(3) of the *CCAA*, to exercise its discretion to extend the stay of proceedings, the Court must be satisfied that: (i) circumstances exist that make the order appropriate, and (ii) the applicant has acted, and is acting, in good faith and with due diligence during the *CCAA* proceedings.

- *CCAA*, s. 11.02(3)

[TAB 1]

## **2. Actions in Good Faith and with Due Diligence**

10. As is described in further detail in this Bench Brief and in the Bovington Affidavit No. 4, Argent has acted in good faith and with due diligence since the previous stay extension was granted on May 5, 2016. Argent has taken the following steps:

- (a) cooperating with the Monitor to facilitate its monitoring of the Applicants' business and operations;
- (b) communicating with various stakeholder groups and/or their advisors, including the Syndicate, critical suppliers, trade creditors, employees, contractors and others;
- (c) liaising with US counsel and appearing in the U.S. Bankruptcy Court regarding the Chapter 15 Proceedings in respect of Argent Canada and Argent US;
- (d) obtaining an Order from the U.S. Bankruptcy Court which recognized the approval of the Transaction and the Sale Agreement;
- (e) working with the Monitor, Oil & Gas Asset Clearinghouse, LLC ("OGAC"), and BXP to close the Transaction and the Sale Agreement as between Argent

US and BXP (the Transaction closed on May 20, 2016; the Applicants have continued and are continuing to work with the Monitor, OGAC and BXP on post-closing matters);

- (f) working with the Monitor with respect to distributions of the net proceeds of the sale from the Transaction, in accordance with the Order (Interim Distribution) granted herein and filed on May 10, 2016, including working with the Monitor to distribute the KERP and KEIP to employees of Argent;
- (g) working with the Monitor and potential lien claimants to determine the validity, priority and amounts of the liens as set out in Schedule "B" of the Order (Interim Distribution);
- (h) working with the Monitor and with parties to contracts with Argent US regarding the assumption and assignments of the contracts assumed by and assigned to BXP from Argent US pursuant to the Sale Agreement and the Order of the U.S. Bankruptcy Court, and in distributing cure costs in relation to the same;
- (i) working with the Monitor and potential tax claimants to determine the validity, priority and amounts of certain secured tax claims asserted against Argent US;
- (j) working with the Monitor with respect to winding down Argent US, the CCAA Proceedings and the Chapter 15 Proceedings; and
- (k) continuing to operate and manage Argent's business in the ordinary course, subject to the terms of the Amended and Restated Initial Order and the other Orders granted in the CCAA Proceedings and the Chapter 15 Proceedings.

Bovingdon Affidavit No. 4, paras. 8, 9.

### **3. Circumstances Exist that make a Stay Extension Order Appropriate**

11. Argent seeks to extend the stay of proceedings to August 31, 2016, which will allow for a number of post-closing matters to continue to be addressed. These post-closing matters include, but are not limited to:

- (a) further distribution by the Monitor of the net proceeds of sale from the Transaction, in accordance with the Order (Interim Distribution), including distribution of:
  - (i) Completion Costs, as defined in the Order (Interim Distribution);
  - (ii) the Administration Charge, as defined in the Initial Order and in the Amended and Restated Initial Order;
  - (iii) the Ad Hoc Committee First Charge, as defined in the Amended and Restated Initial Order;
  - (iv) the Directors' Charge, as defined in the Initial Order and in the Amended and Restated Initial Order;
  - (v) holdback funds in relation to lien claims registered against the assets of Argent US on or before May 20, 2016, depending upon the validity, amount and priority of those lien claims;
  - (vi) holdback funds in relation to tax claims registered against the assets of Argent US on or before May 20, 2016, depending upon the validity, amount and priority of those tax claims; and
  - (vii) distributions to the Syndicate;
- (b) finalizing the statement of adjustments and reaching agreement on the final accounting statement, as is contemplated in the Sale Agreement, which involves a 90-day post-closing period for preparation of the statement of adjustments, a seven-day response period, and a five-day period to reach an agreement on the same, or otherwise timelines for referral of any disputes regarding the final accounting statement to the U.S. Bankruptcy Court;
- (c) working to effect the change in operatorship of the assets of Argent US located in Wyoming, which have been purchased by BXP;

- (d) working with respect to other post-closing matters including other matters relating to changes of operatorship to purchasers of Argent's assets, which work is expected to continue over the next few months; and
- (e) winding down the CCAA proceedings.

Bovingdon Affidavit No. 4, paras. 11-15 and 17.

12. As such, Argent submits that the requested extension of the stay of proceedings to August 31, 2016 is reasonable and appropriate, in the circumstances.

**B. Further Distributions to the Syndicate**

13. Argent understands that the Monitor (with the assistance of its Canadian and US counsel) has reviewed the pre-CCAA security granted by Argent in favour of the Syndicate and has determined it to be valid; however, the pre-CCAA security over the rolling stock of Argent US and over certain of its leasehold interests was not perfected by the Syndicate. As such, the Monitor has retained a holdback of US \$525,000 with respect to the rolling stock and the leasehold interests.

Bovingdon Affidavit No. 4, para. 20.

14. As the assets of Argent US are secured in favour of the Syndicate by way of the Interim Lender's Charge, and as the Initial Order and the Amended and Restated Initial Order granted herein do not require such security in relation to the Interim Financing Credit Agreement to be registered or perfected, Argent understands that the Monitor's view is that the rolling stock and all leasehold interests of Argent US are, as a result of the Initial Order and the Amended and Restated Initial Order, properly secured. The Monitor intends to pay out to the Syndicate the US \$525,000 held by it in relation to the rolling stock and the said leasehold interests, and seeks an Order approving the Monitor's proposed actions in that regard.

Bovingdon Affidavit No. 4, para. 21.

15. The Interim Lender's Charge constitutes a charge on the Property (defined in the Initial Order as the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof) of Argent, and as is confirmed



by the Amended and Restated Initial Order, the filing, registration or perfection of the Interim Lender's Charge is not required.

Amended and Restated Initial Order filed March 17, 2016, paras. 41-42.

16. The Interim Lender's Charge grants the Syndicate a priority secured charge with respect to amounts advanced by the Syndicate pursuant to the Interim Financing Credit Agreement. That priority charge is subordinate only to the Administration Charge and the Ad Hoc Committee First Charge, both of which have been reserved for.

Amended and Restated Initial Order filed March 17, 2016, para. 40.

