

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

BETWEEN:

BRIO FINANCE HOLDINGS B.V.

Applicant

and

CARPATHIAN GOLD INC.

Respondent

**APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED**

**BOOK OF AUTHORITIES OF BRIO FINANCE HOLDINGS B.V.
(returnable April 22, 2016)**

April 21, 2016

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Case Name:

Canwest Global Communications Corp. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement
Act, R.S.C. 1985, C-36. as amended
AND IN THE MATTER OF a Proposed Plan of Compromise or
Arrangement of Canwest Global Communications Corp. and
the other applicants listed on schedule "A"**

[2009] O.J. No. 4286

59 C.B.R. (5th) 72

2009 CanLII 55114

2009 CarswellOnt 6184

181 A.C.W.S. (3d) 853

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

October 13, 2009.

(60 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Affiliated debtor companies -- Application by Canwest Global for relief under the Companies' Creditors Arrangement Act and to have the stay of proceedings and other provisions extend to several partnerships allowed -- Applicant Canwest Global owned CMI which was insolvent -- CMI Entities and Ad Hoc Committee of noteholders had agreed on terms of a going concern recapitalization transaction -- Stay under Act was extended to several partnerships that were intertwined with the applicants' ongoing operations -- DIP and administration charges approved -- Applicants were also permitted to pay pre-filing liabilities to their critical suppliers.

Application by Canwest Global for relief under the Companies' Creditors Arrangement Act and to have the stay of proceedings and other provisions extend to several partnerships. The applicants were affiliated debtor companies with total claims against them exceeding \$5 million. The partnerships were intertwined with the applicants' ongoing operations. Canwest was a leading Canadian media company. Canwest Global owned 100 per cent of CMI. CMI had direct or indirect ownership interests in all of the other CMI Entities. The CMI Entities generated the majority of their revenue from the sale of advertising. Fuelled by a deteriorating economic environment, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. CMI breached certain of the financial covenants in its secured credit facility. The stay of proceedings was sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual pre-packaged recapitalization transaction. The CMI Entities and an Ad Hoc Committee of noteholders had agreed on the terms of a going concern recapitalization transaction which was intended to form the basis of the plan. The applicants anticipated that a substantial number of the businesses operated by the CMI Entities would continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. Certain steps designed to implement the recapitalization transaction had already been taken prior to the commencement of these proceedings.

HELD: Application allowed. The CMI Entities were unable to satisfy their debts as they come due and were insolvent. Absent these proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. It was just and convenient to grant the relief requested with respect to the partnerships. The operations and obligations of the partnerships were so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. The DIP charge for up to \$100 million was appropriate and required having regard to the debtors' cash-flow statement. The administration charge was also approved. Notice had been given to the secured creditors likely to be affected by the charge, the amount was appropriate, and the charge should extend to all of the proposed beneficiaries. The applicants were also permitted to pay pre-filing liabilities to their critical suppliers.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. c. 36, s. 11, s. 11(2), s. 11.2, s. 11.2(1), s. 11.52

Counsel:

Lyndon Barnes, Edward Sellers and Jeremy Dacks, for the Applicants.

Alan Merskey, for the Special Committee of the Board of Directors.

David Byers and Maria Konyukhova,> for the Proposed Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick, for Ad Hoc Committee of Noteholders.

Edmond Lamek, for the Asper Family.

Peter H. Griffin and Peter J. Osborne, for the Management Directors and Royal Bank of Canada.

Hilary Clarke, for Bank of Nova Scotia,

Steve Weisz, for CIT Business Credit Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*.¹ The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Background Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*². It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US\$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US\$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving

asset based loan facility of up to \$75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of \$4.855 billion and total consolidated liabilities of \$5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling \$2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately \$954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by \$272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by \$253 million or 47%. It reported a consolidated net loss of \$1.578 billion compared to \$22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by \$8 million or 4% in the third quarter of 2009 and operating profit was \$21 million compared to \$39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US\$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US\$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US\$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US\$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of \$75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to \$23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the

proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of \$100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately \$634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of \$10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US\$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of \$187.3 million and an unsecured promissory note in the principal amount of \$430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value

for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than \$2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of \$13.3 million as at the last valuation date and a wind up deficiency of \$32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding \$5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US\$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*³ definition and under the more expansive definition of insolvency used in *Re Stelco*⁴. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*⁵; *Re Smurfit-Stone Container Canada Inc.*⁶; and *Re Calpine Canada Energy Ltd.*⁷. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement.

If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*⁸ and *Re Global Light Telecommunications Ltd.*⁹

(c) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

- (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge -- in an amount that the court considers appropriate -- in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
- (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
- (4) In deciding whether to make an order, the court is to consider, among other things,

(aa) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to \$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately \$10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the

DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is \$10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

- (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate -- in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to \$15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

- (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order

declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

- (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
- (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
- (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek

direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of \$20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank *pari passu* with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first \$85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

- (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
- (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
- (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of \$20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the

failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for \$30 million in coverage and \$10 million in excess coverage for a total of \$40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*¹⁰ Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of \$5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them.

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*¹¹ have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public

access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*¹² provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from \$1000 to \$5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

S.E. PEPALL J.

* * * * *

SCHEDULE A

[Editor's note: Schedule "A" was not attached to the copy received by LexisNexis Canada and therefore is not included in the judgment.]

2 R.S.C. 1985, c.C.44.

3 R.S.C. 1985, c. B-3, as amended.

4 (2004), 48 *C.B.R. (4th)* 299; *leave to appeal refused*, [2004] O.J. No. 1903, 2004 *CarswellOnt* 2936 (C.A.).

5 (1993), 9 *B.L.R. (2d)* 275.

6 [2009] O.J. No. 349.

7 (2006), 19 *C.B.R. (5th)* 187.

8 (1995), 30 *C.B.R. (3d)* 29.

9 (2004), 33 *B.C.L.R. (4th)* 155.

10 (2003), 39 *C.B.R. (4th)* 216.

11 [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522.

Case Name:
Essar Steel Algoma Inc. (Re)

**IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C. 1985, c.
C-36, as amended
AND IN THE MATTER OF a Plan of Compromise
or Arrangement of Essar Steel
Algoma Inc., Essar Tech Algoma Inc.,
Algoma Holdings B.V., Essar Steel
Algoma (Alberta) ULC, Cannelton Iron Ore
Company and Essar Steel Algoma Inc.
USA**

[2016] O.J. No. 433

2016 ONSC 595

2016 CarswellOnt 1040

263 A.C.W.S. (3d) 301

33 C.B.R. (6th) 313

Court File No.: 15-CV-0011169-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: January 14, 2016.

Judgment: January 25, 2016.

(99 paras.)

Conflict of laws -- Jurisdiction -- International issues -- Determination of -- Real and substantial connection -- Forum conveniens -- Procedure for determining -- Motion by Cleveland-Cliffs Iron Company et al. (Cliffs), objecting to the jurisdiction of the Ontario court with respect to a contract

dispute with the applicant, Essar Steel Algoma (Algoma), dismissed -- Cliffs argued that the Ontario court lacked jurisdiction, or that Ontario was not the most convenient forum -- The Ontario court had jurisdiction simpliciter -- The subject matter was connected to Ontario, where the contract was made, and where that Cliffs had been carrying on business -- Cliffs had not established that Ontario was not the most convenient forum -- Companies' Creditors Arrangement Act, s. 11.

Conflict of laws -- Conflicts by legal area -- Contracts -- Jurisdiction with most substantial connection -- Motion by Cleveland-Cliffs Iron Company et al. (Cliffs), objecting to the jurisdiction of the Ontario court with respect to a contract dispute with the applicant, Essar Steel Algoma (Algoma), dismissed -- Cliffs argued that the Ontario court lacked jurisdiction, or that Ontario was not the most convenient forum -- The Ontario court had jurisdiction simpliciter -- The subject matter was connected to Ontario, where the contract was made, and where that Cliffs had been carrying on business -- Cliffs had not established that Ontario was not the most convenient forum -- Companies' Creditors Arrangement Act, s. 11.

Motion by Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company (Cliffs) objecting to the jurisdiction of the Ontario court with respect to a contract dispute with the applicant Essar Steel Algoma. In 2001 Algoma Steel (Old Algoma) began proceedings under the Companies' Creditors Arrangement Act, and ultimately was restructured into the applicant Algoma. In 2002, Algoma contracted with Cliffs to exclusively source its long-term needs for iron ore pellets. Each year, Algoma was to "nominate" its future years' needs for iron ore and communicate this amount to Cliffs. In 2014, due to a harsh winter and late spring, Algoma did not require all the pellets it nominated in 2013. Algoma claimed that Cliffs negotiated to reduce the 2014 shipments; this was contested by Cliffs. In 2015, Cliffs terminated the contract and brought an action against Algoma in the Ohio court for breach. In November, 2015, Algoma commenced a CCAA proceeding. In December, 2015, Algoma moved for an order declaring that the CCAA proceedings were the proper forum for determining the issues between the parties, declaring the purported termination of the contract was not effective, and directing Cliffs to comply with its obligations under the contract. Cliffs moved to dismiss the Algoma motion on the grounds that Ohio, not Ontario, was the proper forum. Cliffs argued that the contract was governed by Ohio law, and that the relief sought was not available under the CCAA, because Cliffs had terminated the contract before the CCAA proceedings began. Algoma argued that the Ontario court had jurisdiction simpliciter under the CCAA and that, in any event, Ontario was the most convenient forum. Algoma claimed that the contract was made in Ontario, and that Cliffs carried on business in Ontario.

HELD: Application dismissed. The Ontario court had jurisdiction simpliciter over the dispute. Algoma had established a good arguable case for assuming jurisdiction. The subject matter of the dispute was whether the contract had been breached, and by whom. This subject matter was clearly connected to Ontario, where the contract was made in Ontario, and that Cliffs had been carrying on

business in Ontario. Further, CCAA proceedings should be harmonized under the single control model. Cliffs was a creditor under the CCAA, by virtue of its Ohio action against Algoma. As to the issue of forum non conveniens, Cliffs had not met the onus of establishing that Ohio was a more convenient forum. Any delay or additional costs would be minimal. There was nothing to indicate that the Ontario court could not deal with the matter as quickly and efficiently as the Ohio court. While the applicable law was that of Ohio, Ontario courts often applied foreign law. There was evidence that an Ontario judgment would be enforced in Ohio.

Statutes, Regulations and Rules Cited:

11 U.S.C., s. 362

BIA,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.4

Rules, Rule 17.02

U.S. Bankruptcy Code, Chapter 15

Counsel:

Eliot Kolers, Maria Konyukhova and Yannick Katirai, for the Applicants.

Andrew Kent, Markus Koehnen and Jeffery Levine, for the the Moving Parties The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company ("Cliffs").

Derrick Tay, Clifton Prophet and Nicholas Kluge, for the Monitor.

L. Joseph Latham and Bradley Whiffen, for the Ad Hoc Committee of Noteholders.

Natalie E. Levine, for the Ad Hoc Committee of senior and junior secured Noteholders.

Sarah-Anne Van Allen, for Wilmington Trust, National Association,.

Evan Cobb, for the directors of the applicants.

Andrea Lockhart, for Deutsche Bank.

Ronald Carr, for Her Majesty the Queen in Right of Ontario.

ENDORSEMENT

1 F.J.C. NEWBOULD J.:-- The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company (collectively "Cliffs") move to object to the jurisdiction of this Court to hear a motion brought by the applicants (together "Essar Algoma") for relief in connection with a supply contract under which Cliffs supplied Essar Algoma for a number of years with all of its iron ore pellets until Cliffs purported to terminate the contract on October 5, 2015, shortly before this CCAA proceeding was commenced. Cliffs submits in the alternative that Ontario is not the convenient forum in which to determine the dispute between Cliffs and Essar Algoma, and in the further alternative a ruling that a summary procedure for the determination of the dispute is inappropriate.

2 For the reasons that follow, I have concluded that this Court does have jurisdiction over the claim of Essar Algoma against Cliffs and that Cliffs has not established that Ontario is not the convenient forum for the dispute. What the procedure will be to determine the dispute has not yet been settled.

Relevant history

3 In 2001 Algoma Steel Inc. ("Old Algoma") began proceedings under the CCAA and eventually put forward and had approved a plan of compromise and arrangement. As part of its restructuring, Old Algoma divested itself of certain non-core assets, including its interest in a mine in Michigan (the "Tilden Mine") from which Old Algoma sourced its iron ore pellets. In January 2002 Old Algoma sold its interest in the Tilden Mine to Cliffs in consideration for an assumption by Cliffs of certain Old Algoma liabilities and future obligations in respect of the Tilden Mine and Old Algoma and Cliffs entering into a long-term supply agreement effective January 31, 2002 (the "Cliffs Contract"). The Cliffs Contract has been amended a number of times. Essar Algoma succeeded to Old Algoma's rights and obligations under the Cliffs Contract in 2007. The Cliffs Contract is governed by Ohio law.

4 The Cliffs Contract provides that Essar Algoma will source its long-term needs for iron ore pellets exclusively from Cliffs to 2016. As last amended by term sheet in 2013, the Cliffs Contract obliged Essar Algoma to purchase iron ore pellets exclusively from Cliffs until and including 2016. From 2017 to 2024 it obliged Essar Algoma to purchase a portion of its pellets each year from Cliffs. The Cliffs Contract provides that Essar Algoma is obliged in November of each year to provide to Cliffs its good faith estimate of its iron ore requirements (or nomination) for the next year. After Essar Algoma has set its nomination, it has certain rights to modify its nomination to increase or decrease its nomination within a specified range of percentages if it provides written notice to Cliffs by certain deadlines.

5 The Cliffs Contract specifies: (a) a formula for calculating the price of iron ore pellets for the 2013 calendar year; (b) a price for the purchase and sale of iron ore pellets for the 2014 calendar year; (c) a formula for fixing the price of iron ore pellets in 2015 and 2016; and (d) a separate

pricing formula for calendar years 2017 to 2024.

6 Cliffs mines the iron ore in Michigan at its mines at the Tilden site and then processes and delivers iron ore pellets by rail to a dock in Michigan known as the Marquette dock or a railway yard in Michigan known as the Partridge rail yard, from which points Essar Algoma takes delivery. Essar Algoma then arranges delivery to Sault Ste. Marie by ship or train.

7 There have been several disputes between Cliffs and Essar Algoma under the Cliffs Contract. The most recent and relevant of such disputes relates to the timing and volume of shipments of iron ore pellets from Cliffs to Essar Algoma beginning in late 2013. At the end of 2013, Essar Algoma advised Cliffs of its nomination for the 2014 calendar year. However, it soon became apparent that the 2013/2014 winter season was one of the coldest and longest in recent history. As a result, the Great Lakes thawed later than usual and the 2014 shipping season was accordingly shortened and Essar Algoma determined that it would not be able to take and use all of the iron ore pellets that it had nominated for 2014. It met with Cliffs to discuss the situation.

