Court File No. CV-19-615862-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 **JTI-MACDONALD CORP.**

Applicant

BOOK OF AUTHORITIES OF THE MOVING PARTY, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

MOTIONS TO LIFT STAYS IN
Court File No. CV-19-615862-00CL, *JTI-Macdonald Corp., Re*
Court File No. CV-19-616077-00CL, *Imperial Tobacco Canada Limited et al., Re*
Court File No. CV-19-616779-00CL, *Rothmans, Benson & Hedges Inc., Re*
RETURNABLE APRIL 4 - 5, 2019

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9
Fax: (416) 326-4181

Jacqueline L. Wall, LSO No. 38511D
Tel: (416) 325-8435
Email: jacqueline.wall@ontario.ca

Shahana Kar, LSO No. 33311O
Tel: (416) 314-2080
Email: shahana.kar@ontario.ca

Edmund Huang, LSO No. 42673F
Tel: (416) 326-4161
Email: edmund.huang@ontario.ca

Lawyers for the Moving Party,
Her Majesty the Queen in right of Ontario

TO: ATTACHED SERVICE LIST

INDEX

21. *Puratone Corp., Re*, 2013 MBQB 171.

22. *Growthworks Canadian Fund Ltd. (Re)*, 2014 ONSC 1856.

23. *Wabush Iron Co. Ltd. (Arrangement relatif à)*, 2016 QCCS 6061.

24. *Imperial Tobacco Canada ltée c. Conseil Québécois sur le tabac et la santé,* [2019] J.Q. No. 1387 at paras. 476, 477, 496 and 563, Unofficial English Translation prepared by Ontario.

25. *Canwest Global Communications Corp. (Re*), 2010 ONSC 3530

TAB 1

Ontario

Français

Tobacco Damages and Health Care Costs Recovery Act, 2009

S.O. 2009, CHAPTER 13

Consolidation Period: From December 12, 2017 to the e-Laws currency date.

Last amendment: 2017, c. 25, Sched. 9, s. 121.

Legislative History: [+]

CONTENTS [−]

Definitions and interpretation

1 (1) In this Act,

"cost of health care benefits" means the sum of,

(a) the present value of the total expenditure by the Crown in right of Ontario for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and

(b) the present value of the estimated total expenditure by the Crown in right of Ontario for health care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco related disease or the risk of tobacco related disease; ("coût des prestations de soins de santé")

"disease" includes general deterioration of health; ("maladie")

"exposure" means any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product; ("exposition", "exposer")

"health care benefits" means,

(a) payments under the *Charitable Institutions Act*,

(b) payments under the *Health Insurance Act*,

(c) payments under the *Homemakers and Nurses Services Act*,

(d) payments under the *Homes for the Aged and Rest Homes Act*,

(e) payments under the *Independent Health Facilities Act*,

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (e) of the definition of "health care benefits" in subsection 1 (1) of the Act is repealed and the following substituted: (See: 2017, c. 25, Sched. 9, s. 121)

(e) payments under the *Oversight of Health Facilities and Devices Act, 2017*,

(f) payments under the *Local Health System Integration Act, 2006*,

(g) payments under the *Long-Term Care, 1994*,

(g.1) payments under the *Long-Term Care Homes Act, 2007*,

(h) payments under the *Nursing Homes Act*,

(i) payments under the *Ontario Drug Benefit Act*,

(j) payments under the *Public Hospitals Act*, and

(k) other expenditures, made directly or through one or more agents or other intermediate bodies, by the Crown in right of Ontario for programs, services, benefits or similar matters associated with disease; ("prestations de soins de santé")

"insured person" means,

(a) a person, including a deceased person, for whom health care benefits have been provided, or

(b) a person for whom health care benefits could reasonably be expected will be provided; ("assuré")

"joint venture" means an association of two or more persons, if,

(a) the relationship among the persons does not constitute a corporation, a partnership or a trust, and

(b) the persons each have an undivided interest in assets of the association; ("coentreprise")

"manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product; ("fabrication", "fabriquer")

"manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past,

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) for any fiscal year of the person, derives at least 10 per cent of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,

(c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(d) is a trade association primarily engaged in,

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product; ("fabricant")

"person" includes a trust, joint venture or trade association; ("personne")