17. The Order Granting Emergency Application for Provisional Relief pursuant to Sections 105(a) and 1519 of the Bankruptcy Code granted by the U.S. Bankruptcy Court and entered on February 24, 2016 confirms that the Interim Lender's Charge and priorities as set out in the Initial Order are enforced against the DIP Collateral, as it is defined in that Order, in accordance with the Terms of Initial Order. The terms of that Order were extended on a final basis pursuant to paragraph 5 of the Order Granting Recognition as a Foreign Main Proceeding, or in the alternative as a Foreign Nonmain Proceeding, granted by the U.S. Bankruptcy Court and entered on March 11, 2016.

Bovingdon Affidavit No. 4, para. 22.

18. As such, regardless of the fact that, as Argent understands it, the Syndicate has not perfected its security with respect to the rolling stock and certain leases of Argent US, the Syndicate is secured with respect to that rolling stock and those leases as a result of the Interim Lender's Charge. Further, distribution of the net proceeds of the Transaction to the Syndicate with respect to those amounts secured by the Interim Lender's Charge in priority to the Syndicate's pre-CCAA security:

- (a) is in accordance with the priorities set out in the Initial Order and the Amended and Restated Initial Order; and

- (b) does not cause any prejudice to any other creditors of Argent, particularly in the circumstances where the Syndicate will not receive payment in full of all amounts owed to it by Argent, and as such, the manner in which distributions are made in relation to the Syndicate's security has no bearing on the position of any other creditors of Argent.

**C. Application for Enhanced Powers of the Monitor**

19. As of June 30, 2016, it is expected that the directors of Argent Energy Ltd. ("AEL") will resign. AEL is the administrator of the Trust. In those circumstances, Argent seeks an Order granting certain enhanced powers to the Monitor to authorize it to act on behalf of the administrator of the Trust, as set out in the form of Order attached as Schedule "A" to Argent's application, effective June 30, 2016.

20. This will ensure that in the absence of any directors of AEL, the Monitor will have the power to preserve, protect, and maintain control of the property of the Trust, receive funds on behalf of the Trust, make distributions or payments by the Trust, execute documents with respect to the property of the Trust, provide instructions to advisors of the Trust, oversee and direct the preparation of cash flow statements, assist in the dissemination of information in these proceedings with respect to the Trust, and assign the Trust into bankruptcy.

Bovingdon Affidavit No. 4, para. 22.

21. Pursuant to section 23(1)(k) of the CCAA, this Honourable Court has the discretion to authorize the Monitor to have functions other than those specifically enumerated by Parliament. Further support for this proposition is the explicit recognition of a monitor carrying on the debtor's business in section 11.8 of the CCAA. Those provisions state:

23(1) Duties and Functions – The monitor shall

(k) carry out any other functions in relation to the company that the court may direct.

...

11.8 No personal liability in respect of matters before appointment – Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor

company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

- (a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and
- (b) that exists before the monitor is appointed or that is calculated by preference to a period before the appointment.

[emphasis added]

- CCAA, s. 23(1)(k), s. 11.8 [TAB 1]
- *Re 843504 Alberta Ltd. (Bankruptcy and Insolvency Act)*, 2003 ABQB 1015 at para. 10. [TAB 2]

22. Enhanced powers are routinely granted to the Monitor in CCAA proceedings where directors of the debtor company have resigned.

- Order (Expansion of Monitor's Powers) granted and filed September 30, 2013, In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, And In the Matter of Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership and Poseidon Concepts Inc., Court of Queen's Bench of Alberta Court File No. 1301-04364. [TAB 3]
- *Nortel Networks Corp., Re*, 2009 CarswellOnt 9378 (Ont. S.C.J. [Commercial List]). [TAB 4]

23. It is intended that the Trust will be assigned into bankruptcy at the time that these CCAA proceedings are terminated. There will be no property in the Trust. The Trust Indenture (attached as Exhibit "2" to the Affidavit No. 1 of Sean Bovingdon filed February 17, 2016) does not provide for an orderly windup or termination of the Trust, other than by special resolution of the unitholders thereto (which will be impractical to obtain). Further, the trustee of the Trust, Computershare Trust Company of Canada ("**Computershare**") wishes to ensure that its obligations as trustee are discharged. As such, Argent seeks an Order granting the Monitor the power to assign the Trust into bankruptcy, and further, directing the Monitor to assign the Trust into bankruptcy at such time that the Monitor deems appropriate.

**IV. RELIEF SOUGHT**

24. Argent seeks an extension of the stay of proceedings to August 31, 2016, as well as the other relief as set out in the proposed form of Order attached as Schedule "A" to Argent's application.

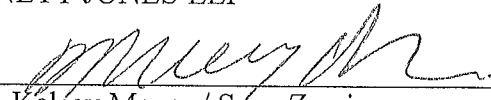
Calgary, Alberta  
June 20, 2016

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Estimated Time for  
Argument: 20 minutes

BENNETT JONES LLP

Per:

  
\_\_\_\_\_  
Kelsey Meyer / Sean Zweig  
Counsel for the Applicants,  
Argent Energy Trust, Argent Energy (Canada)  
Holdings Inc. and Argent Energy (US) Holdings Inc.

V. TABLE OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, s. 11.02(2), s. 11.02(3), 11.8, 23(1)(k) .....
2. *Re 843504 Alberta Ltd. (Bankruptcy and Insolvency Act)*, 2003 ABQB 1015
3. Order (Expansion of Monitor's Powers) granted and filed September 30, 2013, In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, And In the Matter of Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership and Poseidon Concepts Inc., Court of Queen's Bench of Alberta Court File No. 1301-04364.
4. *Nortel Networks Corp., Re*, 2009 CarswellOnt 9378 (Ont. S.C.J. [Commercial List]).

**TAB 1**



CANADA

CONSOLIDATION

CODIFICATION

## Companies' Creditors Arrangement Act

## Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to March 28, 2016

À jour au 28 mars 2016

Last amended on February 26, 2015

Dernière modification le 26 février 2015

available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1986, c. C-36, s. 10; 2006, c. 47, s. 127.

### General power of court

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

R.S., 1986, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 107; 1997, c. 12, s. 124; 2006, c. 47, s. 128.

### Rights of suppliers

**11.01** No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2006, c. 47, s. 128.

### Stays, etc. — initial application

**11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

### Stays, etc. — other than initial application

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

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1986), ch. C-36, art. 10; 2006, ch. 47, art. 127.