8 Whether an agreement was reached to reduce the 2014 shipments became contested, Cliffs saying there was no agreement and Essar Algoma saying there was. The number of tons to be taken by Essar Algoma in 2014 remained a question of debate when Essar Algoma nominated in October 2014 what it would take in 2015 and when it reduced its nomination in July 2015. Cliffs took the position that Essar Algoma had to take the entire tonnage that it had nominated in 2014. Essar Algoma took the position that there was an agreement to reduce the tonnage for 2014.

9 On January 12, 2015, Cliffs filed a complaint in the United States District Court for the Northern District of Ohio (Eastern Division) (the "Ohio Court"). On August 31, 2015, Cliffs amended its complaint. In its Amended Complaint, Cliffs claimed, among other things, damages plus interest and costs for alleged breaches of the Cliffs Contract, including Essar Algoma's alleged failure to take timely delivery of iron ore pellets in the requisite amounts, and a declaratory judgment that Essar Algoma had materially breached the Cliffs Contract by failing to take delivery of or pay for the full amount of ore that it nominated it would require in 2013, 2014 and 2015 by the end of each calendar. Cliffs did not claim any order or direction permitting it to terminate the Cliffs Contract.

10 In response to the Amended Complaint, Essar Algoma filed an Answer to Plaintiffs' Amended Complaint and Counterclaim on September 14, 2015, wherein it denied Cliffs' allegations and counterclaimed against Cliffs, seeking damages, including a claim for a long-term contract renewal credit payment payable to Essar Algoma pursuant to the Cliffs Contract and a claim for damages for alleged underreporting of moisture levels in pellets delivered by Cliffs.

11 On July 31, 2015, Cliffs filed a motion for partial summary judgment, seeking judgment on its claim that Essar Algoma breached a contractual duty to take its 2014 nomination and to dismiss Essar Algoma's claim for damages related to Cliffs' underreporting of moisture levels to Algoma since 2010. The Cliffs motion was scheduled to be heard on October 6, 2015.

12 On October 5, 2015 Cliffs purported to terminate the Cliffs Contract by letter which stated that as a result of multiple and material breaches and repudiation of the Cliffs Contract by Essar Algoma, Cliffs was treating the Cliffs Contract as terminated effective immediately. The termination came with no advance notice and within days of the next adjustment in price and at a time of year that Essar Algoma has historically begun building up inventory before the winter freeze.

13 On October 7, 2015, Cliffs offered to resume supplying Essar Algoma on a "just in time basis" at a materially higher price than provided for in the Cliffs Contract. The next day Essar Algoma notified Cliffs that the proposed price was commercially unfeasible for it. On October 14, 2015 Cliffs proposed a slightly lower price to Essar Algoma that was still materially higher than the price Essar Algoma had been paying.

14 The Cliffs summary judgment motion in the Ohio Court was heard on October 6, 2015. On the following day, Judge Nugent released his reasons. He granted Cliffs motion in part and denied it in part. He held that there had been no agreement reached in an exchange of emails in April 2014 regarding Essar Algoma's request to decrease its 2014 nomination and that Essar Algoma had thus failed to meet its annual requirements by a margin of at least 500,000 tons. He held however that there were issues as to whether Essar Algoma had given effective notice to reduce a further amount of tons for 2014, whether a force majeure clause gave Essar Algoma a defence to any liability for damages stemming from its alleged failure to meet its annual requirements nomination amounts for 2014, and whether any outstanding damages remained following any allowable off-sets for alleged over-billing caused by Cliffs' use of the 2014 pricing structure in its 2015 sales. In the result he dismissed Cliffs' motion for summary judgment for breach of contract relating to Essar Algoma's 2014 nomination. He also granted Cliffs' motion to dismiss the counterclaim of Essar Algoma with respect to moisture content.

15 On October 6, 2015, one day after Cliffs purported to terminate the Cliffs Contract, Essar Algoma moved in the Ohio Court for a temporary restraining order and a preliminary injunction requiring Cliffs to supply Essar Algoma with iron ore pellets. On October 15, 2015 Essar Algoma filed a notice of withdrawal of its motion. In the notice, Essar Algoma stated that it had obtained supply from another supplier that would provide it with supply for the next several weeks and that this supply removed the need for immediate injunctive relief.

16 A trial for all of the issues in the Ohio litigation was scheduled for December 7, 2015. On October 30, 2015 Essar Algoma filed a motion to adjourn the trial, essentially on the grounds that too much work, particularly documentary production, the conducting of depositions and the production of expert reports, was required for the parties to be ready to start the trial as scheduled.

17 This CCAA proceeding commenced on November 9, 2015 when the Initial Order was made. On November 10, 2015, Essar Algoma commenced ancillary insolvency proceedings under chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. On that

day the foreign representative of Essar Algoma sought and obtained, among other things, orders recognizing and enforcing in the United States the orders granted in the CCAA proceeding which was recognized as a foreign main proceeding. The foreign representative of Essar Algoma also filed a complaint for a declaratory judgment against Cliffs and a motion for entry of an order compelling Cliffs to resume supplying iron ore pellets under the Cliffs Contract. Judge Shannon who heard the motions in Delaware was advised by counsel for the foreign representative that this motion was filed as a "placeholder" in the event that the Canadian Court declined to assume jurisdiction to hear Essar Algoma's motion for injunctive relief against Cliffs.

18 On November 11, 2015 Essar Algoma filed with the Ohio Court a notice pursuant to 11 U.S.C. Section 362 that the Ohio action was automatically stayed as to the defendant Essar Algoma. On December 3, 2015 Judge Nugent of the Ohio Court on his own without argument dismissed the case without prejudice. The order stated that upon application, the action may be reinstated, if necessary, when the bankruptcy proceedings have concluded.

19 On December 4, 2015 Cliffs moved in the Ohio Court for an order vacating the without prejudice dismissal of the action and instead placing the case on the suspense docket until the claim is resolved by the bankruptcy court. No decision on that motion has been rendered by Judge Nugent.

Relevant motions in the CCAA proceeding

20 In mid-November 2015 Essar Algoma served a motion seeking a critical supplier order against Cliffs under section 11.4 of the CCAA. The motion was adjourned to December 3, 2015 and then ultimately not proceeded with. The explanation given by Essar Algoma is that following the filing of the motion, it was able to find alternative suppliers for the shorter term. It now has supply of pellets to the end of March. What is at issue on its motion is the right of Essar Algoma under Cliffs Contract to the end of 2024.

21 On December 8, 2015 the applicants served a motion for an order (i) declaring that the CCAA proceedings are the correct forum for the determination of issues relating to the Cliffs Contract; (ii) declaring that the purported termination of the Cliffs Contract was not effective and that it remains in full force and effect and that Cliffs must supply iron ore pellets to Essar Algoma at the price payable under the Cliffs Contract; (iii) directing Cliffs to comply with its obligations under the Cliffs Contract, and (iv) directing Cliffs to pay damages resulting from its purported termination of the Cliffs Contract.

22 On December 23, 2015 Cliffs delivered a notice of motion for an order (i) dismissing or staying the applicants' motion on the grounds that this Court does not have jurisdiction to grant the relief sought by Essar Algoma; (ii) in the alternative, an order staying the applicants' motion on the grounds that Ontario is not a convenient forum for the hearing of the applicants' motion and (iii) in the further alternative, an order dismissing the applicants' motion without prejudice to the applicants to seek the same relief in the form of an action. It is this motion that was heard on January 14, 2016.

Analysis

23 Cliffs raises a number of issues, including (i) the lack of power to deal with this matter under the CCAA, (ii) a lack of jurisdiction to deal with the claim against Cliffs in Ontario, (iii) Ontario is *forum non conveniens* and (iv) the relief sought is inappropriate for a summary CCAA proceeding.

Jurisdiction under the CCAA

24 Cliffs takes the position that there is no jurisdiction in the CCAA to grant the relief sought by Essar Algoma declaring the termination of the Cliffs Contract to be ineffective and requiring Cliffs to deliver iron ore pellets as required by that contract. It says that the Cliffs Contract was terminated before the CCAA proceedings were commenced and thus the powers of the Court given under the CCAA cannot be used in this case. It relies on *Re SNV Group Ltd.*, 2001 BCSC 1644 in which Justice Pitfield refused to make an order under the CCAA ordering the repayment of money paid before the CCAA proceeding was brought that was said to have been in breach of an agreement that the debtor had with a third party. In that case, Pitfield J. stated:

The capacity to stay, whether pursuant to section 11 or by virtue of the Court's inherent jurisdiction, applies to prospective proceedings. By its very nature, a proceeding that has been carried to completion cannot be stayed. An order to repay an amount obtained in contravention of a stay granted by the Court would be appropriate, but it is my opinion that the Court cannot rely on the CCAA or its inherent jurisdiction to compel repayment of an amount alleged to have been obtained in reliance upon a contract in a manner that would amount to adjudication of a claim. The CCAA is not intended to give the Court the capacity to undo transactions completed before the effective date of the initial or subsequent orders.

25 Essar Algoma takes the position that Cliffs has misconstrued what Essar Algoma seeks. Rather, it says that it is requesting the Court to invoke its broad and inherent jurisdiction in exercising its territorial jurisdiction, retaining its territorial jurisdiction under the principles of *forum non conveniens*, and determining the appropriate procedures for the determination of the substantive issues in dispute between the parties. It is the consequent modification of Cliffs' procedural rights that Essar Algoma seeks under the CCAA which it says is routinely granted.

26 I do not see the *SNV Group* case as being apposite. Essar Algoma is not asking the Court on its motion to declare the Cliffs Contract as operative because of some provision of the CCAA, which is what the situation was in *SNV Group*.

27 The CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted or barred. A court under the CCAA has both statutory authority granted under the CCAA and an inherent and equitable jurisdiction when supervising a reorganization. The most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the

provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding. See *Ted Leroy Trucking [Century Services] Ltd., Re*, [2010] 3 S.C.R. 379 at paras. 57, 64 and 65.

28 The CCAA provides in section 11 that a court has jurisdiction to make any order "that it considers appropriate in the circumstances"¹. A CCAA court clearly has the power as per *Century Services* to make the procedural orders of the kind sought by Essar Algoma in this case. See also *Smokey River Coal Ltd., Re*, (1999), 12 C.B.R. (4th) 94 (Alta. C.A.) at paras. 60 and 67 per Hunt J.A. in which he held that a judge has the discretion under the CCAA to permit issues to be decided in another forum (in that case arbitration) but is under no obligation to do so.

29 The "single control" model also favours a CCAA court to deal with the issues between Essar Algoma and Cliffs. In *Eagle River International Ltd., Re* [2001] 3 S.C.R. 978 ["*Sam Lévy*"] Binnie J. referred to and adopted a "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction. He stated:

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation"...

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse...

30 *Sam Lévy* involved a BIA proceeding. In it, Binnie J. referred to *Stewart*, a winding-up application. I see no reason why the principles in *Sam Lévy* should not be applicable in a CCAA proceeding. In *Century Services* it was noted that the harmonization of insolvency law common to the BIA and CCAA is desirable to the extent possible. The central nature of insolvency and the resolution of issues caused by insolvency are common to both BIA and CCAA proceedings and so too should the underlying principles. See my comments in *Nortel Networks Corp., Re*, (2015), 23 C.B.R. (6th) 264 at para. 24.

31 In this case Cliffs has sued in Ohio for damages claiming material breaches of the Cliffs Contract. It is thus a party that has claimed to be a creditor of Essar Algoma². The single control model requires that its claim against Essar Algoma be dealt with in this CCAA proceeding. Essar Algoma claims in this Court a declaration that the Cliffs Contract has not been legally terminated. Cliffs says that the material breaches by Essar Algoma that it claimed in the Ohio litigation to have occurred permit it to terminate the Cliffs Contract. These issues are completely interwoven and it would make no sense to require Essar Algoma to litigate its claim against Cliffs in the United States

³ when Cliffs' claim against Essar Algoma must be dealt with in this Court in Ontario. The claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt with in this Court.

32 In *Montréal, Maine & Atlantic Canada Co. Re*, 2013 QCCS 5194, a CCAA proceeding arising out of the Lac-Mégantic rail disaster, it was held that a claim by the debtor against its American insurer under a policy governed by Maine law with a forum selection clause in favour of Maine was an asset of the debtor and should be dealt with in Quebec. Dumas J.C.S. referred to the single control model for insolvencies and stated:

In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company. Without a shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction.⁴

33 For the single control model to apply, the third-party, in this case Cliffs, must not be a stranger to the insolvency proceedings. Cliffs has raised significant damage claims against Essar Algoma and seeks to have those claims remain alive and dealt with in Ohio. Its purported termination of the Cliffs Contract was an important factor that led to Essar Algoma filing for protection under the CCAA. Cliffs is not a stranger to these proceedings.

Jurisdiction *simpliciter*

34 Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. See *Van Breda v Village Resorts Ltd.*, 2012 SCC 17 at para. 82 per LeBel J. See also para. 79 in which LeBel J. referred to the link between the subject matter of the litigation and the defendant to the forum.

35 To establish jurisdiction *simpliciter*, a plaintiff need only establish that there is a good arguable case for assuming jurisdiction. See *Ontario (Attorney General) v. Rothmans Inc.*, 2013 ONCA 353 at para. 54, 110, 118-19. The phrase a "good arguable case" is not a high threshold and means no more than a "serious question to be tried" or a "genuine issue" or that the case has "some chance of success". See *Tucows.com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 at para. 36.

36 It is for the plaintiff to establish that there is a presumptive connecting factor to the forum. If the plaintiff establishes that, the defendant has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. See *Van Breda* at paras. 95 and 100.

37 Apart from this test of the connection between the subject matter of the litigation and the forum, traditional tests for basing jurisdiction continue to exist. See *Van Breda* at para. 79 in which LeBel J. stated:

However, jurisdiction may also be based on traditional grounds, like the

defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

38 The subject matter of the dispute is whether the Cliffs Contract has been breached and by whom. Cliffs claims Essar Algoma has materially breached provisions of the contract, which if proven, would be grounds to terminate it under Ohio law. Essar Algoma claims that Cliffs had no basis to terminate the contract. Counsel for Cliffs in argument contended that the subject matter of the dispute is a request for specific performance of the contract in Ohio where the ore is mined and delivered to Essar Algoma. I do not agree with that contention. The subject matter of the dispute is the Cliffs Contract and who breached it. While the relief sought by Essar Algoma includes mandatory injunctive relief, that does not make that prayer for relief the subject matter of the dispute. LeBel J. in *Van Breda* stated that it was the legal situation or the subject matter of the litigation that must be connected to the forum. The legal situation is the contention that the Cliffs Contract has been breached and by whom.

39 Rule 17.02 provides a guide to what may be a presumptive factor. LeBel J. stated:

83 At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario Rules of Civil Procedure. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction...Thus they offer guidance for the development of this area of private international law.

40 Rule 17.02 refers to the following in dealing with contract claims:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

(f) in respect of a contract where,

(i) the contract was made in Ontario,...