"promote" or "promotion" includes, for a tobacco product, the marketing, distribution or sale of the tobacco product and research with respect to the tobacco product; ("promouvoir", "promotion")

"tobacco product" means tobacco and any product that includes tobacco; ("produit du tabac")

"tobacco related disease" means disease caused or contributed to by exposure to a tobacco product; ("maladie liée au tabac")

"tobacco related wrong" means,

(a) a tort committed in Ontario by a manufacturer which causes or contributes to tobacco related disease, or

(b) in an action under subsection 2 (1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in Ontario who have been exposed or might become exposed to a tobacco product; ("faute d'un fabricant")

"type of tobacco product" means one or a combination of the following tobacco products:

(a) cigarettes,

(b) loose tobacco intended for incorporation into cigarettes,

(c) cigars,

(d) cigarillos,

(e) pipe tobacco,

(f) chewing tobacco,

(g) nasal snuff,

(h) oral snuff, and

(i) a prescribed form of tobacco. ("type de produit du tabac") 2009, c. 13, ss. 1 (1), 11.

"Manufacturer", exclusions

(2) The definition of "manufacturer" in subsection (1) does not include,

(a) an individual;

(b) a person who,

(i) is a manufacturer only because they are a wholesaler or retailer of tobacco products, and

(ii) is not related to,

(A) a person who manufactures a tobacco product, or

(B) a person described in clause (a) of the definition of “manufacturer”; or

(c) a person who,

(i) is a manufacturer only because clause (b) or (c) of the definition of “manufacturer” applies to the person, and

(ii) is not related to,

(A) a person who manufactures a tobacco product, or

(B) a person described in clause (a) or (d) of the definition of “manufacturer”. 2009, c. 13, s. 1 (2).

Meaning of “related”

(3) For the purposes of subsection (2), a person is related to another person if, directly or indirectly, the person is,

(a) an affiliate, as defined in section 1 of the *Business Corporations Act*, of the other person, or

(b) an affiliate of the other person or an affiliate of an affiliate of the other person. 2009, c. 13, s. 1 (3).

Meaning of “affiliate”

(4) For the purposes of clause (3) (b), a person is deemed to be an affiliate of another person if the person,

(a) is a corporation and the other person, or a group of persons not dealing with each other at arm’s length of which the other person is a member, owns a beneficial interest in shares of the corporation,

(i) carrying at least 50 per cent of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, if exercised, to elect a director of the corporation, or

(ii) having a fair market value, including a premium for control if applicable, of at least 50 per cent of the fair market value of all the issued and outstanding shares of the corporation; or

(b) is a partnership, trust or joint venture and the other person, or a group of persons not dealing with each other at arm’s length of which the other person is a member, has an ownership interest in the assets of that person that entitles the other person or group to receive at least 50 per cent of the profits or at least 50 per cent of the assets on dissolution, winding up or termination of the partnership, trust or joint venture. 2009, c. 13, s. 1 (4).

Deemed affiliate

(5) For the purposes of clause (3) (b), a person is deemed to be an affiliate of another person if the other person, or a group of persons not dealing with each other at arm’s length of which the other person is a member, has any direct or indirect influence that, if exercised, would result in control in fact of that person except if the other person deals at arm’s length with that person and derives influence solely as a lender. 2009, c. 13, s. 1 (5).

Formula for determining market share

(6) For the purposes of determining the market share of a defendant for a type of tobacco product sold in Ontario, the court shall calculate the defendant’s market share for the type of tobacco product by the following formula:

$$dms = 100\% \times dm / MM$$

where,

dms = the defendant’s market share for the type of tobacco product from the date of the earliest tobacco related wrong committed by that defendant to the date of trial,

dm = the quantity of the type of tobacco product manufactured or promoted by the defendant that is sold within Ontario from the date of the earliest tobacco related wrong committed by that defendant to the date of trial,

MM = the quantity of the type of tobacco product manufactured or promoted by all manufacturers that is sold within Ontario from the date of the earliest tobacco related wrong committed by the defendant to the date of trial.

2009, c. 13, s. 1 (6).

Section Amendments with date in force (d/m/y) [+]

Direct action by Crown

2 (1) The Crown in right of Ontario has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong. 2009, c. 13, s. 2 (1).