### Pouvoir général du tribunal

**11** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1986), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 107; 1997, ch. 12, art. 124; 2006, ch. 47, art. 128.

### Droits des fournisseurs

**11.01** L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2006, ch. 47, art. 128.

### Suspension : demande initiale

**11.02 (1)** Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

### Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :



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

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

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

#### Burden of proof on application

(3) The court shall not make the order unless

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

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

#### Restriction

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

2006, c. 47, s. 128, 2007, c. 38, s. 62(F).

#### Stays — directors

**11.03 (1)** An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

#### Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

#### Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

#### Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

#### Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2006, ch. 47, art. 128, 2007, ch. 38, art. 62(F).

#### Suspension — administrateurs

**11.03 (1)** L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

#### Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

#### Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

#### Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

1997, c. 12, s. 124; 2005, c. 47, s. 129.

#### No personal liability in respect of matters before appointment

**11.8 (1)** Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

#### Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

a) qui est ou, au cours des deux années précédentes, a été :

(i) administrateur, dirigeant ou employé de la compagnie,

(ii) lié à la compagnie ou à l'un de ses administrateurs ou dirigeants,

(iii) vérificateur, comptable ou conseiller juridique de la compagnie, ou employé ou associé de l'un ou l'autre;

b) qui est :

(i) le fondé de pouvoir aux termes d'un acte constitutif d'hypothèque — au sens du *Code civil du Québec* — émanant de la compagnie ou d'une personne liée à celle-ci ou le fiduciaire aux termes d'un acte de fiducie émanant de la compagnie ou d'une personne liée à celle-ci,

(ii) lié au fondé de pouvoir ou au fiduciaire visé au sous-alinéa (i).

#### Remplacement du contrôleur

(3) Sur demande d'un créancier de la compagnie, le tribunal peut, s'il l'estime indiqué dans les circonstances, remplacer le contrôleur en nommant un autre syndic, au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité*, pour agir à ce titre à l'égard des affaires financières et autres de la compagnie.

1997, ch. 12, art. 124; 2005, ch. 47, art. 129.

#### Immunité

**11.8 (1)** Par dérogation au droit fédéral et provincial, le contrôleur qui, en cette qualité, continue l'exploitation de l'entreprise de la compagnie débitrice ou lui succède comme employeur est déchargé de toute responsabilité personnelle découlant de quelque obligation de la compagnie, notamment à titre d'employeur successeur, si celle-ci, à la fois :

a) l'oblige envers des employés ou anciens employés de la compagnie, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;

b) existait avant sa nomination ou est calculée par référence à une période la précédant.

#### Obligation exclue des frais

(2) L'obligation visée au paragraphe (1) ne fait pas partie des frais d'administration.

### Liability of other successor employers

**(2.1)** Subsection (1) does not affect the liability of a successor employer other than the monitor.

### Liability in respect of environmental matters

**(3)** Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

- (a) before the monitor's appointment; or
- (b) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

### Reports, etc., still required

**(4)** Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

### Non-liability re certain orders

**(5)** Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (b), the monitor

- (i) complies with the order, or
  - (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;
- (b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a) or within ten days after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

### Responsabilité de l'employeur successeur

**(2.1)** Le paragraphe (1) ne dégage aucun employeur successeur, autre que le contrôleur, de sa responsabilité.

### Responsabilité en matière d'environnement

**(3)** Par dérogation au droit fédéral et provincial, le contrôleur est, ès qualités, dégage de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu, avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée.

### Rapports

**(4)** Le paragraphe (3) n'a pas pour effet de soustraire le contrôleur à l'obligation de faire rapport ou de communiquer des renseignements prévus par le droit applicable en l'espèce.

### Immunité — ordonnances

**(5)** Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (3), le contrôleur est, ès qualités, dégage de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par des procédures intentées au titre de la présente loi, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

- (i) il s'y conforme,
- (ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout intérêt dans l'immeuble en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

- (i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au contrôleur de la contester,

sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

#### Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

1997, c. 12, s. 126; 2005, c. 47, s. 131; 2007, c. 36, s. 71.

#### Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2005, c. 47, s. 131; 2007, c. 36, s. 71.

## Monitors

#### Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than \$1,000 advising them that the order is publicly available, 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;

c) les voies de droit ouvertes aux créanciers, abstraction faite de la transaction ou de l'arrangement, et la mesure dans laquelle il pourrait être satisfait à leurs réclamations s'ils s'en prévalaient;

d) tous autres critères réglementaires compatibles avec ceux énumérés aux alinéas a) à c).

#### Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

#### Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

22.1 Malgré le paragraphe 22(1), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

## Contrôleurs

#### Attributions

23 (1) Le contrôleur est tenu :

a) à moins que le tribunal n'en ordonne autrement, lorsqu'il rend une ordonnance à l'égard de la demande initiale visant une compagnie débitrice :

(i) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires,

(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :

(A) de rendre l'ordonnance publique selon les modalités réglementaires,

(B) d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,

(C) d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;

**(b)** review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

**(c)** make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

**(d)** file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

**(i)** without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

**(ii)** not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

**(iii)** at any other time that the court may order;

**(d.1)** file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

**(e)** advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

**(f)** file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

**(f.1)** for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

**(g)** attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

**(h)** if the monitor is of the opinion that it would be more beneficial to the company's creditors if

**b)** de réviser l'état de l'évolution de l'encaisse de la compagnie, en ce qui a trait à sa justification, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

**c)** de faire ou de faire faire toute évaluation ou investigation qu'il estime nécessaire pour établir l'état des affaires financières et autres de la compagnie et les causes des difficultés financières ou de l'insolvabilité de celle-ci, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

**d)** de déposer auprès du tribunal un rapport portant sur l'état des affaires financières et autres de la compagnie et contenant les renseignements réglementaires :

**(i)** dès qu'il note un changement défavorable important au chapitre des projections relatives à l'encaisse ou de la situation financière de la compagnie,

**(ii)** au plus tard quarante-cinq jours — ou le nombre de jours supérieur que le tribunal fixe — après la fin de chaque trimestre d'exercice,

**(iii)** à tout autre moment fixé par ordonnance du tribunal;

**d.1)** de déposer auprès du tribunal, au moins sept jours avant la date de la tenue de l'assemblée des créanciers au titre des articles 4 ou 5, un rapport portant sur l'état des affaires financières et autres de la compagnie, contenant notamment son opinion sur le caractère raisonnable de la décision d'inclure dans la transaction ou l'arrangement une disposition prévoyant la non-application à celle-ci des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, et contenant les renseignements réglementaires;

**e)** d'informer les créanciers de la compagnie du dépôt du rapport visé à l'un ou l'autre des alinéas b) à d.1);

**f)** de déposer auprès du surintendant des faillites, selon les modalités réglementaires, de temps et autre, une copie des documents précisés par règlement;

**f.1)** afin de défrayer le surintendant des faillites des dépenses engagées par lui dans l'exercice de ses attributions prévues par la présente loi, de lui verser, pour dépôt auprès du receveur général, le prélèvement réglementaire, et ce au moment prévu par les règlements;

**g)** d'assister aux audiences du tribunal tenues dans le cadre de toute procédure intentée sous le régime de la

proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

#### Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

2005, c. 47, s. 131; 2007, c. 36, s. 72.