41 Essar Algoma takes the position that the Cliffs Contract was made in Ontario.

42 The genesis of the Cliffs Contract was the 2001 CCAA proceeding of Old Algoma. As part of

that restructuring, Old Algoma sold Cliffs its interest in the Tilden Mine and concurrently entered into the Cliffs Contract. Old Algoma's restructuring, including the Cliffs Contract, required the approval of the CCAA court which was given by order of Chief Justice LeSage of this Court in 2002.

43 There are traditional rules governing where a contract is made. The general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance. See *Eastern Power Ltd. v. Azienda Comunale Energia and Ambiente* (1999), 50 B.L.R. (2d) 33 at para. 22 per MacPherson J.A. When acceptance of a contract is transmitted electronically and instantaneously, the contract is usually considered to be made in the jurisdiction where the acceptance is received. See *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONCA 497 at para. 66 per Lauwers J.A. There is an exception to this rule which is the postal acceptance rule that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. See *Eastern Power* at para. 22.

44 There is no provision in the Cliffs Contract or any of its amendments that would give rise to the postal acceptance rule. Thus the traditional rule that a contract is made in the location where the offeror receives notification of the offeree's acceptance would apply. The evidence as to how the original Cliffs Contract or its amendments was concluded is somewhat unclear but unlikely to get better. Mr. Mee of Cliffs in his affidavit stated:

I no longer have a specific recollection of where the Agreement and each of its amendments was negotiated or signed. My general recollection is that Essar would sign amendments first and that Cliffs would sign them in Cleveland, Ohio after they had been signed by Essar. I have looked back in my calendar for face to face meetings with Essar in which I participated since 2002. I found a total of 50 meetings 20 of which were in Canada and 30 of which were in the United States.

45 Neither the original Cliffs Contract nor the amendments provide that the contract or amendments becomes binding when signed without delivery. The original Cliffs Contract states in the first recital that "concurrently with the execution and delivery of this Agreement [the parties] are entering into that Purchase and Sale Agreement in which [Cliffs is acquiring the interest of Algoma in the Tilden Mine Company]" (Underlining added). This language would indicate that the parties expected delivery of the contract to the other to be required for it to be binding.

46 Therefore if the evidence of Mr. Mee of Cliffs is accepted, it would mean that Essar Algoma generally signed the contract and amendments first, then sent them to Cliffs in Cleveland who then signed them and then sent them back to Essar Algoma. That would mean that the contract was formed when Essar Algoma received notice from Cliffs in Ontario of the acceptance of its offer.

47 There is no date of execution on the original Cliffs Contract effective January 31, 2002 or many of the amendments. There are exceptions. The second amendment was signed and dated by

Algoma three days after it was signed by Cliffs. The third amendment was signed and dated by Algoma one day before it was signed by Cliffs. Some were signed the same day. The final amendment that extended the term to 2014 that was produced by Cliffs has an execution date by Essar Algoma of June 7, 2013 and no execution by Cliffs.

48 Based on the evidence led by Cliffs, I find that based on the traditional rules governing where a contract is made, Essar Algoma has at least an arguable case, and likely a stronger case than that, that the Cliffs Contract and its amendments generally were contracts made in Ontario.

49 Beyond this, the fact that the original Cliffs Contract became effective only when approved in Ontario by Justice LeSage under the CCAA is a strong indicator that there is a strong and substantial connection of the Cliffs Contract to Ontario. In *Trillium Lauwers J.A.* referred to Professor Waddams and consideration whether the traditional rules in determining the place of contract are appropriate for jurisdictional cases. He stated:

70 Should the traditional rules for determining the place of the contract be determinative in applying the fourth PCF [presumptive connecting factor]? This is perhaps an issue for another case, but I agree with the observation of Professor Waddams, at paras. 108-109, that the arbitrary common law rules for determining the place of a contract may not always be apposite in jurisdictional cases. The traditional contract placement rules respond to concerns that are different from those engaged by a jurisdictional analysis. A broader, more contextual analysis is required, which would inevitably engage the same considerations as the real and substantial connection test itself.

50 One may ask why a technical rule as to where an e-mail or fax was sent or received should determine the local of an international piece of litigation. The fact that the Cliffs Contract had its genesis in an Ontario CCAA process and required the approval of the CCAA court in Ontario appears to me to be at least as much a factor in holding that the contract is an Ontario contract as the factor of who sent or received confirmation of the terms of the contract. Often, and in this case, contract terms or amendments are discussed and agreed orally over the phone or in meetings and then papered afterwards.

51 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that the contract was made in Ontario.

52 Essar Algoma also says that Cliffs has operated its business in Ontario and on that basis Ontario has jurisdiction to hear the Essar Algoma request for relief against Cliffs. As stated in para. 79 of *Van Breda*, a defendant's presence in the jurisdiction is a traditional basis for a court having jurisdiction. LeBel J. also stated that carrying on business in a jurisdiction could be an appropriate connecting factor. He stated:

87 Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor. (Underlining added)

53 Rule 17.02(p) provides:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

(p) against a person ordinarily resident or carrying on business in Ontario;

54 The three Cliffs corporations that are a party to the Cliffs Contract are The Cleveland-Cliffs Iron Company, an Ohio corporation with its principal place of business in Cleveland, Cliffs Mining Company, a Delaware corporation with its principal place of business in Cleveland and Northshore Mining Company, a Delaware corporation with its principal place of business in Silver Bay, Minnesota. They are each wholly-owned subsidiaries of Cliffs Natural Resources Inc. which is an international mining and natural resources company and publicly traded in the United States and until 2014 owned a mining project in the "Ring of Fire" region of Ontario.

55 Under the Cliffs Contract, Cliffs mined the iron ore in Michigan, refined the ore into iron ore concentrate in Michigan, processed the iron ore concentrate into iron ore pellets in Michigan and delivered the iron ore pellets to Essar in Michigan. Cliffs asserts that it has not carried on any business in Canada and has no presence here. However, the fact that all of the mining and delivery took place in Michigan does not by itself mean that it did not carry on business in Canada.

56 Essar Algoma relies on the fact that during the course of the Cliffs Contract representatives of Cliffs have continuously dealt with Essar Algoma or its predecessor Old Algoma in Sault Ste. Marie in Ontario. Mr. Mee of Cliffs stated that he himself had visited Canada 20 times in connection with the Cliffs Contract. Essar Algoma and its predecessor Old Algoma has been a significant customer

of Cliffs. Mr. Marwah of Essar Algoma stated in his affidavit that representatives of Cliffs visit Sault Ste. Marie and representatives of Essar Algoma visit Cleveland in alternating years, during which visits they discuss the status of the Cliffs Contract and ongoing issues relating to their business relationship. Representatives of Cliffs review Essar Algoma's operations and stockpiles of iron ore pellets when they visit Sault Ste. Marie. The most recent visit by Cliffs' personnel was on September 18, 2015 shortly before Cliffs purported to terminate the Cliffs Contract. Prior to that, representatives of Cliffs, including sales, operational, safety and quality personnel visited Essar Algoma in Sault Ste. Marie in October 2014 and August 2013. All of these visits fall within LeBel J.'s statement in *Van Breda* that "regularly visiting the jurisdiction" can constitute carrying on business in the jurisdiction.

57 Cliffs has previously appeared in the Ontario Superior Court of Justice in connection with the Cliffs Contract. In 2010 after Cliffs purported to terminate the Cliffs Contract after a pricing dispute, Essar Algoma applied for and obtained interim injunctive relief. Cliffs appeared on the application and did not oppose the jurisdiction of the Court to hear the relief. Rather it opposed the injunction on the merits. Cliffs complied with the terms of the injunction.

58 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that Cliffs has carried on business in Ontario.

59 Cliffs has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factors in this case do not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. I do not think Cliffs has met that burden. The relationship between the Cliffs Contract and Ontario is not weak and the visits and meetings by Cliffs personnel in Sault Ste. Marie were not for trivial purposes. They were regular visits to meet with an important customer.

60 Accordingly I find that this Court has jurisdiction over the claim of Essar Algoma against Cliffs.

Forum non conveniens

61 The party raising *forum non conveniens* has the burden of showing that the alternative forum is clearly more appropriate. The use of the word "clearly" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. See *Van Breda* at paras. 108 and 109.

62 The factors to be considered are numerous and variable. See *Breeden v. Black*, [2012] 1 S.C.R. 666 at para. 23. In *Van Breda*, at para. 5 LeBel J. provided a non-exhaustive list of factors that could play a role. Cliffs relies on a number of these factors as supporting Ohio as the more convenient forum.

63 Before going through these factors, there is an issue as to whether Ohio is the alternative jurisdiction. Essar Algoma says the alternative jurisdiction is Delaware in which the chapter 15 proceedings are taking place. I hesitate to get into that issue and will assume that the alternative forum is the Ohio District Court. That is certainly the view of the expert witness Allan L. Gropper relied on by Cliffs.

(i) The cost of transferring the case or of declining the stay

64 Cliffs says it will result in substantial additional cost and delay to litigate the issues in Ontario. It says that both parties have teams of lawyers in Ohio who are intimately familiar with the case, the relevant documents, witnesses and issues. Cliffs had spent approximately U.S. \$1 million on the Ohio litigation before it was dismissed. Essar Algoma has stated that it has a team of 12 attorneys who have spent more than 5,000 hours reviewing documents in the Ohio litigation and that its attorneys have reviewed more than 43,000 documents that Cliffs has produced.

65 Cliffs is concerned that if the matter is litigated in Ontario, both sides will have to educate Ontario lawyers about all of this. At one time, that would have been a major concern. However it is now possible and becoming commonplace in cross-border litigation for American lawyers to appear in an Ontario court, and *vice versa*. The recent Nortel trial was a perfect example of that in which on many days there were 10 to 20 U.S. lawyers in Toronto attending the trial.

66 Cliffs also says that as the Cliffs Contract is governed by Ohio law, there would be the added expense of proving Ohio law. That appears to me to be a minor expense. Essar Algoma has already provided an affidavit of an expert on Ohio law, which Cliffs accepted at least on one point during argument. An affidavit on Ohio contract law could not be relatively expensive in comparison to what has already been expended. Cliffs has also provided a copy of Ohio jury instructions for a civil breach of contract case. The concepts seem virtually identical to Ontario concepts.

67 This factor is essentially a neutral one.

(ii) The impact of a transfer on the conduct of the litigation or on related parallel proceedings

68 Cliffs says having an Ontario court hear the dispute would deprive it of an Ohio judge who is familiar with the issues. Judge Nugent is certainly far more familiar with the issues than an Ontario judge would be. However an Ontario judge, like any other judge hearing a trial or proceeding, is used to coming in cold and picking it up quickly.

69 Judge Nugent has not ruled on whether the Cliffs Contract can be terminated or on whether there were breaches of the contract by Essar Algoma that could be considered material breaches. He merely found on the summary judgment motion, that he dismissed, that there was no legally enforceable agreement between the parties to reduce the 2014 annual nomination to 3.3 million tons and that Essar Algoma therefore failed to meet its annual requirements by a margin of at least 500,000 tons. He did not deal with other defences that Essar Algoma was asserting and stated that he could not conclude that there was a breach entitling Cliffs to damages. Cliffs did not claim any declaration that it had a right to terminate the Cliffs Contract. Cliffs says that if it can prove that there were material breaches, it would have the right to terminate the Cliffs Contract. These are issues yet to be dealt with.

70 So far as the timing of any trial or other proceeding is concerned, there is no evidence that the Ohio District Court would be in a better position to hear the case sooner than in this Court. Cliffs says it is ready to proceed to trial. Essar Algoma has said it needs more discovery. Both Cliffs and Essar Algoma say they want the matter determined as quickly as possible.

71 Whatever the situation, this Court can accommodate the parties quickly. The situation for Essar Algoma is critical, and the Monitor has stated in its sixth report that in developing and carrying out the SISP, which has tight timelines, Algoma needs certainty concerning the status of the Cliffs Contract and an expedited determination of the rights of the parties is linked to the development of the SISP. Whether those rights can be determined that quickly may be a question mark, but this Court is in at least as good a position as the Ohio court to deal with the issues quickly.

72 I see this factor as neutral or at best perhaps slightly favouring Cliffs.

(iii) The possibility of conflicting judgments

73 I do not see this as an issue. In argument, Essar Algoma acknowledged that it is bound by the finding made by Judge Nugent, to which I have already referred. It could hardly say otherwise, given the principle of *res judicata*. All other issues remain open.

(iv) Location of evidence

74 Cliffs says it will have to call evidence of witnesses in the U.S. regarding its advance planning and why Essar Algoma's actions were a problem to Cliffs. These witnesses would come from Cleveland.

75 However, Essar Algoma's witnesses are from Sault Ste. Marie. There is no evidence how many from each side will need to be called. It is a shorter trip from Cleveland to Toronto than from Sault Ste. Marie to Toronto, whether by air or car. In this day of international contracts, particularly between parties near the Canadian border, I do not see this factor as compelling. It is a neutral factor.

(v) Applicable law

76 Ohio law governs the Cliffs Contract. Cliffs says there is a risk an Ontario court will apply Ohio law incorrectly. I suppose it can be said that an Ohio judge would also apply it incorrectly. This might be a material factor if the law in question was markedly different from Ontario law with concepts unknown to Ontario law. It is clear from the record however that this is not the case. It was acknowledged in argument that Ohio law is not substantially different from Ontario law regarding material breach.

77 Cliffs cites the standard jury instructions in Ohio which defines material breach as follows:

"Material breach" by plaintiff means a breach that violates a term essential to the purpose of the contract. Mere nominal, trifling, slight or technical departures from the contract terms are not material breaches so long as they occur in good faith.

78 The jury instructions go on to say that some Ohio courts have utilized the following five factors listed in the Restatement of the Law, (2d) Contracts (1981) in deciding whether a breach is material:

- (i) The extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (ii) The extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived;
- (iii) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (iv) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (v) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
- (vi) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

79 Cliffs argues that the determination of whether a party failed to comport with standards of good faith and fair dealing is an inherently local reflection of local commercial mores and that the nature of an Ontario court's determination of standards of good faith and fair dealing would inevitably reflect Ontario values and standards rather than Ohio values and standards. I find this argument a stretch. There is no suggestion in the evidence that the values in Cleveland on such an issue would be different from the values in Sault Ste. Marie. In any event, there is nothing in the Ohio law that says that in a case involving parties undertaking a contract in Cleveland and Sault Ste. Marie, it is the Cleveland values rather than the Sault Ste. Marie values that are to be considered.

80 Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any.

(vi) Recognition and enforcement of an Ontario judgment

81 Cliffs takes the position that there is no jurisdiction in this Court to deal with the Essar Algoma claim against Cliffs because an injunction should not be ordered against a U.S. resident such as Cliffs that could not be enforced.

82 This argument assumes that Cliffs would ignore a decision of an Ontario court. Whether that is so is a question. Cliffs complied with an injunction ordered in Ontario in 2010 after it purported to terminate the Cliffs Contract. Cliffs has requested alternative relief if this Court assumes jurisdiction requiring a statement of claim to be delivered by Essar Algoma, which is some indication that it intends to appear and deal with the issue if it is to be dealt with in Ontario. If it does there could be no issue of Ontario having jurisdiction that would not be recognized by a U.S. Court as Cliffs would have attorned to the jurisdiction.