Action not subrogated

(2) An action under subsection (1) is brought by the Crown in right of Ontario in its own right and not on the basis of a subrogated claim. 2009, c. 13, s. 2 (2).

Action independent of recovery by others

(3) In an action under subsection (1), the Crown in right of Ontario may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco related wrong committed by the defendant. 2009, c. 13, s. 2 (3).

Recovery for individuals or on aggregate basis

(4) In an action under subsection (1), the Crown in right of Ontario may recover the cost of health care benefits,

(a) for particular individual insured persons; or

(b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product. 2009, c. 13, s. 2 (4).

Evidence and procedure in action brought on aggregate basis

(5) If the Crown in right of Ontario seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis, the following apply:

1. It is not necessary,
    i. to identify particular individual insured persons,
    ii. to prove the cause of tobacco related disease in any particular individual insured person, or
    iii. to prove the cost of health care benefits for any particular individual insured person.
2. The health care records and documents of particular individual insured persons and the documents relating to the provision of health care benefits for particular individual insured persons are not compellable, except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness.
3. A person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons.
4. Despite paragraphs 2 and 3, on motion by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph 2 and the order shall include directions concerning the nature, level of detail and type of information to be disclosed.
5. If an order is made under paragraph 4,
    i. the identity of particular individual insured persons shall not be disclosed, and
    ii. all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons shall be deleted from any documents before the documents are disclosed. 2009, c. 13, s. 2 (5).

Recovery of cost of health care benefits on aggregate basis

3 (1) In an action under subsection 2 (1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if the Crown in right of Ontario proves, on a balance of probabilities, that, in respect of a type of tobacco product,

(a) the defendant breached a common law, equitable or statutory duty or obligation owed to persons in Ontario who have been exposed or might become exposed to the type of tobacco product;

(b) exposure to the type of tobacco product can cause or contribute to disease; and

(c) during all or part of the period of the breach referred to in clause (a), the type of tobacco product, manufactured or promoted by the defendant, was offered for sale in Ontario. 2009, c. 13, s. 3 (1).

Presumptions

(2) Subject to subsections (1) and (4), the court shall presume,

(a) that the population of insured persons who were exposed to the type of tobacco product manufactured or promoted by the defendant would not have been exposed to the product but for the breach referred to in clause (1) (a); and

(b) the exposure described in clause (a) caused or contributed to disease or the risk of disease in a portion of the population described in clause (a). 2009, c. 13, s. 3 (2).

Effect of presumptions

(3) If the presumptions under clauses (2) (a) and (b) apply,

(a) the court shall determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in clause (1) (a) resulting from exposure to the type of tobacco product; and

(b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in clause (a) equal to its market share in the type of tobacco product. 2009, c. 13, s. 3 (3).

Reduction or readjustment

(4) The amount of a defendant's liability assessed under clause (3) (b) may be reduced, or the proportions of liability assessed under clause (3) (b) readjusted among the defendants, to the extent that a defendant proves on a balance of probabilities that the breach referred to in clause (1) (a) did not cause or contribute to,

(a) the exposure referred to in clause (2) (a); or

(b) the disease or risk of disease referred to in clause (2) (b). 2009, c. 13, s. 3 (4).

Joint and several liability in an action under s. 2 (1)

4 (1) Two or more defendants in an action under subsection 2 (1) are jointly and severally liable for the cost of health care benefits if,

(a) those defendants jointly breached a duty or obligation described in the definition of "tobacco related wrong" in subsection 1 (1); and

(b) as a consequence of the breach described in clause (a), at least one of those defendants is held liable in the action under subsection 2 (1) for the cost of those health care benefits. 2009, c. 13, s. 4 (1).

Joint breach

(2) For purposes of an action under subsection 2 (1), two or more manufacturers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition of "tobacco related wrong" in subsection 1 (1) if,

(a) one or more of those manufacturers are held to have breached the duty or obligation; and

(b) at common law, in equity or under an enactment, those manufacturers would be held,

(i) to have conspired or acted in concert with respect to the breach,

(ii) to have acted in a principal and agent relationship with each other with respect to the breach, or

(iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach. 2009, c. 13, s. 4 (2).