#### Right of access

24 For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

2005, c. 47, s. 131.

#### Obligation to act honestly and in good faith

25 In exercising any of his or her powers or 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*.

2005, c. 47, s. 131.

## Powers, Duties and Functions of Superintendent of Bankruptcy

#### Public records

26 (1) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers

présente loi relativement à la compagnie et aux assemblées de créanciers de celle-ci, s'il estime que sa présence est nécessaire à l'exercice de ses attributions;

h) dès qu'il conclut qu'il serait plus avantageux pour les créanciers qu'une procédure visant la compagnie soit intentée sous le régime de la *Loi sur la faillite et l'insolvabilité*, d'en aviser le tribunal;

i) de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et ses créanciers;

j) de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents;

k) d'accomplir à l'égard de la compagnie tout ce que le tribunal lui ordonne de faire.

#### Non-responsabilité du contrôleur

(2) S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)b) à d.1), le contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie.

2005, ch. 47, art. 131; 2007, ch. 36, art. 72.

#### Droit d'accès aux biens

24 Dans le cadre de la surveillance des affaires financières et autres de la compagnie et dans la mesure où cela s'impose pour lui permettre de les évaluer adéquatement, le contrôleur a accès aux biens de celle-ci, notamment les locaux, livres, données sur support électronique ou autre, registres et autres documents financiers.

2005, ch. 47, art. 131.

#### Diligence

25 Le contrôleur doit, dans l'exercice de ses attributions, agir avec intégrité et de bonne foi et se conformer au code de déontologie mentionné à l'article 13.5 de la *Loi sur la faillite et l'insolvabilité*.

2005, ch. 47, art. 131.

## Attributions du surintendant des faillites

#### Registres publics

26 (1) Le surintendant des faillites conserve ou fait conserver, en la forme qu'il estime indiquée et pendant la

**TAB 2**

2003 ABQB 1015  
Alberta Court of Queen's Bench

843504 Alberta Ltd., Re

2003 CarswellAlta 1786, 2003 ABQB 1015, [2003] A.J. No. 1549, 127  
A.C.W.S. (3d) 1135, 30 Alta. L.R. (4th) 91, 351 A.R. 222, 4 C.B.R. (5th) 306

**In the Matter of the Bankruptcy and Insolvency Act R.S.C.  
1985, C. B-3, As Amended and 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  
843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

Topolniski J.

Heard: November 10, 2003  
Judgment: December 9, 2003  
Docket: Edmonton 0303-19663

Counsel: A. Robert Anderson for EdgeStone Capital Mezzanine Fund II Nominee Inc.  
Emi R. Bossio for Ingersoll-Rand Canada Inc.  
Michael McCabe for Proposal Trustee, PricewaterhouseCoopers LLP  
Kent Rowan for GE Commercial Distribution Finance Canada Inc.  
Michael Penny, Stuart Weatherill for Unknown Purchaser  
Darren Bieganek for Transportation Lease Systems Inc.  
David Stratton for CNH Canada Ltd. (New Holland Construction), New Holland (Canada) Credit Company  
Jerry Hockin for JLG Industries Ltd., CAFO Inc.  
Rick Reeson for Alberta Treasury Branches

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.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.b Grant of stay

XIX.2.b.vii Extension of order

**Headnote**

**Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings**

Company operated under threat of enforcement proceedings by two of its secured creditors, G Inc. and E Ltd. — Company made arrangement with E Ltd. to seek protection under Companies' Creditors Arrangement Act (CCAA) — Company then filed notice of intention to make proposal under Bankruptcy and Insolvency Act — E Ltd. applied for stay of proceedings under CCAA — Company was placed under protection of CCAA for 30 days and Monitor was appointed — E Ltd. and Monitor brought application to extend stay of proceedings — Application granted — Monitor's proposed restructuring



process and timeline contemplated sale of company's assets before plan was developed and presented to creditors — Monitor's proposed process was unacceptable — Monitor acted diligently by moving process towards development of plan — No evidence existed that E Ltd. had acted in bad faith — Monitor had clearly acted in good faith — Extension would provide Monitor with more opportunity to formulate plan to creditors — Controls could be put in place to prevent some creditors from manoeuvring for better position — Further assessment of diligence and good faith could be made at end of extension period — Conditions were imposed on extension of stay of proceedings.

## Table of Authorities

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

*Alberta (Human Rights Commission) v. Alberta Blue Cross Plan* (1983), [1983] 6 W.W.R. 758, 4 C.H.R.R. D/1661, 48 A.R. 192, 1 D.L.R. (4th) 301, 4 Admin. L.R. 135, 84 C.L.L.C. 17,002, 28 Alta. L.R. (2d) 1, 1983 CarswellAlta 159 (Alta. C.A.) — referred to

*Allen v. Alberta* (2001), 2001 CarswellAlta 1070, [2001] 9 W.W.R. 609, 2001 ABCA 171, 286 A.R. 132, 253 W.A.C. 132, 93 Alta. L.R. (3d) 213 (Alta. C.A.) — referred to

*Anvil Range Mining Corp., Re* (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

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

*Blue Range Resource Corp., Re* (1999), 1999 CarswellAlta 597, 245 A.R. 154 (Alta. Q.B.) — considered

*Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104, 1992 CarswellOnt 161 (Ont. Gen. Div.) — referred to

*Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 72 O.T.C. 99, 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — considered

*Consumers Packaging Inc., Re* (2001), 2001 CarswellOnt 3482, 27 C.B.R. (4th) 197, 150 O.A.C. 384, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