83 Cliffs relies on a passage from Sharpe, *Injunctions and Specific Performance*, (loose-leaf ed. November 2015 Toronto: Canada Law Book), para 1.1220 that refers to a reluctance of courts to make an order that cannot be enforced, as follows:

Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. In the case of a money claim, the courts need not limit assumed jurisdiction to cases where enforceability is ensured. Equity, however, acts *in personam* and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction and the practical import of rules permitting service *ex juris* in respect of injunction claims is necessarily limited. Rules of court are typically limited to cases where it is sought to restrain the defendant from doing anything within the jurisdiction. As a practical matter

the defendant "who is doing anything within the jurisdiction" will usually be physically present within the jurisdiction to allow ordinary service.

84 I have not been provided with any case however involving cross-border insolvencies in which orders in proceedings under the CCAA cannot be enforced in the United States in chapter 15 proceedings under the U.S. Bankruptcy Code or that deal with evidence as in this case regarding the enforceability of a non-monetary judgment in the United States.

85 Cliffs relies on an opinion of Allan L. Gropper, a highly regarded federal bankruptcy judge for the Southern District of New York from 2000 to 2015. In that opinion, Mr. Gropper stated that United States courts have the greatest respect for the orders and judgments of courts of other nations, particularly those of Canada and judgments for money are ordinarily enforced. He stated that while non-monetary judgments are less regularly enforced, in appropriate circumstances they may be enforced under the common law principle of comity. However, in order for a foreign order or judgment to be enforced, the foreign court must have personal jurisdiction over the defendant.⁵

86 I could hardly quarrel with an opinion on these matters by someone as eminent as Mr. Gropper. However, Mr. Gropper was instructed to assume that Cliffs does not carry on business in Canada, and that assumption is critical to his analysis. That assumption cannot stand in light of the findings that I have made regarding Cliffs carrying on business in Ontario. While Mr. Gropper opines that a U.S. court must scrutinize the basis on which a foreign court asserts jurisdiction over a defendant, and in light of international concepts of jurisdiction to adjudicate, there is no discussion of this issue if the foreign court such as this Court has found that the defendant has carried on business in Ontario under a contract made in Ontario.

87 Essar Algoma relies on an opinion of Ronald A. Brand, a professor of law at the University of Pittsburgh and highly qualified in the area of the recognition of foreign judgments. Professor Brand's opinion is that the fact that a Canadian judgment provides relief in the form of (a) a declaratory order concerning the rights and obligations of parties under and the status of a contract, and/or (b) specific performance of contractual obligations, would not prevent the recognition and enforcement of that judgment in a court in the United States. Recognition is based on the principle of comity and derives from a U.S. case of *Hilton v. Guyot*, 159 U.S. 113 (1895). Professor Brand says that the principles of comity discussed in that case have made the U.S. one of the most liberal countries in the world in recognizing foreign judgments.

88 Cliffs relies on an opinion of Richard B. McQuade Jr., as U.S. District Court judge from 1986 to 1989 and before that an Ohio Common Pleas Court judge from 1978. Since 1998 he has served as a judge by assignment in both federal and Ohio states courts. His opinion is that an Ohio, Minnesota or Michigan court would not enforce an order of an Ontario court in the nature of specific performance. I must say that I prefer the opinion of Professor Brand for the reasons given by Professor Brand and his impressive credentials on the subject, credentials that I believe to be superior to those of Mr. McQuade.

89 Mr. McQuade states in his opinion that recognition of foreign judgments is based upon general principles of comity. He then goes on to state that the Uniform Foreign-Money Judgments Recognition Act that has been adopted in many states, including Ohio, Michigan and Minnesota, restricts the enforcement of foreign judgments to the recovery of money only. This, however, is not the whole picture. As Professor Brand points out, those state statutes are limited in scope to the recognition of foreign money judgments, but they all include a "savings clause" which specifically acknowledges that judgments other than money judgments may be recognized by applying traditional concepts of comity.

90 Mr. McQuade in his opinion stated that courts that adopted the Uniform Act have consistently denied enforcement to non-monetary judgments, and he cited one case *Sea Search Armada v. Republic of Columbia*, 821 F. Supp. 2d 268 as authority for that proposition. However, as explained by Professor Brand, that decision dealt with a version of the Uniform Foreign Money-Judgments Recognition Act that was in effect in Washington D.C. in 2011 that did not contain the savings clause that other states including Ohio, Michigan and Minnesota had adopted. A Washington D.C. statute was later passed in 2011 after the decision to expressly preserve the D.C. courts' discretion to recognize foreign non-money judgments under principles of comity or otherwise. Curiously, Mr. McQuade in a footnote to his opinion stated that a U.S. court may provide injunctive relief to enforce a foreign judgment it has recognized and that a U.S. court in doing so may take into account a number of factors typically taken into account in ordering injunctive relief. That footnote was contrary to his opinion stated in the body of his affidavit.⁶

91 There is also the issue as to what a U.S. court would consider in recognizing an injunctive order from this Court. In a recent article in 2014 by Judge Martin Glenn of the United States Bankruptcy Court for the Southern District of New York, Judge Glenn commented on the practice of comity between the U.S. and Canada. He stated:

In *Hilton v. Guyot*, the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton*, 159 U.S. at 202-03. "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." *In re Bd. of Dirs. of Hopewell Int'l. Ins. Ltd., Inc.*, 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) (internal quotation marks and citations omitted). For example, the U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford

creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.

92 Judge Glenn also referred to a reluctance to second guess a decision of a foreign court in taking jurisdiction if the defendant appeared in the foreign court to challenge its jurisdiction and failed to prevail. He stated:

In deciding whether to enforce a foreign judgment, a court in the United States may scrutinize the basis for the assertion of jurisdiction by the foreign court. *See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* s. 482 cmt. c. ("*Lack of jurisdiction over defendant*. The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor. If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state. Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate."). Whether jurisdiction was challenged in the foreign court is relevant but not necessarily decisive in deciding whether to enforce a foreign judgment, although a renewed challenge to jurisdiction is generally precluded. *Id.* ("If the defendant appeared in the foreign court to challenge the jurisdiction of the court and failed to prevail, it is not clear whether such determination will be considered *res judicata* by a court in the United States asked to recognize the resulting judgment."); *Id.* at s. 482 rn.3 ("[i]f the defendant challenged the jurisdiction of the rendering court in the first action and the challenge was unsuccessful or was not carried to conclusion . . . a renewed challenge to jurisdiction of the rendering court is generally precluded").

93 I recognize the reluctance expressed by Justice Sharpe in his text that our courts avoid making orders that cannot be enforced. However on the basis of the evidence before me, Cliffs has not established that an order made in this Court requiring Cliffs to perform the Cliffs Contract would not be enforced in those states where Cliffs has assets. I accept that there may be some risk as opinions are only opinions, but the risk on the basis of the evidence before me does not rise to the level that would render Ontario a *forum non conveniens* in this case.

(vii) Conclusion on forum non conveniens

94 Cliffs has not met its burden of showing that the alternative forum, in this case Ohio, is clearly more appropriate.

Is the relief inappropriate for a summary proceeding?

95 Cliffs takes the position that the relief Essar Algoma seeks is inappropriate for a summary proceeding and that there is no basis for Essar Algoma claiming urgency. This is not raised as a *forum non conveniens* point. It requests an order that Essar Algoma must deliver a statement of claim.

96 So far as the urgency is concerned, the Monitor has made clear that the issue needs to be quickly decided. I cannot find that Essar Algoma has purposely delayed the issue. In any event, Cliffs in argument took the position that it wanted the issue decided quickly.

97 Regarding the kind of hearing required to deal with the dispute, there is nothing in the record before me to say that Essar Algoma is demanding some summary procedure that would impair Cliffs' procedural rights in any material way. In argument, counsel for Essar Algoma said that what procedure will be adopted is for this Court on another day and that the parties will have to work together to come up with an appropriate procedure. It could be a full trial or less.

98 I would not at this stage order that Essar Algoma deliver a statement of claim. What the form of the process will take is yet to be decided. I agree with Cliffs that the procedural rights of the parties should be protected as much as possible as the circumstances will permit. Those circumstances, of course, include the fact that Essar Algoma filed under the CCAA shortly after Cliffs purported to terminate the Cliffs Contract and that the issue needs to be dealt with quickly for the sake of both parties. As well, the principles laid out in *Hryniak v. Mauldin*, 2014 SCC 7 and the need to be mindful of the most proportionate procedure for a case will need to be considered.

Conclusion

99 The motion of Cliffs is dismissed.

F.J.C. NEWBOULD J.

1 The power in section 11 is "subject to the restrictions set out in this Act." Cliffs argued that an inference should be drawn that because Essar Algoma withdrew its critical supplier motion, an inference should be drawn that it did so because it could not comply with the critical supplier tests in section 11(4). Thus the failure to be able to comply with section 11(4) should be read as a restriction in the Act preventing the use of section 11 by the applicants. I decline to make such an inference and in any event do not think a failure to fall into the language of section 11(4) which provides that a court *may* make an order can be read to be a restriction under section 11. It is commonplace in CCAA proceedings to make orders requiring supply without invoking section 11(4).

2 At the request of Cliffs, the claims procedure order signed on January 14, 2016 in this CCAA proceeding by agreement did not cover Cliffs' claims and the procedure to govern those claims is to await the determination of this motion.

3 It would be up to the Delaware Bankruptcy Court to determine if the claim should proceed in that Court or in the Ohio District Court.

4 Although Justice Dumas referred to a trustee and the Bankruptcy Court, the case was a CCAA case and the MME was not a bankrupt.

5 Mr. Gropper went on in his opinion to give his view ("it is submitted...") that a U.S. Court would not find that Cliffs has submitted to the jurisdiction of the Canadian courts. I have serious doubts as to whether an expert in foreign law should go beyond stating what the foreign law is and give an opinion on what the foreign court would do in a particular case. See my comments in *Nortel Networks Corp. (Re)* (2014), 20 C.B.R. (6th) 171 at paras. 103-104. In any event, his opinion was based on the assumption that Cliffs did not carry on business in Canada.

6 Mr. Gropper also referred, in a footnote to his statement that in appropriate circumstances a non-monetary may be enforced under the common law principle of comity, to the *Sea Search* case as authority that where the Uniform Act has been adopted, courts have consistently denied enforcement to non-monetary judgments. However Professor Brand's analysis is a complete answer to that case. I would note that while Mr. Gropper has extremely impressive credentials as a bankruptcy expert, his *curriculum vitae* does not list experience in dealing with state courts or the enforcement of foreign judgments under state legislation.

Indexed as:
Hover (Re)

IN THE MATTER OF the proposal of John Vincent Hover

[2000] A.J. No. 1496

2000 ABQB 938

285 A.R. 318

21 C.B.R. (4th) 263

101 A.C.W.S. (3d) 875

Action No. 069083

Alberta Court of Queen's Bench
Judicial District of Calgary

Registrar Laycock

Heard: November 11, 2000.
Judgment: filed December 13, 2000.

(37 paras.)

Counsel:

Susan Robinson-Burns and James R. Farrington, for trustee/KPMG.
Frank Llewellyn, for the bankrupt/James Hover.
Jill Medhurst-Tivador, for the Superintendent of Bankruptcy.
Richard A. Low, for Pleasure Pool Sales Ltd.
Barry Schurr, Office of the Official Receiver.

REASONS FOR JUDGMENT

1 REGISTRAR LAYCOCK:-- On November 12th, 1999, the debtor filed a Notice of Intention to file a proposal under the Bankruptcy & Insolvency Act, Part III. Sandy D. Lyons, a licensed trustee, of KPMG Inc. in Lethbridge consented to act as trustee under the proposal.

2 On November 21st, 1999, KPMG filed with the Official Receiver in Calgary a cash flow statement, the insolvent persons report on the cash flow statement and the trustee's report on the cash flow statement. Subsequently 3 orders were granted extending the time for the debtor and the trustee to file the proposal with the Official Receiver. The proposal was filed with the Official Receiver on April 25th, 2000 and the following day, documents including a notice of a meeting of creditors were mailed out to the debtor, the Official Receiver, and every known creditor. The meeting originally called for May 16th, 2000 was subsequently adjourned and proceeded on June 22nd 2000.

3 On June 22nd, 2000, the required number of proven creditors accepted the proposal subject to an amendment made during the meeting. An application for court approval of the proposal was scheduled for August 31st, 2000 and rescheduled and heard on September 28th, 2000.

4 Prior to filing the notice of intention, the debtor had an ongoing dispute with Canada Customs and Revenue Agency (CCRA) regarding a debtor's ability to claim farm losses on an unrestricted basis. The debtor and CCRA entered into a compromise agreement prior to the meetings of creditors and CCRA voted in favour of the proposal.

5 Four issues emerged from the various applications and cross-applications:

1. Should the proposal be accepted?
2. Should KPMG Inc., have obtained permission from the court pursuant to the Bankruptcy & Insolvency Act, section 13.3 before acting as trustee?
3. Should KPMG be removed as trustee for alleged misconduct?
4. Should vehicles seized by an execution creditor on November 12, 1999 be returned to the debtor?

A short oral decision was given covering all of the issues on November 11th, 2000 and costs were dealt with. These written reasons were to follow.

ONE

6 The statement of affairs filed by the debtor lists secured creditors totalling \$711,112.00 and unsecured creditors totalling \$1,509,506.40. His statement of assets estimate the gross value at \$1,859,000.00. The trustee has prepared a statement of estimated realization under a proposal and a bankruptcy. In a bankruptcy the unsecured creditors would receive approximately \$743,000.00 before trustee's fees, legal expenses, levies, commissions, holding and liquidation costs. Under the proposal the unsecured creditors would receive \$1,220,240.00.

7 The required number of creditors representing the required portion of debts have approved the proposal. Several small creditors who voted against the proposal opposed the granting of approval by the court.

8 The Bankruptcy & Insolvency Act, section 59(2) states:

Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

9 No argument was made to establish that the debtor had committed any of the offences mentioned in sections 198 to 200, therefore the court must consider whether the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors. The trustee argues that the proposal is reasonable having been accepted by the required number of creditors; it provides for greater benefits than the alternative i.e. bankruptcy; and the proposal has a reasonable possibility of being successfully completed having regard to the debtor's assets and ability to earn an income.

10 The objecting creditors do not trust the debtor and would prefer that he was in bankruptcy so that his assets would be controlled and sold by the trustee. Other than the objecting creditors being suspicious of the debtor, there is no evidence to support their concerns. In the alternative, the objecting creditors ask that the vehicles under seizure be delivered over to a car lot in Lethbridge and sold in order to help fund the proposal. Holden & Morawetz 2001 Annotated Bankruptcy & Insolvency Act at page 209 states:

The power to make alterations and amendments at the meeting of creditors is very wide; the power of the court to make alterations and amendments, on the other hand, is very limited.

11 The court's authority to approve or refuse a proposal is set out in section 60(5) and rule 92. The court can refuse to approve the proposal, approve a proposal or in making an approval may correct any error or admission that does not constitute an alteration of substance. The change recommended by the objecting creditor is not a correction of a clerical error or omission, it is a change in substance. On an acceptance of a proposal the debtor has control of all of his assets. To take over control of any of his assets of the debtor would be to make a substantial alternation in the proposal.