Population-based evidence to establish causation and quantify damages or cost

5 Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought,

(a) by or on behalf of a person in the person's own name or as a member of a class of persons under the *Class Proceedings Act, 1992;* or

(b) by the Crown in right of Ontario under subsection 2 (1). 2009, c. 13, s. 5.

Limitation periods

6 (1) No action that is commenced within two years after the coming into force of this section by,

(a) the Crown in right of Ontario;

(b) a person, on his or her own behalf or on behalf of a class of persons; or

(c) a person entitled to bring an action under section 61 (right of dependants to sue in tort) of the *Family Law Act*,

for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong, is barred under the *Limitations Act, 2002* or any other Act. 2009, c. 13, s. 6 (1).

Certain actions revived

(2) Any action described in subsection (1) for damages alleged to have been caused or contributed to by a tobacco related wrong is revived, if the action was dismissed before the coming into force of this section merely because it was held by a court to be barred or extinguished by the *Limitations Act, 2002* or any other Act. 2009, c. 13, s. 6 (2).

Apportioning liability

Scope

7 (1) This section applies to an action for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong other than an action for the recovery of the cost of health care benefits on an aggregate basis. 2009, c. 13, s. 7 (1).

Two or more defendants

(2) If a plaintiff is unable to establish which defendant caused or contributed to the exposure described in clause (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a) one or more defendants causes or contributes to a risk of disease by exposing persons to a type of tobacco product; and

(b) the plaintiff has been exposed to the type of tobacco product referred to in clause (a) and suffers disease as a result of the exposure,

the court may find each defendant that caused or contributed to the risk of disease liable for a proportion of the damages or cost of health care benefits incurred equal to the proportion of its contribution to that risk of disease. 2009, c. 13, s. 7 (2).

Considerations

(3) The court may consider the following in apportioning liability under subsection (2),

(a) the length of time a defendant engaged in the conduct that caused or contributed to the risk of disease;

(b) the market share the defendant had in the type of tobacco product that caused or contributed to the risk of disease;

(c) the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant;

(d) the amount spent by a defendant on promoting the type of tobacco product that caused or contributed to the risk of disease;

(e) the degree to which a defendant collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;

(f) the extent to which a defendant conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;

(g) the extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product;

(h) the efforts a defendant made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;

(i) the extent to which a defendant continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;

(j) affirmative steps that a defendant took to reduce the risk of disease to the public; and

(k) other considerations considered relevant by the court. 2009, c. 13, s. 7 (3).

Apportionment of liability in tobacco related wrongs

8 (1) This section does not apply to a defendant in respect of whom the court has made a finding of liability under section 7. 2009, c. 13, s. 8 (1).

Action or proceeding for contribution

(2) A defendant who is found liable for a tobacco related wrong may commence, against one or more of the defendants found liable for that wrong in the same action, an action or other proceeding for contribution toward payment of the damages or the cost of health care benefits caused or contributed to by that wrong. 2009, c. 13, s. 8 (2).

Action or proceeding may be commenced even if damages or costs not paid

(3) Subsection (2) applies whether or not the defendant commencing an action or other proceeding under that subsection has paid all or any of the damages or the cost of health care benefits caused or contributed to by the tobacco related wrong. 2009, c. 13, s. 8 (3).

Apportioning liability and contributions: factors

(4) In an action or other proceeding described in subsection (2), the court may apportion liability and order contribution among each of the defendants in accordance with the considerations listed in clauses 7 (3) (a) to (k). 2009, c. 13, s. 8 (4).

Regulations

9 The Lieutenant Governor in Council may make regulations,

(a) prescribing a form of tobacco for the purposes of clause (i) of the definition of “type of tobacco product” in subsection 1 (1);

(b) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act. 2009, c. 13, s. 9.

Retroactive effect

10 When brought into force under section 13, a provision of this Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under subsection 2 (1) arising from a tobacco related wrong, whenever the tobacco related wrong occurred. 2009, c. 13, s. 10.