*Hovsepian v. Westfair Foods Ltd.* (2003), 37 B.L.R. (3d) 78, 2003 ABQB 641, 2003 CarswellAlta 1300 (Alta. Q.B.) — referred to

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

*Liberty Oil & Gas Ltd., Re* (2002), 2002 ABQB 949, 2002 CarswellAlta 1364, 38 C.B.R. (4th) 227 (Alta. Q.B.) — referred to

*Mine Jeffrey inc., Re* (2003), 2003 CarswellQue 90, 35 C.C.P.B. 71, [2003] R.J.D.T. 23, 40 C.B.R. (4th) 95, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.*) [2003] R.J.Q. 420 (Que. C.A.) — referred to

*Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93, 1995 CarswellOnt 340 (Ont. Gen. Div. [Commercial List]) — referred to

*PSINET Ltd., Re* (2001), 2001 CarswellOnt 3405, 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) — referred to

*Rio Nevada Energy Inc., Re* (2000), 2000 CarswellAlta 1584, 283 A.R. 146 (Alta. Q.B.) — referred to

*Royal Bank v. Fracmaster Ltd.* (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — referred to

*Sammi Atlas Inc., Re* (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — referred to

*United Used Auto & Truck Parts Ltd., Re* (2000), 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — referred to

#### Statutes considered:

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

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

s. 11(6) — considered

s. 11.7(3) [en. 1997, c. 12, s. 124] — referred to

s. 11.8 [en. 1997, c. 12, s. 124] — referred to

APPLICATION by creditor and monitor to extend stay of proceedings under *Companies' Creditors Arrangement Act*.

#### *Topolniski J. (orally):*

##### Introduction

1 EdgeStone Capital Mezzanine Fund II Ltd., (EdgeStone) a creditor of 84305 Alberta LTD., more commonly known as Skyreach Equipment, and the Monitor of Skyreach, appointed under an Initial Order pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), seek an extension of the stay of proceedings. With the exception of GE Commercial Distribution Finance Canada Inc. (GE), Skyreach's other creditors oppose the extension of the stay. These reasons further expand upon my oral decision on the reasons given on November 10, 2003.

##### Facts

2 Skyreach Equipment, is a well-known name in Alberta. The company specializes in renting, servicing and selling industrial lifts and aerial work platforms to a variety of business sectors. The Skyreach name, up until a short time ago, graced the arena that is home to the Edmonton Oilers, and continues to be the name of another arena, home to the Kelowna Rockets. It has 142 employees, and operates 12 branches — 19 in Alberta and 3 in British Columbia.

3 Since this spring Skyreach has operated under the threat of enforcement proceedings by its two general secured creditors, G.E. and EdgeStone. It tried to negotiate a going concern sale.

4 On September 19 2003, days after making an arrangement with EdgeStone to seek protection under the CCAA, Skyreach filed a Notice of Intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (BIA). EdgeStone then chose to apply instead for the CCAA stay of proceedings, and after a contested motion on October 9, 2003, Skyreach was placed under the protective umbrella of the CCAA for 30 days (Initial Order). PriceWaterhouseCoopers was appointed Monitor, with power to operate the business.

5 EdgeStone and the Monitor apply to have the stay extended. The PIMSI and mortgage creditors oppose the extension application. It is common ground that the onus in applications of this nature is on the applicant to satisfy the test in section 11(6) of the CCAA that:

- a) circumstances exist to make the extension order appropriate and
- b) the applicant is acting in good faith and diligently.

The test is not whether the plan of arrangement is doomed to failure — That is the test for terminating, not extending, a stay of proceedings (*Rio Nevada Energy Inc., Re* (2000), 283 A.R. 146 (Alta. Q.B.)).

6 The PIMSI and mortgage creditors argue that EdgeStone has not discharged the onus, asserting that the proceeding has been, and continues to be, an impermissible receivership under the guise of a CCAA restructuring. Further, they object to the Monitor's application on the basis that it is inappropriate for it to take a position in opposition to one of the parties.

7 EdgeStone and the Monitor rely on the Monitor's *Third Report to the Court* and an excerpt from an *Information Circular*. as the necessary evidence of good faith and due diligence in pursuing a plan of arrangement. EdgeStone's officer's affidavit says that, based upon his review of the Monitor's reports, the Monitor is acting diligently, in good faith, and that circumstances exist to warrant the extension.

### **1. The Initial Order**

8 On October 9th, EdgeStone applied to vacate the Notice of Intention and to obtain a CCAA stay of proceedings. GE supported the application. Skyreach took no position. A number of creditors holding PIMSI and mortgage security opposed the initial application on the ground that the CCAA process would benefit only EdgeStone, and therefore was really a receivership for EdgeStone's benefit at the expense of others and an abuse of the CCAA.

9 Appreciating the PIMSI creditors' concerns, I granted the Initial Order with conditions designed to protect the interests of all stakeholders. It provided for the usual 30-day moratorium to permit the development of, at least, a germ of a plan of arrangement, and further required court approval of any sale of assets for more than \$100,000 and, in the case of assets subject to PIMSI's, \$20,000. It gave the power to carry on business and to solicit invitations from prospective purchasers to the Monitor, and created an expedited process for proving claims for creditors holding PIMSI and mortgage security.

10 The CCAA contemplates a monitor having powers beyond those required to fulfil the traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and the court. Section 11.7(3) of the CCAA leaves discretion in the court to authorize functions other than those specifically enumerated by Parliament. Further support for this proposition is the explicit recognition of a monitor carrying on the debtor's business in section 11.8. (*Mine Jeffrey inc., Re* (2003), 40 C.B.R. (4th) 95, [2003] R.J.Q. 420 (Que. C.A.)). The Monitor's ability to carry on business, at least during the Initial Order phase, was considered necessary given the undisputed evidence of corporate interference and allegations of conflict of interest by Skyreach's Director and CEO, and the imminent resignation of the debtor's directors.

### **2. Subsequent Motions**

11 The minutes of the initial order were settled. In the course of that hearing the Monitor's powers were reviewed to ensure that it had the powers necessary to carry on the business and to establish a process for soliciting offers to purchase assets. The

intention was to provide sufficient, but not overreaching powers, given the unusual situation of the Monitor, rather than the company, operating the business.

12 GE also sought an order amending an earlier order granted by another judge which permitted funding for Skyreach by GE on specific terms. Notice had not been given to most other creditors. The amending order was refused, with the ability to reapply on notice to affected parties.