12 In reviewing all of the material and arguments made by the parties, it appears that the proposal is reasonable and is calculated for the benefit for the general bodies of creditors. The proposal was therefore approved.

TWO:

13 The Bankruptcy & Insolvency Act section 13.3(1) states:

Except with the permission of the court and on such conditions as the court may impose, no trustee shall act as trustee in relation to the estate of a debtor

- (a) where the trustee is, or at any time during the two preceding years was,
 - (i) a director or officer of the debtor,
 - (ii) an employer or employee of the debtor or of a director or officer of the debtor,
 - (iii) related to the debtor or to any director or officer of the debtor, or
 - (iv) the auditor, accountant or solicitor, or a partner or employee of the auditor, accountant or solicitor, of the debtor; or.....

14 The Official Receiver argues that KPMG should not have acted as trustee of the proposal since they were the accountant of the debtor during the preceding two years. KPMG Inc., argues that they were not the debtor's accountant during the two preceding years and, in the alternative, if they were the accountant they seek leave of the court to act as trustee of the estate of the debtor.

15 KPMG LLP is a firm of chartered accountants with an office in Lethbridge who prepared financial statements for the debtor's professional corporation from its incorporation in May 1976 until the last review engagement report was completed January 30th, 1996. Before the 1996, 1997 and 1998 year ends KPMG LLP compiled data provided by the debtor, made journal entries, obtained bank confirmations and generated some of the financial statements on the firms computer system. The firm's name did not appear on the financial statements, accordingly the firm argues that they did not do a notice to reader, perform a review engagement, or audit the statements. The firm's address was used as a mailing address on the corporate tax returns but the firm did not sign the returns on behalf of the corporation nor does their name appear as the preparer of the tax return. The firm prepared the T4 payroll returns for the professional corporation based on information received from the Toronto Dominion Bank for the employees of the professional corporation other than the debtor and his wife.

16 KPMG LLP compiled personal tax returns for the debtor from 1995 to the present using information supplied by the debtor. No financial statements for the debtor were prepared. The debtor provided his synoptic for his farm affairs and the firm would make journal entries without independent verification and insert the information in the farm income statement for filing.

17 KPMG Inc., is a corporate trustee controlled by KPMG LLP. Sandy Lyons is licensed trustee in bankruptcy who works for KPMG Inc.

18 The official receiver argues that based on these facts KPMG Inc., though not an auditor for the debtor was certainly his accountant. Accountant is not a defined term in the Bankruptcy &

Insolvency Act nor have counsel found any cases where the courts have interpreted that term.

19 The solicitors for KPMG Inc. have provided copies of the Canadian Insolvency Practitioners Association Rules of Professional Conduct and Interpretations. In dealing with section 13.3 the association rule 4(4) states:

The term "accountant" means anyone who has prepared unaudited financial statements in accordance with section 8200 of the CICA Handbook.

20 The Institute of Chartered Accountants Association of Alberta in their code of ethics in guideline G204.73 states in part:

For the purpose of this guideline the term accountant means any member who has prepared unaudited financial statements in accordance with section 8200 of the CICA Handbook.

21 Section 8200 of the Canadian Institute of Chartered Accountants (CICA) Handbook deals with review engagement reports issued after January 1st, 1989. That section excludes from its operation any engagements in which the accountant compiles but does not review an unaudited financial statements. KPMG Inc., states that it is the practice and understanding in the Insolvency practice that the restriction on a trustee acting for the debtor as provided in the Bankruptcy Act section 13.3 only applies if the firm prepares a review engagement report for the debtor. All other work for a client is excluded by definition.

22 Firstly, this definition could only apply to business entities which have financial statements. It could not have been intended to define accountants who do work for individuals who do not need a financial statement.

23 Secondly, statutory interpretation requires the term accountant be given its usual, normal and generally accepted meaning. The views of the professional associations in their rules and guidelines which provide a restrictive interpretation to the word "accountant" are not supportable. The function of accountants have expanded over time and the services of accounting firms continue to expand. Before Canada had an Income Tax Act, accountants would prepare and maintain books and records for businesses and individuals. They have expanded into the area of preparation of income tax returns for individuals, corporations and other business entities. The preparation of a review engagement financial statement is but a small part of work performed by accountants. While the work of KPMG LLP for the debtor and his professional corporation was somewhat restricted after 1995, the firm continued to do accounting work for both the professional corporation and the debtor. No doubt the debtor continued to view KPMG as his accounting firm not as his bookkeeping or data entry clerk. I am equally certain that KPMG continued to charge fees commensurate with their duties as accountants and not as bookkeepers and data entry clerks.

24 The first document filed in a Division I proposal is the notice of intention to make a proposal

pursuant to section 50.4(1). The notice of intention names the licensed trustee who has consented to being the trustee under the proposal and the form of consent is attached to the notice. On the filing of the notice of intention on November 12, 1999, KPMG was the trustee of the proposal. Section 13.3 prohibits KPMG Inc. from acting as trustee in relation to the estate of the debtor because the trustee's employer KPMG Inc., through its controlling corporation, KPMG LLP, acted as the debtor's accountant. Section 13.3 requires court approval before KPMG could act as a trustee of the estate of the debtor. KPMG Inc. and Sandy Lyons therefore acted contrary to section 13.3.

25 The trustee advises that in accepting the appointment as trustee he was following the practice in the industry as mandated by the professional associations. There is no Canadian authority which interprets the term accountant. Until the official receiver's office raised the issue the trustee had no idea that he might be in breach of section 13.3. The debtor, having been satisfied with the accounting services provided by KPMG LLP, chose Sandy Lyons of KPMG Inc. to be his trustee in the proposal. Prior to the appointment of Mr. Lyons, he had no dealings with the debtor. From the time the debtor approached Mr. Lyons until the date of the hearing Mr. Lyons has expended considerable time and effort in putting together the financial information necessary to complete the proposal to the creditors, has conducted numerous meetings with the creditors and has an intimate knowledge of the issues raised in the proposal.

26 The purpose of section 13.3 is to prevent a conflict of interest, to protect the debtor from an accountant who may have information that could be used to the prejudice of the debtor and to insure that the trustee who may have a close relationship with the debtor does not work to the prejudice of the creditors. There is no evidence that the trustee has or will act in a way that would prejudice the creditors. The debtor and the majority of creditors support the continuation of Mr. Lyons as his trustee.

27 Although the trustee should have obtained court approval before his appointment, his acts done in good faith since his appointment, are not invalid.(BIA s.14.07)

28 In *Re Planta Dei Pharma Inc.* 1999 Carswell NB 540, 212 N.B.R. (2d) 143, 541 A.P.R. 143, 14 C.B.R. (4th) 256 the New Brunswick Court of Queen's Bench found the trustee offended s. 13.3 and allowed them to continue as trustee where there were allegations of prejudice but no evidence of real prejudice.

29 Although Mr. Lyons acting as trustee offends s. 13.3, I exercised my discretion and gave him leave to continue as trustee. If Mr. Lyons accepted the appointment knowing he was in breach of s. 13.3, approval would not be granted. However when he accepted the appointment he felt that the professional association rules and s. 13.3 had been complied with. Additionally he has now spent a considerable amount of time on a difficult proposal which has been accepted by creditors and the court. His future actions will be subject to scrutiny of the inspectors. There is little chance for his future acts to be prejudicial to the creditors or to the debtor. The court should be vigilant to prevent the possibility of prejudice and conflict of interest and ensure that the trustee's Code of Ethics in

rules 34 to 53 are not going to be breached.

THREE:

30 The objecting creditor, Pleasure Pool Sales Ltd., applies pursuant to section 14.4 for an order to remove the trustee for cause and appoint another licenced trustee in his place. In *Alzeer Holdings Ltd. v. Browning Smith Inc.* (1994), 38 C.B.R. (3d) 199, Master Quinn held that "for cause" meant improper conduct by the trustee. Other cases allow for substitution of trustees where there is a conflict of interest or a perceived conflict of interest (*Tannis Trading Inc. v. Camco Foods Services Ltd.* (1988), 67 C.B.R. (NS) 1, 63 O.R. (2d) 775, 49 D.L.R. (4th) 128). The court has allowed the trustee to continue where a change would cause delay in the administration in estates and cause additional expense to the estate in changing the trustee (*R.J. Nicol Homes Ltd*) (1995), 30 C.D.R. (3d) 90. The Ontario Court of Justice in *Re Ethier* (1991), 7 C.B.R. (3d) 268 stated at page 273:

In my view, the fact the inspectors themselves have approved of the trustee's performance thus far suggests not only that the trustee is acting without interest or bias, but is also perceived to be acting in the proper manner. Although the test to be applied is an objective one, it is usual for the courts to defer to the creditors' and inspectors' view on that point as was seen in *Re Terrace Sporting Goods Ltd.* (1979), 31 C.B.R. (N.S.) 68 (Ont. S.C.) And *Re Bryant Isard & Co.* (1923), 4 C.B.R. 317, 25 O.W.N. 382, [1924] 1 D.L.R. 217 (S.C.) (emphasis added).

31 Other factors for the court to consider include, whether the trustee is guilty of impropriety or misconduct or whether they lack qualifications to discharge their function as trustee. The satisfaction or dissatisfaction of the majority of creditors is also material (*Re United Fuel Investments Ltd. and Dencon et al v. Union Gas Company of Canada*, [1966] 1 O.R. 165.

32 Allegations of conflict of interest and misconduct by the trustee are set out in the affidavit of Michael Benison. To the extent that complaints are made about the debtor and not linked to activities of the trustee, the complaints are ignored.

33 The complaints about Mr. Lyon's conduct and potential conflict of interest are more than adequately responded to by Mr. Lyons. In the end I am satisfied that there is no conflict of interest and that Mr. Lyons has acted properly since his appointment as trustee. To replace Mr. Lyons would delay the administration of the proposal and increase the costs of supervising the proposal. The application to have Mr. Lyons removed was therefore dismissed.

FOUR:

34 On instructions from Pleasure Pools, four of the debtors motor vehicles were seized by a civil enforcement agency on February 2nd, 1998 and left with the debtor on a bailee's undertaking. Because of various court ordered stays, the vehicles could not be removed and sold until after noon on November 12th, 1999. The execution debtor instructed the civil enforcement agency to go and

remove the four seized vehicles from the debtor's lands. At the same time Mr. Lyons was filing a notice of intention to make a proposal by fax to the Office of the Superintendent of Bankruptcy. Believing that the notice of intention had been faxed and received by the Superintendent's office, Mr. Lyons attended the debtor's premises. There is a dispute between the parties on the exact location of the vehicles when Mr. Lyons attended on the debtor's property. The civil enforcement agent states that one vehicle had already been removed from the property and was going down the road when Mr. Lyons intervened. Mr. Lyons indicates that none of the vehicles had left the debtor's property.

35 The exact location of the one vehicle attached to the tow truck is not relevant. Mr Lyons advised the civil enforcement agency that a stay of proceedings was in effect as a result of a filing of notice of intention. Since Mr. Lyons did not have a copy of notice of intention with a filed stamp, the civil enforcement agency declined to follow the instructions of Mr. Lyons and completed the removal of all four vehicles which remained in storage until this hearing.

36 Section 69(1) creates a stay of all enforcement proceedings on the filing of a notice of intention. Pleasure Pool can not continue the execution on it's judgment for the recovery of a claim provable in Bankruptcy. When Mr. Lyons and the civil enforcement agency were standing toe to toe fighting over the possession of the motor vehicles, Pleasure Pools had no right to continue the execution. Pleasure Pools argues that they can continue the execution until they have satisfactory proof of the filing of the notice of intention. The act does not contain any such wording. The stay does not come into effect when proof of the filing of the notice of intention is provided to the execution creditor. The act states that the stay comes into effect on the filing of the notice of intention.

37 Even if Mr. Lyons had not advised the civil enforcement agent of the filing of the notice of intention, the removal of the vehicles at that precise time was improper as the notice of intention had been received by fax at the office of the superintendent. The importance of the civil enforcement agency being advised of the filing goes to the issue of costs of the removal of the vehicles and possibly damages arising from the wrongful removal of the vehicles. Since the removal of the vehicles was a continuation of the execution which is prohibited by section 69, the vehicles were ordered to be forthwith returned to the debtor. Because the creditor and the civil enforcement agent had knowledge at the time of the removal that a stay was in effect, they must be responsible for all of the costs of the removal, the return of the vehicles and storage of the vehicles in the interim.

REGISTRAR LAYCOCK

cp/i/qljpn/qlcas/qlgxc

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) MONDAY, THE 30TH
JUSTICE NEWBOULD) DAY OF SEPTEMBER, 2013



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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC.,
AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC.

Applicants

INITIAL ORDER

THIS APPLICATION, made by Data & Audio-Visual Enterprises Holdings Inc., Data & Audio-Visual Enterprises Wireless Inc. and 8440522 Canada Inc. (collectively, the "Applicants"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of William E. Aziz sworn September 29, 2013 and the Exhibits thereto (the "Aziz Affidavit"), and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants, Ernst & Young Inc. (as the proposed Monitor), the Ad Hoc Committee of Noteholders (as defined in the Aziz Affidavit), the DIP Lenders (as defined in the Aziz Affidavit), The Catalyst Capital Group Inc. and Equity Financial Trust Company, no one else appearing although duly served as appears from the affidavit of service of Evan Cobb sworn September 30, 2013 and on reading the consent of Ernst & Young Inc. to act as the Monitor,

✓ [, QCP CW S.A.R.L. ✓ J.T. -

SERVICE

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

APPLICATION

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

PLAN OF ARRANGEMENT

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

POSSESSION OF PROPERTY AND OPERATIONS

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

5. THIS COURT ORDERS that the Applicants shall be entitled to continue to utilize the cash management systems currently in place with, among others, National Bank, TIO Networks Corp., and Chase Paymentech Solutions ("Paymentech") as described in the Aziz Affidavit or, with the consent of the DIP Lenders, replace those systems with other substantially similar central cash management systems (the "Cash Management System") and that any present or future bank providing the Cash Management System shall not be under any obligation

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

6. THIS COURT ORDERS that, subject to the terms and conditions of the DIP Loan Agreement, including the applicable terms therein that refer to the cash flow forecast approved by the DIP Lenders pursuant to the DIP Loan Agreement (the "Cash Flow Forecast"), the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

- (a) all outstanding and future wages, salaries, commissions, employee benefits, vacation pay (excluding any severance or termination payments without the consent of the Chief Restructuring Officer (as defined below) and the DIP Lenders) and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
- (b) any amounts owing to Dealers (as such term is defined in the Aziz Affidavit) and incurred in the ordinary course of business and consistent with existing Dealer compensation policies and arrangements, subject to the prior approval of the Chief Restructuring Officer; and
- (c) the reasonable fees and disbursements of any Assistants retained or employed by an Applicant in respect of these proceedings, at their standard rates and charges, subject to the prior approval of the Chief Restructuring Officer.