11 Omitted (provides for amendments to this Act). 2009, c. 13, s. 11.

12 Omitted (amends, repeals or revokes other legislation). 2009, c. 13, s. 12.

13 Omitted (provides for coming into force of provisions of this Act). 2009, c. 13, s. 13.

14 Omitted (enacts short title of this Act). 2009, c. 13, s. 14.

Français

TAB 2

Court File Number: CV-19-615862-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Re: JTI Macdonald Corp
Plaintiff(s)

AND

Defendant(s)

Case Management ☑ Yes ☐ No by Judge: McEwen J

Counsel	Telephone No:	Facsimile No:
(see attached)		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

The Quebec Class Action Plaintiffs ("the Plaintiffs") bring this motion seeking an order suspending the operation of paragraphs 8(c) and 8(d) of the Initial Order of Justice Hainey dated March 8, 2019 (the "Initial Order") thus prohibiting the payments of principal, interest and royalties to JTI-Macdonald TM Corp.

19 March 19
Date

Judge's Signature

☑ Additional Pages nine

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

pending Further Order of the Court.

The Plaintiffs also seek an Order permitting them to oppose or seek a variation of the Initial Order at the comeback hearing scheduled for April 4 and 5, 2019.

The Plaintiffs are supported by HMQ for Ontario.

JTI Macdonald Corp ("JTIM") opposes the relief sought. It is supported by JT Canada LLC and PWC, as well as the Monitor.

For the reasons below I am prepared to grant the relief sought pending the return of the comeback hearing or further order made by me as the case management judge.

The plaintiffs raise a number of arguments primarily as follows:

- JTIM did not disclose to

Judges Initials TM

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Justice Hainey the negative comments made by Justice Riarden against TTIM and TTI - Macdonald TM Corp ("TM") with respect to their inter-company contracts concerning payments of principal, interest and royalties: see in particular paras: 1095-97, 1101, 1103 and 2141;

- the affidavit of Robert McMaster filed in support of the Application was vague regarding potential adverse tax consequences;
- when TTIM obtained an initial order from Justice Farley in August 2004 these same payments to TM were not requested nor made;
- subsequent to the order of Justice Farley at various times royalty payments and interest were not paid or in the case of interest the

Judges Initials TM

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

interest rates reduced;

- JTIM also did not disclose to Justice Hainey comments made by Justice Schrager who heard a motion to have JTIM and others post security: see in particular paras 42 and 52.

Based on the foregoing the Plaintiffs submit the Intercompany Royalty and Interest payments that are scheduled to take place before the comeback hearing ought to be suspended. They argue that JTIM had an obligation to put all of the above information before Justice Hainey and failed to do so. Based on the above the Plaintiffs claim that there is nothing to suggest that JTIM or TM will be prejudiced if the payments stop and that the payments in any event are a sham.

Judges Initials TM

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Last, the Plaintiffs submit that it is unfair to allow JTIM to continue to make the payments in the above circumstances. It is not in keeping with the purpose of the CCAA and payments ought to be suspended pending an opportunity to adjudicate the matter at the comeback hearing.

JTIM vigorously opposes the relief sought primarily submitting as follows:

- the proper materials were before Justice Hainey;
- the decision of Justice Morgan in effect "cancels out" the comments made by Justice Riordan;
- the relief sought is designed to inflict pain on a secured creditor;
- there is no request to pay principal and none will be paid absent a

Judges Initials TM

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Further Order of this court;

- if pre-filing royalties are not paid they will be deducted from a deposit held by TM
- royalties going forward must be paid pursuant to the provisions of s.11 of the CCAA;
- with respect to the issue of interest, it is a secured debt and its suspension could lead to an enormous debt later as it will compound - this would adversely affect plaintiffs in all actions;
- there is a repayment agreement in place to satisfy any judgment with a proper Capitalized entity - TT International Holdings B.V., with respect to interest (not royalties);
- the Monitor approved TTIM's submissions and neither TTIM or for that fact the Monitor sought to [illegible] in any

Judges Initials TM

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

way mislead the Court or provide insufficient information.

TTIM is submits that it is premature to grant the orders sought. I disagree.

While I am not prepared to cast aspersions with respect to the materials before Justice Hainey at this time the arguments raised by the Plaintiffs persuade me that there should be a pause in the payments pending the return of the comeback hearing.

The comments of Justices Riordan[1] and Schrager raise clear concerns about the legitimacy of the inter-company contracts. Their decisions post-date the decision of Justice Morgan which was released pre-trial. Further, given the history of

Judges Initials _____

1. Justice Riordan's factual findings were upheld on appeal.

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

reduced or lack of payments after the 2004 order of Justice Farley I am not satisfied at this juncture that the adverse consequences described by Mr McMaster will be borne out. Further, as noted, the relief concerning principal, interest and royalty payments was not sought before Justice Farley, nor granted.