### 3. This Application

13 The CCAA is intended to provide a structured, court supervised environment for the negotiation of compromises between a debtor and its creditors for the benefit of not only those parties, but also other stakeholders such as employees and shareholders. At the end of day, the objective is to enable the debtor to continue in business so that all stakeholders benefit (*United Used Auto & Truck Parts Ltd., Re* (2000), 135 B.C.A.C. 96, 2000 BCCA 146 (B.C. C.A.), at paras. 10 and 11). The CCAA is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholder's position at the expense of others — there should be no confiscation of legal rights. This requires a balancing of interests, rights and prejudices to "see if rights are compromised . . . and have the pain of the compromise equitably shared." (*Sammi Atlas Inc., Re*, [1998] O.J. No. 1089 (Ont. Gen. Div. [Commercial List]) citing *Campeau Corp., Re*, [1992] O.J. No. 237, 10 C.B.R. (3d) 104 (Ont. Gen. Div.), at 109).

14 As acknowledged by LoVecchio J. in *Blue Range Resources Corp.* (1999), 245 A.R. 154, 1999 ABQB 1038 (Alta. Q.B.), reorganization of a company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organizational and management restructuring, downsizing, refinancing, or debt to equity conversion — the solutions are generally limited only by the creativity of those structuring the plan of arrangement. That said, the solutions in Alberta generally expect the corporate entity to continue in some form or another and do not allow for a liquidation proposal unless exceptional circumstances exist to justify it, notwithstanding that the CCAA seems to allow it (*Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93, 11 C.B.R. (4th) 230 (Alta. C.A.)). Simply put, in this province the corporate entity is expected to continue in some form or another unless there are exceptional circumstances. Liquidation proceedings are typically reserved for receiverships, windings up or bankruptcy.

15 This is quite different than in Ontario where apparently debtors can use the benefits of the legislation when there is no prospect of corporate survival or no plan of arrangement is proposed: *Anvil Range Mining Corp.* (2002), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), aff'd (2002), 34 C.B.R. (4th) 157 (Ont. C.A.); *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104; *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 46.

### EdgeStone's Application and Evidence

16 As noted previously, EdgeStone's affidavit is based upon the deponent's review of the Monitor's reports and merely asserts that the Monitor is acting diligently and in good faith, and that circumstances exist to warrant the extension. This offers nothing more than a conclusion about the very determinations that the court is required to make in deciding whether the test has been satisfied. It is of very little assistance, and this form of conclusory affidavit is not acceptable: *Alberta (Human Rights Commission) v. Alberta Blue Cross Plan* (1983), 48 A.R. 192 (Alta. C.A.) at para. 8; *Allen v. Alberta*, [2001] A.J. No. 863, 2001 ABCA 171 (Alta. C.A.) at para. 8; *Hovsepian v. Westfair Foods Ltd.*, [2003] A.J. No. 1133, 2003 ABQB 641 (Alta. Q.B.). I note that the Monitor's report is filed with the court for information purposes and is available to me.

17 GE supports EdgeStone's application, acknowledging that it expects to be paid out in full through an asset sale, and that it continues to be paid full interest at a rate of \$15,000 per day on its loan under the terms of a funding order granted earlier by another judge.

### The Monitor's Duties, Application, and Evidence

18 The appropriateness of the Monitor's application to extend the stay of proceedings was questioned on the basis that by its actions, the Monitor was favouring the debtor and EdgeStone.

19 As an officer of the court, the Monitor owes a duty to treat all creditors reasonably and fairly. Like a court-appointed receiver or liquidator, its duties are those of a fiduciary.

20 Because of the special circumstances that existed at the date of the Initial Hearing, the Monitor was given the power to carry on Skyreach's business. With that power comes a risk, be it perceived or real, of conflict of interest, and where the Monitor advocates a position or a plan of arrangement that risk may be exacerbated. In making its application for the extension the Monitor presumed that it was reasonable for it to do so since it was operating the business and there were no directors in place. Although motivated by good intentions this gave rise to a perception of conflict of interest, something that must be jealously guarded against. The appointment of a Chief Restructuring Officer or the appointment of new or returning directors can easily avoid perceptions of bias.

21 The Monitor relies on an affidavit that attaches its Third Report to the Court and two pages from an Information Circular. The report indicates that since the Initial Order, the Monitor has taken control of the business, working closely with management. The report indicates that the Monitor has identified excess equipment and undertaken an extensive process to solicit offers for:

- a) all or part of the debtor's assets business and undertakings,
- b) refinancing,
- c) acquisition of the shares of Skyreach (subject to the approval of EdgeStone which holds and may exercise the shares under its security), or
- d) any combination thereof.

22 The Monitor has advertised in newspapers, posted information on its national electronic bulletin board and web site, delivered some 300 Information Circulars to prospective purchasers, and set up a data room. Negotiations have begun with prospective purchasers, one of whom has expressed an interest in buying Skyreach's significant tax losses. Counsel for the Monitor, EdgeStone, and GE argued that only a sale of the tax losses will result in some payment to the unsecured creditors at the end of the day. Whether this is likely given voting structures under the CCAA is, of course, yet to be seen.

### **The proposed restructuring process**

23 The Monitor proposes the following restructuring process and time line. The Monitor will:

1. will solicit offers until November 28;
2. report the results of the solicitations to the Court by December 19
3. close transactions after obtaining court approval by January 30 2004, and
4. finally, formulate a plan of arrangement for presentation to the creditors by February 28, 2004.

24 Clearly, this process contemplates the sale of Skyreach's assets, either hard assets or shares, well before a plan is developed and presented to the creditors.

25 The Monitor, EdgeStone and GE urge that this process will maximize recoveries for the stakeholders, contending that the marketplace can best determine value of the debtor's assets. EdgeStone relies on *Consumers Packaging Inc., Re* (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197 (Ont. C.A.) and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 72 O.T.C. 99, 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) in support of the proposition that this is an acceptable practice.

26 Once again, the opposing creditors say that this is simply more evidence that this proceeding is nothing more than a receivership in disguise for EdgeStone's benefit.

27 In *Consumers Packaging Inc.* the court approved a going concern sale before the plan of arrangement was presented because the sale would preserve the business, albeit under new ownership, and because of uncertainty over whether the debtor could continue operations given its financiers' demands.