7. THIS COURT ORDERS that the Applicants shall be authorized but not required to continue to perform and provide services for which customers of any of the Applicants prepaid prior to the date of this Order in the ordinary course.

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

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services, subject to the prior approval of the Chief Restructuring Officer; and
- (b) payment for goods or services actually supplied to the Applicants following the date of this Order.

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

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and
- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the

Applicants, subject to the prior approval of the Chief Restructuring Officer.

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

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

RESTRUCTURING

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

- (a) permanently or temporarily cease, downsize or shut down any of their business or operations, and to dispose of redundant or non-material assets not exceeding \$500,000 in any one transaction or \$2,000,000 in the aggregate, subject to the prior approval of the Chief Restructuring Officer.
- (b) terminate the employment of such of their employees as they deem appropriate, subject to the prior approval of the Chief Restructuring Officer;
- (c) disclaim, in whole or in part, with prior consent of the Monitor and the DIP Lenders or further Order of the Court, such of their arrangements or agreements, whether oral or written, as the Applicants deem appropriate, in accordance with Section 32 of the CCAA, with such disclaimers to be on such terms as may be agreed upon between

the Applicants and such counter-parties, or failing such agreement, with the consequences thereof to be dealt with in the Plan; and

- (d) pursue all avenues of refinancing and offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or sale,

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

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

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

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

15. THIS COURT ORDERS that until and including October 30, 2013, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of any of the Applicants, the Monitor, the DIP Lenders, the holders of the Bridge Notes (in such capacities, the "Bridge Lenders") or Equity Financial Trust Company (in its capacity as Trustee and Collateral Agent under the Bridge Notes, the DIP Facility and the First Lien Notes (as such term is defined in the Aziz Affidavit)) (in such capacity, the "Trustee") or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court. This Paragraph 15 shall apply to Proceedings commenced or continued against or in respect of the Trustee, DIP Lenders or the Bridge Lenders solely to the extent that such Proceedings relate to the DIP Lenders' or the Bridge Lenders' lending arrangements with the Applicants.

NO EXERCISE OF RIGHTS OR REMEDIES

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

NO INTERFERENCE WITH RIGHTS

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

the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

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

NON-DEROGATION OF RIGHTS

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

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

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

obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

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

22. THIS COURT ORDERS that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of \$550,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 53 and 55 herein.

23. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) an Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

APPOINTMENT OF MONITOR

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

25. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and

obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicants' receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) assist the Applicants, to the extent required by the Applicants, in its dissemination, to the DIP Lenders and its counsel at the times required under the DIP Loan Agreement (as such term is defined in the Aziz Affidavit) of financial and other information as agreed to between the Applicants and the DIP Lenders which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lenders;
- (d) advise the Applicants in its preparation of the Applicants' cash flow statements and reporting required by the DIP Lenders, which information shall be reviewed with the Monitor and delivered to the DIP Lenders and their counsel on a periodic basis at the times required in the DIP Loan Agreement, or as otherwise agreed to by the DIP Lenders;
- (e) advise the Applicants in their development of the Plan and any amendments to the Plan;
- (f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;
- (h) assist the Applicants, to the extent required by the Applicants, with their restructuring activities and/or any sale of the Property and the Business or any part thereof;
- (i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and

performance of its obligations under this Order; and

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

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

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

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

29. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or

obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. THIS COURT ORDERS that, subject to the terms and conditions of and availability under the DIP Loan Agreement, including the applicable terms therein that refer to the Cash Flow Forecast, and the prior approval of the Chief Restructuring Officer (i) the Monitor, counsel to the Monitor, counsel to the Applicants, counsel to the DIP Lenders and the Ad Hoc Committee of Noteholders, and the Trustee shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings; and (ii) the Financial Advisors and the Chief Restructuring Officer (each as defined in the Aziz Affidavit) shall be paid their reasonable fees and disbursements, in each case in accordance with the terms of the Engagement Letters (as defined in the Aziz Affidavit). The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants and counsel for the DIP Lenders and the Ad Hoc Committee of Noteholders on a weekly basis, or on such basis as otherwise agreed by the Applicants and the applicable payee. The Applicants are hereby authorized and directed to pay amounts owing to the Chief Restructuring Officer in accordance with the terms of its Engagement Letter monthly in advance.

31. THIS COURT ORDERS that if requested by the Applicants, the DIP Lenders, or this Court, the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. THIS COURT ORDERS that the Monitor, counsel to the Monitor, if any, the Applicants' counsel, counsel for the DIP Lenders and the Ad Hoc Committee of Noteholders, the Financial Advisors, the Chief Restructuring Officer and counsel to any board of directors of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of \$10,000,000, as security for their professional fees and disbursements incurred (i) at the standard rates and charges of the Monitor and such counsel both before and after the making of this Order in respect of these proceedings; or (ii) as prescribed in the Engagement Letters in the case of the Financial Advisors and the Chief Restructuring Officer. The Administration Charge shall have

the priority set out in paragraphs 53 and 55 hereof.

APPROVAL OF FINANCIAL ADVISORS' ENGAGEMENT

33. THIS COURT ORDERS that the Applicants are authorized to continue the engagement of the Financial Advisors on the terms and conditions set out in the FA Engagement Letters (as such term is defined in the Aziz Affidavit).

34. THIS COURT ORDERS that the FA Engagement Letters be and are hereby ratified and confirmed and the Applicants are authorized to perform their obligations thereunder.

35. THIS COURT ORDERS that any obligations of the Applicants under the FA Engagement Letters, whether for payment of fees, expenses, indemnities or otherwise, shall be entitled to the benefit of the Administration Charge.

36. THIS COURT ORDERS that any claims of the Financial Advisors under the FA Engagement Letters shall be treated as unaffected in any Plan.

APPOINTMENT OF CHIEF RESTRUCTURING OFFICER

37. THIS COURT ORDERS that the Applicants are authorized to continue the engagement of BlueTree Advisors II Inc. as Chief Restructuring Officer (in such capacity, the "Chief Restructuring Officer") on the terms and conditions set out in the CRO Engagement Letter (as such term is defined in the Aziz Affidavit).

38. THIS COURT ORDERS that the CRO Engagement Letter be and is hereby ratified and confirmed and the Applicants are authorized to perform their obligations thereunder.

39. THIS COURT ORDERS that any obligations of the Applicants under the CRO Engagement Letter, whether for payment of fees, expenses, indemnities or otherwise, shall be entitled to the benefit of the Administration Charge.

40. THIS COURT ORDERS that any claims of the Chief Restructuring Officer under the CRO Engagement Letter shall be treated as unaffected in any Plan.

DIP FINANCING

41. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to

obtain and borrow under a credit facility (the "DIP Facility") from the DIP Lenders in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under the DIP Facility shall not exceed the amounts prescribed in the DIP Loan Agreement.

42. THIS COURT ORDERS that the DIP Facility shall be on the terms and subject to the conditions set forth in the DIP Loan Agreement.

43. THIS COURT ORDERS that the DIP Facility and the DIP Loan Agreement be and are hereby approved.

44. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "Definitive Documents"), as are contemplated by the DIP Loan Agreement or as may be reasonably required by the DIP Lenders pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lenders under and pursuant to the DIP Loan Agreement and the other Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

45. THIS COURT ORDERS that the DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Lenders' Charge**") on the Property as security for any and all obligations of the Applicants under the DIP Loan Agreement and the Definitive Documents (including on account of principle, interest, fees, expenses and other liabilities) (the aggregate of all such obligations being the "**DIP Indebtedness**"), which DIP Lenders' Charge shall be in the aggregate amount of the DIP Indebtedness outstanding at any given time. The DIP Lenders' Charge shall not secure an obligation that exists before this Order is made. The DIP Lenders' Charge shall have the priority set out in paragraphs 53 and 55 hereof.

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

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

- (b) upon the occurrence of an event of default under the DIP Loan Agreement, the Definitive Documents or the DIP Lenders' Charge (A) the DIP Lenders may cease making advances to the Applicants, (B) the DIP Lenders may (i) set off and/or consolidate any amounts owing by the DIP Lenders to the Applicants against the obligations of the Applicants to the DIP Lenders under the DIP Loan Agreement, the Definitive Documents, or the DIP Lenders' Charge and make demand, accelerate payment and give other notices, and (ii) following an Order of the Court, granted on 5 days' notice to the Applicants and the Monitor, exercise any and all of their respective rights and remedies against the Applicants or the Property under or pursuant to the DIP Loan Agreement, the Definitive Documents, the DIP Lenders' Charge, or the *Personal Property Security Act* of Ontario or any other applicable jurisdiction, including without limitation, to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants;
- (c) the foregoing rights and remedies of the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property; and
- (d) notwithstanding any other provision hereof, the DIP Lenders shall not take any steps to enforce their security granted in connection with DIP Loan Agreement or the Definitive Documents without prior approval of the Court.

47. THIS COURT ORDERS AND DECLARES that the DIP Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by any of the Applicants under the CCAA, or any proposal (the "Proposal") filed by any of the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

48. THIS COURT ORDERS that the obligations under ~~the Bridge Notes~~ the DIP Loan Agreement and the Definitive Documents shall be treated as unaffected by any Plan or any Proposal and the Applicants shall not file a Plan in these proceedings or any Proposal that does not provide for the indefeasible payment in full in cash of the obligations outstanding in respect of ~~the Bridge Notes~~ the DIP Loan Agreement and the Definitive Documents as a pre-condition

to the implementation of any such Plan.

49. THIS COURT ORDERS that, subject to the terms of this Order, including without limitation paragraph 11, the Applicants are hereby authorized and empowered to take all steps and actions in respect of, and comply with all of their obligations pursuant to, the Bridge Notes and such other agreements, security documents, guarantees and other definitive documents as executed in connection with the Bridge Notes.

KEY EMPLOYEE RETENTION PLAN

50. THIS COURT ORDERS that the payments to be made pursuant to the Key Employee Retention Plan (as such terms are defined in the Aziz Affidavit) as described in the supplemental employment agreements of the Key Employees (as such term is defined in the Aziz Affidavit), which are attached as confidential exhibits to the Aziz Affidavit, are hereby approved and the Applicants are authorized and directed to make payments in accordance with the terms of such supplemental employment agreements.

51. THIS COURT ORDERS that the Key Employees shall be entitled to the benefit of and are hereby granted a charge (the “**KERP Charge**”) on the Property, which charge shall not exceed an aggregate amount of \$600,000, to secure the amounts payable to the Key Employees pursuant to paragraph 50 of this Order.

52. THIS COURT ORDERS that the KERP Charge shall have the priority set forth in paragraphs 53 and 55.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

53. THIS COURT ORDERS that the priorities of the Directors’ Charge, the Administration Charge, the DIP Lenders’ Charge, and the KERP Charge as among them and relative to the liens securing the obligations under the First Lien Notes and the Bridge Notes, shall be as follows:

- (a) First, liens securing obligations under the First Lien Notes and the First Lien Notes Indenture (as defined in the Aziz Affidavit) (collectively, the “First Lien Notes Liens”);
- (b) Second, the Administration Charge and the KERP Charge on a *pari passu* basis;

- (c) Third, the Directors' Charge;
- (d) Fourth, the DIP Lenders' Charge and the liens securing the obligations under the Bridge Notes, on a *pari passu* basis.

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

55. THIS COURT ORDERS that each of the Directors' Charge, the Administration Charge, the KERP Charge and the DIP Lenders' Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person with the exception of the First Lien Notes Liens and the Encumbrances ranking in priority to the First Lien Notes Liens.

56. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the DIP Lenders' Charge, unless the Applicants also obtain the prior written consent of the Monitor, the DIP Lenders and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.

57. THIS COURT ORDERS that the Directors' Charge, the Administration Charge, the KERP Charge, the Definitive Documents and the DIP Lenders' Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") and/or the DIP Lenders thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of

Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Loan Agreement or the Definitive Documents shall create or be deemed to constitute a breach by an Applicant of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from an Applicant entering into the DIP Loan Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and
- (c) the payments made by the Applicants pursuant to this Order, the DIP Loan Agreement or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

58. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in an Applicant's interest in such real property leases.

59. THIS COURT ORDERS that the deposit accounts held by Paymentech and containing cash collateral pledged to Paymentech in an amount not to exceed \$1,200,000 shall be excluded from the DIP Lenders' Charge, the Administration Charge, the KERP Charge and the Directors' Charge and shall be held as security for any Chargebacks (as such term is defined in the Select Merchant Application and Agreement dated as of April 16, 2010 between Wireless and Paymentech) arising after the date of this Order.

SERVICE AND NOTICE

60. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in the Globe & Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner

prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against an Applicant of more than \$1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder. The list included in subparagraph (C) above shall not include the names, addresses or estimated amounts of the claims of those creditors who are individuals or any personal information in respect of an individual.

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

62. THIS COURT ORDERS that the Applicants, the Monitor, the DIP Lenders, the Ad Hoc Committee of Noteholders and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at www.ey.com/ca/mobilicity.

SEALING OF CONFIDENTIAL EXHIBITS

63. THIS COURT ORDERS that Confidential Exhibits "K", "L" and "W" through "DD" be and are hereby sealed pending further Order of the Court and shall not form part of the public record.

GENERAL

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

65. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting

as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of an Applicant, the Business or the Property.

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

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

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

69. THIS COURT ORDERS that, notwithstanding the immediately preceding paragraph, no order shall be made varying, rescinding or otherwise affecting the provisions of this Order with respect to the DIP Loan Agreement and the Definitive Documents, including, without limitation, Paragraphs 42 to 49, and 53 to 58, inclusive, unless notice of a motion is served on the Monitor, the Applicants and the DIP Lenders, returnable no later than October 9, 2013.

~~17~~ 17 - 205

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



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



SEP 3 3 2013

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

Court File No:

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 8440522
CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-
VISUAL ENTERPRISES HOLDINGS INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

INITIAL ORDER

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Lawyers for the Applicants



ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.) THURSDAY, THE 29th DAY
)
JUSTICE C. CAMPBELL) OF DECEMBER, 2011

INTERNATIONAL FOREST PRODUCTS CORPORATION

Applicant

- and -

ST. MARYS PAPER CORP.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED

ORDER

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing Ernst & Young Inc. as receiver and receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of St. Marys Paper Corp. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavits of Daniel J. Moore sworn August 31, 2011; September 27, 2011; October 6, 2011; and October 14, 2011 and the Exhibits thereto, all filed, and on hearing the submissions of counsel for the Applicant and the Debtor, no other parties appearing although duly served as appears from the affidavits of service filed with the Court, and on reading the

consent of the Debtor dated October 24, 2011, and on reading the consent of Ernst & Young Inc. to act as the Receiver,

SERVICE

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

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, Ernst & Young Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary

course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

- (d) to engage brokers, consultants, appraisers, agents (including listing agents for commercial real property), 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 Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;
- (g) to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
- (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;
- (j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate, including the listing of the Property with such broker or listing agent as the Receiver may deem appropriate and at such listing price as the Receiver may deem appropriate;
- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$250,000, provided that the aggregate consideration for all such transactions does not exceed \$1,000,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.
- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;
- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or

affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien. Notwithstanding any other provision in this Order or these proceedings, the rights and remedies of Her Majesty the Queen in Right of the Province of Ontario, as Represented by the Minister of Northern Development, Mines and Forestry ("Ontario"), under the Crown Forest Sustainability Act, 1994, S.O. 1994, c. 25 (the "CFSA"), with respect to the Wood in the Mill Yard (as defined in the Affidavit of David Hayhurst sworn October 7, 2011) are not stayed, suspended, or otherwise limited, without prejudice to the right of any party to take any position contrary to Ontario and, in addition, the Receiver has a right to inspect the Wood in the Mill Yard within 30 days from the date of this Order, during which period the Wood will not be removed, disposed or otherwise used.

NO INTERFERENCE WITH THE RECEIVER

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

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

RECEIVER TO HOLD FUNDS

12. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

14. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

15. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or

relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

16. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

18. THIS COURT ORDERS that the Receiver and its legal counsel shall, at the request of any creditor of the Debtor, pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

19. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

20. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$1,500,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

21. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

23. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

GENERAL

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

25. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

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

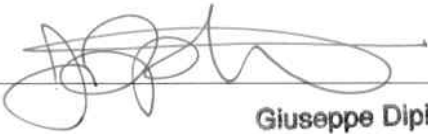
27. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

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

29. THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

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

31. THIS COURT ORDERS that unless proof of sufficient insurance coverage is provided by the Debtor to Ernst & Young Inc. and the Applicant by 9:00 a.m. (Toronto time) on December 30, 2011, this Order shall become immediately effective.


Giuseppe Di Pietro
Registrar

REGISTERED AT THE REGISTRY OF COURTS
TORONTO
BOOK NO:
LE/DANS LE REGISTRE NO.:

DEC 29 2011

• • •

MB

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that Ernst & Young Inc., the receiver and receiver and manager (the "Receiver") of the assets, undertakings and properties of St. Marys Paper Corp. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ___ day of _____, 20__ (the "Order") made in an action having Court file number CV-11-9367-00CL, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$ _____, being part of the total principal sum of \$ _____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver

to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 20__.

Ernst & Young Inc., solely in its capacity
as Receiver of the Property, and not in its
personal or corporate capacity

Per: _____

Name:

Title:

INTERNATIONAL FOREST PRODUCTS CORPORATION
Applicant

- and -

ST. MARYS PAPER CORP.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

RECEIVERSHIP ORDER

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Lawyers for the Applicants

Case Name:
Jaguar Mining (Re)

**RE: IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, As Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of
Jaguar Mining Inc., Applicant**

[2014] O.J. No. 214

12 C.B.R. (6th) 290

236 A.C.W.S. (3d) 820

2013 CarswellOnt 18630

Court File No. CV-13-10383-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz R.S.J.

Heard: December 23, 2013.

Judgment: January 16, 2014.

(50 paras.)

Corporations, partnerships and associations law -- Corporations -- Arrangement -- Application to court -- Powers of court -- Approval -- Fair and reasonable -- Application by Jaguar Mining for protection under Companies' Creditors Arrangement Act allowed -- Jaguar was holding company with registered office in Toronto -- Parent company to subsidiaries that carried on active gold mining -- Current liabilities exceeded assets by \$40 million -- Recapitalization supported by unsecured creditors -- Jaguar faced liquidity crisis and was insolvent -- Stay of proceedings to Jaguar's subsidiaries was appropriate given Jaguar depended on them for their value generating capacity -- Reasonable and appropriate to grant administration charge and director's charge over Jaguar's property.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters --

Application of Act -- Where total claim exceeds \$5,000,000 -- Compromises and arrangements -- With unsecured creditors -- Applications -- Initial applications -- Costs of administration -- Application by Jaguar Mining for protection under Companies' Creditors Arrangement Act allowed -- Jaguar was holding company with registered office in Toronto -- Parent company to subsidiaries that carried on active gold mining -- Current liabilities exceeded assets by \$40 million -- Recapitalization supported by unsecured creditors -- Jaguar faced liquidity crisis and was insolvent -- Stay of proceedings to Jaguar's subsidiaries was appropriate given Jaguar depended on them for their value generating capacity -- Reasonable and appropriate to grant administration charge and director's charge over Jaguar's property.

Application by Jaguar Mining for protection under the Companies' Creditors Arrangement Act. Jaguar was a holding company with a registered office in Toronto and no active business operations. It was the public parent company to several corporations that carried on active gold mining and exploration in Brazil. Its subsidiaries' assets included properties in the development and production stages. Jaguar's objective was to effect a recapitalization and financing transaction on an expedited basis through a plan of compromise and arrangement to provide a financial foundation for Jaguar and its subsidiaries to continue to work towards its operational and financial goals. The recapitalization was expected to result in the reduction of over \$268 million of debt and new liquidity upon exit of \$50 million. Jaguar's senior unsecured convertible notes were the primary liabilities affected by the recapitalization. Jaguar had not paid the latest interest payment due on the notes and was in default. Its current liabilities exceeded its assets by \$40 million. The recapitalization was supported by an ad hoc committee of noteholders. Jaguar sought an administrative charge and director's charge over its property.

HELD: Application allowed. Jaguar faced a liquidity crisis and was insolvent. It had complied with its obligations under s. 10(2) of the Companies' Creditors Arrangement Act. A stay of proceedings to Jaguar's subsidiaries was appropriate given Jaguar depended on them for their value generating capacity. It was reasonable and appropriate to grant the administration charge and director's charge over Jaguar's property. Engagement letters were approved and sealed given they contained sensitive commercial information, the disclosure of which could be harmful to the parties at issue. An Initial Order, Claims Procedure Order and Meeting Order were granted to assist Jaguar's quick implementation of the recapitalization.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.O. 1990, c. B.16,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 10(2), s. 11.51, s. 11.52, s. 22(2)

Counsel:

Tony Reyes and Evan Cobb, for the Applicant, Jaguar Mining Inc.

Robert J. Chadwick and Caroline Descours, for the Ad Hoc Committee of Noteholders.

Joseph Bellissimo, for Global Resource Fund, Secured Lender.

Jeremy Dacks, for FTI Consulting Canada Inc., Proposed Monitor.

Robin B. Schwill, for the Special Committee of the Board of Directors.

REASONS

G.B. MORAWETZ R.S.J.:--

ENDORSEMENT

1 On December 23, 2013, I heard the CCAA application of Jaguar Mining Inc. ("Jaguar") and made the following three endorsements:

1. CCAA protection granted. Initial Order signed. Reasons will follow. It is expected that parties will utilize the e-Service Protocol which can be confirmed on comeback motion. Sealing Order of confidential exhibits granted.
2. Meeting Order granted in form submitted.
3. Claims Procedure Order granted in form submitted.

2 These are my reasons.

3 Jaguar sought protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") and requested authorization to commence a process for the approval and implementation of a plan of compromise and arrangement affecting its unsecured creditors.

4 Jaguar also requested certain protections in favour of its wholly-owned subsidiaries that are not applicants (the "Subsidiaries" and, together with the Applicant, the "Jaguar Group").

5 Counsel to Jaguar submits that the principal objective of these proceedings is to effect a recapitalization and financing transaction (the "Recapitalization") on an expedited basis through a plan of compromise and arrangement (the "Plan") to provide a financial foundation for the Jaguar Group going forward and additional liquidity to allow the Jaguar Group to continue to work towards its operational and financial goals. The Recapitalization, if implemented, is expected to result in a reduction of over \$268 million of debt and new liquidity upon exit of approximately \$50 million.

6 Jaguar's senior unsecured convertible notes (the "Notes") are the primary liabilities affected by the Recapitalization. Any other affected liabilities of Jaguar, which is a holding company with no active business operations, are limited and identifiable.

7 The Recapitalization is supported by an Ad Hoc Committee of Noteholders of the Notes (the "Ad Hoc Committee of Noteholders") and other Consenting Noteholders, who collectively represent approximately 93% of the Notes.

8 The background facts are set out in the affidavit of David M. Petrov sworn December 23, 2013 (the "Petrov Affidavit"), the important points of which are summarized below.

9 Jaguar is a corporation existing under the *Business Corporations Act*, R.S.O. 1990 c. B.16, with a registered office in Toronto, Ontario. Jaguar has assets in Canada.

10 Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration in Brazil, employing in excess of 1,000 people. Jaguar itself does not carry on active gold mining operations.

11 Jaguar has three wholly-owned Brazilian operating subsidiaries: MCT Mineração Ltda. ("MCT"), Mineração Serras do Oeste Ltda. ("MSOL") and Mineração Turmalina Ltda. ("MTL") (and, together with MCT and MSOL, the "Subsidiaries"), all incorporated in Brazil.

12 The Subsidiaries' assets include properties in the development stage and in the production stage.

13 Jaguar has been the main corporate vehicle through which financing has been raised for the operations of the Jaguar Group. The Subsidiaries have guaranteed repayment of certain funds borrowed by Jaguar.

14 Jaguar has raised debt financing by (a) issuing notes, and (b) borrowing from Renvest Mercantile Bank Corp. Inc., through its global resource fund ("Renvest").

15 In aggregate, Jaguar has issued a principal amount of \$268.5 million of Notes through two transactions, known as the "2014 Notes" and the "2016 Notes".

16 Interest is paid semi-annually on the 2014 Notes and the 2016 Notes. Jaguar has not paid the last interest payment due on November 1, 2013. Under the 2014 Notes, the grace period has lapsed and an event of default has occurred.

17 Jaguar is also the borrower under a fully drawn \$30 million secured facility (the "Renvest Facility") with Renvest. The obligations under the Renvest Facility are secured by a general security agreement from Jaguar as well as guarantees and collateral security granted by each of the Subsidiaries.

18 Jaguar has identified another potential liability. Mr. Daniel Titcomb, former chief executive officer of Jaguar, and certain other associated parties, have instituted a legal proceeding against Jaguar and certain of its current and former directors that is currently proceeding in the United States Federal Court. Counsel to Jaguar submits that this lawsuit alleges certain employment-related claims and other claims in respect of equity interests in Jaguar that are held by Mr. Titcomb and others. Counsel to Jaguar advises that Jaguar and its board of directors believe this lawsuit to be without merit.

19 Counsel also advises that, aside from the lawsuit and professional service fees incurred by Jaguar, the unsecured liabilities of Jaguar are not material.

20 The Jaguar Group's mines are not low-cost gold producers and the recent decline in the price of gold has negatively impacted the Jaguar Group.

21 Based on current world prices and Jaguar Group's current level of expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations early in the first quarter of 2014.

22 Counsel also submits that, as a result of Jaguar's event of default under the 2014 Notes, certain remedies have become available, including the possible acceleration of the principal amount and accrued and unpaid interest on the 2014 Notes. As of November 13, 2013, that principal and accrued interest totalled approximately \$169.3 million.

23 Jaguar's unaudited consolidated financial statements for the nine months ending September 30, 2013 show that Jaguar had an accumulated deficit of over \$317 million and a net loss of over \$82 million for the nine months ending September 30, 2013. Jaguar's current liabilities (at book value) exceed Jaguar's current assets (at book value) by approximately \$40 million.

24 I accept that Jaguar faces a liquidity crisis and is insolvent.

25 Jaguar has been involved in a strategic review over the past two years. Counsel submits that the efforts of Jaguar and its advisors have shown that a comprehensive restructuring plan involving a debt-to-equity exchange and an investment of new money is the best available alternative to address Jaguar's financial issues.

26 Counsel to Jaguar advises that the board of directors of Jaguar has determined that the Recapitalization is the best available option to Jaguar and, further, that the plan cannot be implemented outside of a CCAA proceeding. Counsel emphasizes that without the protection of the CCAA, Jaguar is exposed to the immediate risk that enforcement steps may be taken under a variety of debt instruments. Further, Jaguar is not in a position to satisfy obligations that may result from such enforcement steps.

27 Jaguar requests a stay of proceedings in favour of non-applicant Subsidiaries contending that,

because of Jaguar's dependence upon its Subsidiaries for their value generating capacity, the commencement of any proceedings or the exercise of rights or remedies against these Subsidiaries would be detrimental to Jaguar's restructuring efforts and would undermine a process that would otherwise benefit Jaguar Group's stakeholders as a whole.

28 Jaguar also seeks a charge on its current and future assets (the "Property") in the maximum amount of \$5 million (a \$500,000 first-ranking charge (the "Primary Administration Charge") and a \$4.5 million fourth-ranking charge (the "Subordinated Administration Charge") (together, the "Administration Charge")). The purpose of the charge is to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by various professionals, as well as Canaccord Genuity and Houlihan Lokey, as financial advisors to the Ad Hoc Committee (collectively, the "Financial Advisors").

29 Counsel advises that the Financial Advisors' monthly work fees (but not their success fees) will be secured by the Primary Administration Charge, while the Financial Advisors' success fees will be secured solely by the Subordinated Administration Charge.

30 Counsel further advises that the Proposed Initial Order contemplates the establishment of a charge on Jaguar's Property in the amount of \$150,000 (the "Director's Charge") to protect the directors and officers. Counsel further advises that the benefit of the Director's Charge will only be available to the extent that a liability is not covered by existing directors and officers insurance. The directors and officers have indicated that, due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Director's Charge.

31 Counsel to Jaguar further advises that the proposed monitor is of the view that the Director's Charge and the Administration Charge are reasonable in these circumstances.

32 Jaguar is unaware of any secured creditors, other than those who have received notice of the application, who are likely to be affected by the court-ordered charges.

33 In addition to the Initial Order, Jaguar also seeks a Claims Procedure Order and a Meeting Order, submitting that it must complete the Recapitalization on an expedited timeline.

34 Each of the Claims Procedure Order and Meeting Order include a comeback provision.

35 Having reviewed the record and upon hearing submissions, I am satisfied the Applicant is a company to which the CCAA applies. It is insolvent and faces a looming liquidity crisis. The Applicant is subject to claims in excess of \$5 million and has assets in Canada. I am also satisfied that the application is properly before me as the Applicant's registered office and certain of its assets are situated in Toronto, Ontario.

36 I am also satisfied that the Applicant has complied with the obligations of s. 10(2) of the CCAA.

37 I am also satisfied that an extension of the stay of proceedings to the Subsidiaries of Jaguar is appropriate in the circumstances. Further, I am also satisfied that it is reasonable and appropriate to grant the Administration Charge and the Director's Charge over the Property of the Applicant. In these circumstances, I am also prepared to approve the Engagement Letters and to seal the terms of the Engagement Letters. In deciding on the sealing provision, I have taken into account that the Engagement Letters contain sensitive commercial information, the disclosure of which could be harmful to the parties at issue. However, as I indicated at the hearing, this issue should be revisited at the comeback hearing.

38 I am also satisfied that Jaguar should be authorized to comply with the pre-filing obligations to the extent provided in the Initial Order.

39 In arriving at the foregoing conclusions, I reviewed the argument submitted by counsel to Jaguar that the stay of proceedings against non-applicants is appropriate. The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.