28 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* provincial and territorial governments decided to transfer responsibility for the Canadian blood supply to a new national agency. The court held that the CCAA was flexible enough that it could be interpreted to convert the company's assets into a cash fund, crystalizing the highest value recovery pool possible. This was advantageous to unsecured creditors, but did not affect creditors with security interests. The Court ruled that it had jurisdiction to grant the order, noting that the proper question was whether the process was appropriate in all of the circumstances.

29 I accept that the need for flexibility in CCAA proceedings may, in the appropriate circumstances, warrant a sale of a significant portion of a debtors assets or undertaking before a plan of arrangement is put to the creditors. (*PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]); [2001] O.J. 3829, *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* and *Consumer's Packaging*). Obviously, each case must be assessed on its own unique facts, but in this case there is no evidence that it is either necessary or in the stakeholders' best interests. Accordingly, at this stage the proposed process is unacceptable. In deciding this, I make no finding as to EdgeStone's *bona fides* nor rule out the prospect of evidence being adduced to establish that it would be appropriate.

30 EdgeStone argues that there is Alberta authority for the sale of all or substantially all of the debtor's assets (*Blue Range Resource Corp., Gauntlet Energy Corp* action 0301-09612, *Liberty Oil & Gas Ltd., Re* action 0201-03299 [2002 CarswellAlta 1364 (Alta. Q.B.)], and *Mirant Canada Energy Marketing Ltd.* action 0301-11094. *Blue Range* and *Liberty Oil & Gas Ltd.* obtained court sanctioning for liquidation-style plans. *Gauntlet* obtained creditor approval for a liquidation-type plan, but the sanctioning hearing has not yet been held. *Mirant's* creditors have not yet approved a liquidation-style plan, although a plan has been circulated to the creditors.

### The Extension should be granted

31 Applying the three arms of the test in s. 11.7, I find that the Monitor has acted diligently in moving the process along towards the development of a plan. The fact that the on the evidence before me, I disagree with the proposed timing for steps in the restructuring to occur does not detract from that.

32 Although suspicions are raised by the opposing creditors' arguments, I cannot find on the materials before me that EdgeStone is acting in bad faith. The Monitor is certainly acting in good faith, but that is not an appropriate ingredient in applying the s. 11.7 test.

33 In considering whether circumstances exist for the extension, the following factors assist the applicant:

1. An extension gives the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation;

2. With sufficient controls in place, an extension will prevent creditors from maneuvering for a better position (*Rio Nevada Energy Inc.*, and cases cited at para. 36)

3. There is no evidence about whether the anticipated costs of these proceedings will be similar to costs anticipated in a receivership. What is known is that Skyreach is expected to suffer a \$337,000 deficit by the end of January 2004. PIMSI and mortgage creditors want EdgeStone to pay all of CCAA costs. However, it would be inappropriate to allocate costs now since there is no certainty about what benefits will accrue to any given party. That can be done later.

4. The extension Order is only until December 19th. At that time a further assessment of good faith, due diligence, and the appropriateness of the circumstances can be made.
5. I cannot conclude that a liquidation sale is inevitable or the most likely outcome at this stage of the proceedings. The Monitor is offering shares for sale.
6. The prospect of a tax loss sale may have value for unsecured creditors. A tax loss sale is apparently easier to facilitate in CCAA proceedings than other insolvency proceedings;

#### Order

1. The stay of proceedings under the CCAA is extended to December 19<sup>th</sup>
2. The Monitor is to hire and hand over possession and operational control of Skyreach to a Chief Restructuring Officer within 14 days;
3. The Monitor is to fulfil its traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and court and play a supportive role in developing the plan and presenting it to the creditors;
4. The proposed sale of all or substantially all of the assets before a plan of arrangement is presented to the creditors is not approved.
5. A further stay extension should be supported by evidence demonstrating significant progress towards a plan of arrangement.
6. If the company is unable to present a viable plan of arrangement before a sale of all or substantially all of the assets, the sale documents should be prepared as though for a receivership sale. However, if the company or another applicant proposes a sale before the presentation of a plan, the appropriate application may be made.
7. Assets subject to PIMSI interests used in the company's daily operations are to be paid for in accordance with the terms of the governing agreement.
8. A cost allocation hearing is to be scheduled to follow an application to sanction the plan of arrangement.

*Application granted.*

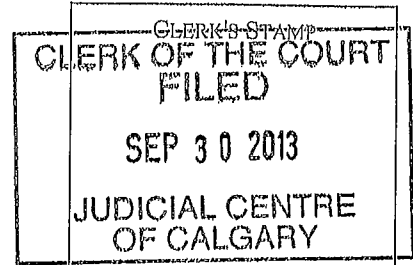
**TAB 3**



I hereby certify this to be a true copy of  
the original Order

Dated this 30 day of Sept., 2013

Grace Pearson  
for Clerk of the Court



COURT FILE NUMBER 1301 - 04364  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY  
APPLICANTS IN THE MATTER OF THE COMPANIES'  
CREDITORS ARRANGEMENT ACT, R.S.C. 1985,  
c. C-36, AS AMENDED

AND IN THE MATTER OF POSEIDON  
CONCEPTS CORP., POSEIDON CONCEPTS  
LTD., POSEIDON CONCEPTS LIMITED  
PARTNERSHIP AND POSEIDON CONCEPTS  
INC.

DOCUMENT ORDER (Expansion of Monitor's Powers)

ADDRESS FOR SERVICE AND CONTACT  
INFORMATION OF PARTY FILING THIS  
DOCUMENT **BENNETT JONES LLP**  
Barristers and Solicitors  
4500, 855 - 2<sup>nd</sup> Street SW  
Calgary, Alberta T2P 4K7

Attention: Ken Lenz  
Telephone No.: (403) 298-3317  
Facsimile No.: (403) 265-7219  
Client File No.: 11866.66

DATE ON WHICH ORDER WAS  
PRONOUNCED: Friday, September 27, 2013

LOCATION WHERE ORDER WAS  
PRONOUNCED: Calgary

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Madam Justice K.M. Eidsvik

UPON the application of the PricewaterhouseCoopers Inc., the Court-appointed Monitor  
(the "Monitor") of Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts

Limited Partnership and Poseidon Concepts Inc. (collectively, "**Poseidon**"); AND UPON the consent of The Toronto-Dominion Bank, as agent for a syndicate comprised of The Toronto-Dominion Bank, National Bank of Canada, The Bank of Nova Scotia and HSBC Bank Canada (collectively, the "**Lending Syndicate**"); AND UPON having read the Thirteenth Report of the Monitor dated September 6, 2013 and the Sixteenth Report of the Monitor dated September 26, 2013; AND UPON noting that the Poseidon Board of Directors have indicated their intention to resign, and that the third party contract management services provided by Total Water Management Inc. have concluded;

AND UPON hearing from counsel for the Monitor, counsel to the Lending Syndicate, counsel to Poseidon and any other affected parties that may be present;

**IT IS HEREBY ORDERED AND DECLARED THAT:**

**DEFINED TERMS**

1. Capitalized terms not defined herein shall have the meanings ascribed to them in the Initial Order of this Court in these proceedings dated April 9, 2013 (the "**Initial Order**").

**SERVICE**

2. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

**EXPANSION OF MONITOR'S POWERS**

3. The expansion of the Monitor's powers in respect of Poseidon as set forth below is hereby authorized and approved, on the terms and conditions set out herein. Nothing in this Order shall derogate from the powers of the Monitor as provided for in the Initial Order.
4. In addition to the powers and duties of the Monitor set out in the Initial Order, without altering in any way the limitations and obligations of Poseidon as a result of these proceedings, the Monitor be and is hereby authorized and empowered to:
  - (a) preserve, protect and maintain control of the Property, or any parts thereof;

- (b) operate and carry on the business of Poseidon including, without limitation:
  - (i) completing any transaction for the sale of Property; and
  - (ii) negotiating, developing and implementing a Plan or Plans on behalf of Poseidon;
- (c) take all steps and actions the Monitor considers necessary or desirable in these proceedings including, without limitation:
  - (i) entering into any agreements;
  - (ii) incurring obligations in the ordinary course of business;
  - (iii) retaining or terminating employees; and
  - (iv) ceasing to carry on all or any part of the Business;
- (d) 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) oversee and direct the preparation of cash flow statements and to assist in the dissemination of financial and other information in these proceedings;
- (f) receive, collect and take possession of all monies and accounts now owed or hereafter owing to any one of Poseidon, including proceeds payable pursuant to a sale of Property;
- (g) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Monitor's name or in the name and on behalf any one of Poseidon;
- (h) initiate, prosecute and continue the prosecution of any and all proceedings on behalf of Poseidon and to settle or compromise any such proceedings or claims. For greater certainty, such authority shall include the ability to represent Poseidon

in any negotiations or mediation with respect to such claims of Poseidon. 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 proceedings;

- (i) instruct counsel respecting the defence of the class proceedings commenced against Poseidon, only to the extent that such instructions are necessary for defence counsel in the class proceedings and only to the extent such instructions do not require the disclosure of privileged information or documentation to the Monitor, and provided that the Monitor shall not have the authority to take any steps that would have the effect of invalidating coverage under any applicable insurance policy;
  - (j) exercise any rights which Poseidon may have;
  - (k) provide instruction and direction to the advisors of Poseidon;
  - (l) make any distribution or payments required under any Order in these proceedings including the Financial Advisor and to fund the KERF created herein; and
  - (m) to perform such other duties or take any steps reasonably incidental to the exercise of such powers and obligations conferred upon the Monitor by this Order or any further order of this Court.
5. No provision in this Order is intended to appoint the Monitor as an officer, director or employee of any of Poseidon. Additionally, nothing in this Order shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, or receiver and manager of any of Poseidon and that any distribution made to creditors of Poseidon will be deemed to have been made by Poseidon.
6. Poseidon and its current and former shareholders, officers, directors, agents and representatives shall fully co-operate with the Monitor in the exercise of its powers and discharge of its duties and obligations under this Order or any other Order of the Court.
7. The Monitor shall continue to have the benefit of all of the protections and priorities as set out in the Initial Order and any such protections and priorities shall apply to the

Monitor in fulfilling its duties under this Order or in carrying out the provisions of this Order.

**FOREIGN ASSISTANCE**

8. 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 Poseidon, the Monitor and their respective agents in carrying out the terms of this Order.



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J.C.Q.B.A.

**TAB 4**

2009 CarswellOnt 9378  
Ontario Superior Court of Justice [Commercial List]

**Nortel** Networks Corp., Re

2009 CarswellOnt 9378

**In the Matter of a Plan of Compromise or Arrangement of  
Nortel Networks Corporation, Nortel Networks Limited, Nortel  
Networks Global Corporation, Nortel Networks International  
Corporation and Nortel Networks Technology Corporation**

Morawetz J.

Judgment: August 14, 2009  
Docket: Toronto 09-CL-7950

Counsel: Derrick Tay, Mario Forte, Jennifer Stam, for Applicants

Subject: Insolvency

**Headnote**

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous**

**Table of Authorities**

**Statutes considered:**

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

***Morawetz J.:***

- 1 The motion was not opposed.
- 2 Counsel to the Applicant submits that a natural transition point has been reached and that going forward it is appropriate and necessary for the Monitor to take on an **enhanced** role in **Nortel's** CCAA proceedings.
- 3 The reasons giving rise to this submission are set out in the affidavit of Mr. Davies sworn Aug. 11/09 and they are also referenced in the 19th Report of the Monitor.
- 4 Having reviewed the record and having heard submissions, I am satisfied that it is appropriate to grant the requested relief to expand the powers and rule of the Monitor in the form requested. In doing so, it is noted that Ernst & Young Inc. has indicated its willingness and consent to the proposed expansion of the powers and duties of the Monitor as reflected in the draft order.
- 5 In seeking this order, the Applicants have noted that "given the decisions that have been made and the direction that the restructuring has taken, **Nortel** has reached a natural transition point for certain matters". In light of these circumstances and in furtherance of expanding the powers of the Monitor, the Monitor advises that it will consult on a timely basis (with regard to the circumstances) with the Applicants' major creditor constituencies (in each case as appropriate in light of their respected potential interests with regard to the specific issue) in exercising powers in relation to matters of material substance

and that it will provide timely (with regard to the circumstances) delivery of relevant information reasonably requested by such appropriate creditor constituent, subject to the terms of the Initial Order, as amended.

6 I also note that a further hearing has been scheduled to deal with this matter.

7 Paragraph 11 of this Order is to be considered as a true come back clause to address any matters arising out of this Order.

8 An order has been signed in the form presented to give effect to the foregoing.

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