40 The court has jurisdiction to extend the stay in favour of Jaguar's Subsidiaries. See *Lehndorff General Partners Limited (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Calpine Canada Energy Limited (Re)*, 2006 ABQB 153, 19 C.B.R. (5th) 187; *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500, 3 C.B.R. (6th) 150.

41 The authority to grant the court-ordered Administration Charge and Director's Charge is contained in ss. 11.51 and 11.52 of the CCAA.

42 In granting the Administration Charge, I am satisfied that:

- (i) notice has been given to the secured creditors likely to be affected by the charge;
- (ii) the amount is appropriate; and
- (iii) the charges should extend to all of the proposed beneficiaries.

43 In considering both the amount of the Administration Charge and who should be entitled to its benefit, the following factors can also be considered:

- (a) the size and complexity of the business being restructured; and
- (b) whether there is an unwarranted duplication of roles.

See *Canwest Publishing Inc. (Re)*, 2010 ONSC 222, 63 C.B.R. (5th) 115.

44 In this case, the proposed restructuring involves the proposed beneficiaries of the charge. I accept that many have played a significant role in the negotiation of the Recapitalization to date and

will continue to play a role in the implementation of the Recapitalization. I am satisfied that there is no unwarranted duplication of roles among those who benefit from the proposed Administration Charge.

45 With respect to the Director's Charge, the court must be satisfied that:

- (i) notice has been given to the secured creditors likely to be affected by the charge;
- (ii) the amount is appropriate;
- (iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
- (iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

46 A review of the evidence satisfies me that it is appropriate to grant the Director's Charge as requested.

47 Jaguar requested that the Initial Order authorize it to perform certain pre-filing obligations in respect of professional service providers and third parties who provide services in respect of Jaguar's public listing agreement. In the circumstances, I find it to be reasonable that Jaguar be authorized to perform these pre-filing obligations.

48 In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.

49 Counsel to Jaguar submits that Jaguar's approach to classification of the affected unsecured creditors is appropriate in these circumstances, citing a commonality of interest. Counsel also references s. 22(2) of the CCAA. For the purposes of today's motion, I am prepared to accept this argument. However, this is an issue that can, if raised, be reviewed at the comeback hearing.

50 In the result, an Initial Order is granted together with a Meeting Order and Claims Procedure Order. All orders have been signed in the form presented.

G.B. MORAWETZ R.S.J.

Most Negative Treatment: Distinguished

Most Recent Distinguished: *Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp.* | 1998 CarswellSask 335, 167 Sask. R. 14, [1998] S.J. No. 344, 80 A.C.W.S. (3d) 62, [1998] 8 W.W.R. 751 | (Sask. Q.B., May 11, 1998)

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992

Judgment: January 6, 1993

Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison and Melissa J. Kennedy*, for applicants.

L. Crozier, for Royal Bank of Canada.

R.C. Heintzman, for Bank of Montreal.

J. Hodgson, Susan Lundy and James Hilton, for Canada Trustco Mortgage Corporation.

Jay Schwartz, for Citibank Canada.

Stephen Golick, for Peat Marwick Thorne^{*} Inc., proposed monitor.

John Teolis, for Fuji Bank Canada.

Robert Thorton, for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

Table of Authorities

Cases considered:

Amirault Fish Co., Re, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — referred to

Associated Investors of Canada Ltd., Re, 67 C.B.R. (N.S.) 237, Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *Re First Investors Corp.*) 46 D.L.R. (4th) 669 (Q.B.), reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — referred to

Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — referred to

Empire-Universal Films Ltd. v. Rank, [1947] O.R. 775 [H.C.] — referred to

Feifer v. Frame Manufacturing Corp., Re, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — referred to

Fine's Flowers Ltd. v. Fine's Flowers (Creditors of) (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — referred to

Gaz Métropolitain v. Wynden Canada Inc. (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — referred to

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

Inducon Development Corp. Re (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — referred to

International Donut Corp. v. 050863 N.B. Ltd. (1992), 127 N.B.R. (2d) 290, 319 A.P.R. 290 (Q.B.) — considered

Keppoch Development Ltd., Re (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) — referred to

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — referred to

McCordic v. Bosanquet (1974), 5 O.R. (2d) 53 (H.C.) — referred to

Meridian Developments Inc. v. Toronto Dominion Bank, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Q.B.) — referred to

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

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) — referred to

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

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) , affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — referred to

Reference re Companies' Creditors Arrangement Act (Canada), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — referred to

Seven Mile Dam Contractors v. R. (1979), 13 B.C.L.R. 137, 104 D.L.R. (3d) 274 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — referred to

Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — *considered*

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — *referred to*

Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon*) 1 O.R. (3d) 321 (Gen. Div.) — *referred to*

United Maritime Fishermen Co-operative, Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, 224 A.P.R. 253, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.*) 51 D.L.R. (4th) 618 (C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 85

s. 142

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — preamble

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43.

Judicature Act, The, R.S.O. 1937, c. 100.

Limited Partnerships Act, R.S.O. 1990, c. L.16 —

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

s. 75

Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

Farley J.:

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

- (a) short service of the notice of application;
- (b) a declaration that the applicants were companies to which the CCAA applies;
- (c) authorization for the applicants to file a consolidated plan of compromise;
- (d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;
- (e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and
- (f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general

partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act*, R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act*, R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately \$370 million, LPC \$45 million and LPC II \$7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately \$543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lender also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

- (a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.
- (b) The restructuring of existing project financing commitments.
- (c) New financing, by way of equity or subordinated debt.
- (d) Elimination or reduction of certain overhead.
- (e) Viability of existing businesses of entities in the Lehndorff Group.
- (f) Restructuring of income flows from the limited partnerships.
- (g) Disposition of further real property assets aside from those disposed of earlier in the process.
- (h) Consolidation of entities in the Group; and
- (i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.); *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S.

T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act*, R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.). It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.*, supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.*, supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 320 where Gibbs J.A. for the court stated:

The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v.*

Nippon Steel Corp., supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik*, unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.*, unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these*. (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

The Power to Stay

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale*

Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a *discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems*, supra, at pp. 65-66 indicated:

Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, (sub nom. *Lane v. Willis; Lane v. Beach*) [1972] 1 W.L.R. 326 (C.A.).

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In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.*) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:

(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation

in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure*, O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership*, 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.), affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide

this as a conditional right: *Control Test*, (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

* As amended by the court.

Case Name:

Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.

**RE: Montrose Mortgage Corporation Ltd., Applicant, and
Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway
Arms (Walden Village) Inc., Kingsway Arms (Carleton Place)
Inc., Respondents**

[2013] O.J. No. 5055

2013 ONSC 6905

2013 CarswellOnt 15278

17 C.B.R. (6th) 169

233 A.C.W.S. (3d) 638

Court File No. CV-13-10298-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: November 5, 2013.

Judgment: November 6, 2013.

(14 paras.)

Counsel:

J. Dietrich, for the Applicant.

R. Jaipargas, for the proposed Receiver, Grant Thornton Limited.

REASONS FOR DECISION

D.M. BROWN J.:-

I Application for approval of a "pre-pack" credit bid sale in a proposed receivership

1 Montrose Mortgage Corporation Ltd. applied for (i) an order appointing Grant Thornton Limited ("GTL") as receiver and manager of all assets, undertakings and properties of Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc. and Kingsway Arms (Carleton Place) Inc. (collectively the "Debtors"), as well as (ii) an order approving a purchase and sale agreement between the Receiver and 2391766 Ontario Inc. dated October 16, 2013, together with a related vesting order. The proposed sale essentially involved an indirect credit bid by the debtors' main secured creditor, Montrose, which was acting on the loans to the Debtors as agent for GMF Nominee Inc. ("Greystone").

2 On November 5, 2013, I granted and signed the orders sought. These are my reasons for so doing.

II. Material facts

3 The Debtors operated four retirement residences which werer home to about 351 residents and employed 220 employees. The Debtors were beneficially owned by several limited partnerships. Service of the application was made on those beneficial owners. Counsel for a number of the beneficial owners sent an email to applicant's counsel on November 4, 2013, advising that he had no instructions to appear at the hearing to oppose the relief requested; no other beneficial owner appeared.

4 The Debtors were operated by three related management companies: Kingsway Arms Management (Villa Orleans/St. Joseph) Inc., Kingsway Arms Management (at Walden Village) Inc. and Kingsway Arms Management (at Carleton Place) Inc. In its November 1, 2013 Supplemental Report Grant Thorton stated that the Property Managers had executed an agreement which contemplated the termination of the property management agreements upon the issuance of the Approval and Vesting Order.

5 As of August 31, 2013, the Debtors owed Montrose close to \$36 million. Montrose had made demands for payment and had given *BIA* s. 244 notices back in March and December, 2012. As well, Montrose delivered notices of sale under the *PPSA* and *Mortgages Act*. The evidence disclosed that the Debtors were unable to repay or service that debt and were in default of the terms of the loans. Independent counsel to GTL delivered opinions that Montrose's security was valid and enforceable subject to the customary qualifications and assumptions.

6 In February, 2012, Montrose appointed GTL as monitor to review and report on the financial and operational condition of the Debtors. With Montrose's support, in March, 2012 one of the

Debtors retained John A. Jenson Realty Inc. as listing agent to market, ultimately, each of the four retirement residences.

7 The application materials described in detail the efforts Jenson undertook to market the properties, which included advertisements, direct contact with potential purchasers, the preparation of a confidential information memorandum and granting access to data to those who made serious expressions of interest. Few offers resulted. Most offers, if accepted, would have resulted in a significant shortfall on the debt. In the first half of this year a more substantial offer emerged which resulted in the execution of a letter of intent, but the transaction did not proceed because the purchaser was unable to secure adequate financing.

8 Montrose obtained appraisals of the retirement residences from a professional appraiser, Altus Group Limited, and, in the case of the Carleton Place Retirement Residence, an additional appraisal from CBRE Limited. The Altus Group appraisals gave two valuation opinions for each property: one on an "as is" basis, and the other on a "stabilized" occupancy basis. I have reviewed those appraisals. Given that the occupancy rates for three of the residences were below the 80% level, with one at 57%, and Carleton Place was 88% occupied, I agreed with the submissions of the applicant that the "as is" basis valuations presented a more accurate picture of fair market value at this juncture.

9 In light of the failure of the marketing process to elicit satisfactory offers for the properties, Montrose applied for the appointment of a receiver over the properties in order to effect a credit bid sale for them. Greystone incorporated the Purchaser who proposed to acquire each Debtor's assets charged by Montrose's security for an amount equivalent to the total amount of all indebtedness owing to Montrose and to assume the prior ranking Desjardins Prior Charge of the Villa Orleans Retirement Residence. In addition, the Purchaser would assume the leasehold interest of the land on which the St. Joseph Retirement Residence is located; the landlord is the National Capital Commission. At the time of the hearing neither Desjardins nor the NCC had provided their formal consents to the proposed assumptions, but both indicated that they were processing Montrose's request. Under the terms of the proposed sale, the Purchaser assumed the risk of securing those consents.

III. Analysis

10 "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation.¹ In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek*² and *Royal Bank v. Soundair Corp.*,³ respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:

Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case:

[T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.⁴

The need for such a robust and transparent record is heightened even more where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors.

11 In the present case, I was satisfied from the evidence filed by Montrose that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thereby ensuring a place to live for the residents and maintaining current levels of employment. The record revealed a professional and prolonged effort to elicit interest in the properties from third party purchasers, but it appeared that market conditions were such that interest could not be generated at a level which would cover the senior secured indebtedness. As to the reasonableness of the credit bid, the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances. Finally, the proposed sale agreement gave proper treatment to claims in priority to that enjoyed by Montrose.

12 Given those circumstances, I concluded that it was just and convenient to appoint GTL as receiver of the Debtors and to approve the proposed sale.

13 Montrose asked for an order sealing large portions of the applicant's main affidavit and the confidential appendices to the GTL report on the basis of commercial sensitivity. I granted a sealing order which would remain in place until the earlier of the closing of the proposed sale or the further order of this court.

14 Finally, Montrose filed a USB key containing an electronic copy of its application materials, for which I thank it. I would observe that although I was able to read the materials on the USB key, I was not able to edit them because they were in "imaged" form. I would remind counsel that the Commercial List's *Guidelines for Preparing and Delivering Electronic Documents requested by Judges* require parties to perform Optical Character Recognition (OCR) within PDF to enable text searching. "Imaged", rather than "OCR'd" documents are of much less use to judges. I would encourage the Commercial List Bar to continue their efforts to train their administrative staffs to follow the scanning directions contained in the *Guidelines*.

D.M. BROWN J.

1 *Tool-Plas Systems Inc., Re* (2008), 48 C.B.R. (5th) 91 (S.C.J.).

2 (1996), 40 C.B.R. (3d) 274 (Gen. Div., Commercial List).

3 (1991), 4 O.R. (3d) 1 (C.A.).

4 *9-Ball Interests Inc. v. Traditional Life Sciences Inc.* (2012), 89 C.B.R. (5th) 78 (S.C.J.), para. 30.

Case Name:
Tool-Plas Systems Inc. (Re)

**RE: IN THE MATTER OF the Receivership of Tool-Plas
Systems Inc. (Applicant)
AND IN THE MATTER OF Section 101 of the Courts of
Justice Act, as amended**

[2008] O.J. No. 4217

172 A.C.W.S. (3d) 113

Court File No. CV-08-7746-00-CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: September 29, 2008.
Judgment: September 29, 2008.
Released: October 24, 2008.

(5 paras.)

Counsel:

D. Bish, for the Applicant Tool-Plas.

T. Reyes, for the Proposed Receiver, RSM Richter.

R. van Kessel for EDC and Comerica.

C. Staples for BDC.

M. Weinczok for Roynat.

ENDORSEMENT

1 G.B. MORAWETZ J.:-- Tool-Plas Systems Inc. (the "Company") brings this application to place itself into receivership under s. 101 of the CJA.

2 Mr. Bish submits that the relief is necessary, in that the Company has no ability to carry on business as usual. It has no funding to continue operations. He also submits that there is a real risk of value dissipation. His submissions are based on the evidence set out in the affidavit of Mr. Claeys and reference was also made to the Richter Motion Record.

3 Section 101 of the CJA provides that the requested order can be made if the Court finds that it is just or convenient to do so. In the circumstances of this case I am satisfied that it is both just and convenient to make the receivership order. In making this order I am taking into account that the Company has disclosed that the purpose of the receivership is to implement an immediate sale transaction if same is approved by the Court. I have also taken into account the urgency of the matter, which is described in the Richter materials.

4 Mr. Szucs made submissions with respect to the status of his claim. In my view, these submissions are best addressed on the sale approval motion.

5 Order to go in the form presented.

G.B. MORAWETZ J.

cp/e/qlaxs/qlcnt/qlana

BRIO FINANCE HOLDINGS B.V.

Applicant

CARPATHIAN GOLD INC.

Respondent

Court File No. CV-16-11359-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

Proceeding commenced at TORONTO

**BOOK OF AUTHORITIES OF
BRIO FINANCE HOLDINGS B.V.
(returnable April 22, 2016)**

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