In all of the above circumstances, pending the comeback hearing or further order, I agree with the Plaintiffs that it is equitable to suspend the payments referred to at Tab DD of Vol 4 of the Application Record; namely the Interamp Royalty and Interest payments (as well as any principal payments although as noted JTIM is not making these payments).

Judges Initials JM

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

There is no real prejudice to STIM or TM in ordering this interim suspension pending the return of the matter at the comeback hearing.

Based on the submissions I believe that the ad relevant payments the Plaintiffs seek to suspend are noted at Tab DD above. If further clarification is required I can be spoken to as I appreciate that paras. 8(c) and 8(d) of Justice Haire's order are somewhat broader in nature than the above-noted payments.

Judges Initials _____

Court File No. CV-19-615862-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 JTI-MACDONALD CORP.

UNOFFICIAL TRANSCRIBED ENDORSEMENT OF JUSTICE MCEWEN

March 19, 2019

The Quebec Class Action Plaintiffs (the "Plaintiffs") bring this motion seeking an order suspending the operation of paragraphs 8(c) and 8(d) of the Initial Order of Justice Hainey dated March 8, 2019 (the "Initial Order") thus prohibiting the payments of principal, interest and royalties to JTI-Macdonald TM Corp. pending further Order of the Court.

The Plaintiffs also seek an Order permitting them to oppose or seek a variation of the Initial Order at the comeback hearing scheduled for April 4 and 5, 2019.

The Plaintiffs are supported by HMQ for Ontario.

JTI-Macdonald Corp. ("JTIM") opposes the relief sought. It is supported by JT Canada LLC and PWC, as well as the Monitor.

For the reasons below I am prepared to grant the relief sought pending the return of the comeback hearing or further order made by me as the case management judge.

The Plaintiffs raise a number of arguments primarily as follows:

- JTIM did not disclose to Justice Hainey the negative comments made by Justice Riordan against JTIM and JTI-Macdonald TM Corp. ("TM") with respect to their inter-company contracts concerning payments of principal, interest and royalties: see in particular paras. 1095-97, 1101, 1103 and 2141;

- the affidavit of Robert McMaster filed in support of the Application was vague regarding potential adverse tax consequences;

- when JTIM obtained an initial order from Justice Farley in August 2004 these same payments to TM were not requested nor made;

- subsequent to the order of Justice Farley at various times royalty payments and interest were not paid or in the case of interest the interest rates reduced;

- JTIM also did not disclose to Justice Hainey comments made by Justice Schrager who heard a motion to have JTIM and others post security: see in particular paras. 42 and 52.

Based on the foregoing the Plaintiffs submit the Intercompany Royalty and Interest payments that are scheduled to take place before the comeback hearing ought to be suspended. They argue that JTIM had an obligation to put all of the above information before Justice Hainey and failed to do so. Based on the above the Plaintiffs claim that there is nothing to suggest that JTIM or TM will be prejudiced if the payments stop and that the payments, in any event, are a sham.

Last, the Plaintiffs submit that it is unfair to allow JTIM to continue to make the payments in the above circumstances. It is not in keeping with the purpose of the CCAA and payments ought to be suspended pending an opportunity to adjudicate the matter at the comeback hearing.

JTIM vigorously opposes the relief sought primarily submitting as follows:

- the proper materials were before Justice Hainey;
- the decision of Justice Mongeon in effect "cancels out" the comments made by Justice Riordan;
- the relief sought is designed to inflict pain on a secured creditor;
- there is no request to pay principal and none will be paid absent a further Order of this court;
- if pre-filing royalties are not paid they will be deducted from a deposit held by TM;
- royalties going forward must be paid pursuant to the provisions of s.11 of the CCAA;
- with respect to the issue of interest, it is a secured debt and its suspension could lead to an enormous debt later as it will compound – this would adversely affect plaintiffs in all actions;
- there is a repayment agreement in place to satisfy any judgment with a properly capitalized entity – JT International Holding B.V., with respect to interest (not royalties);
- the Monitor approved JTIM's submissions and neither JTIM or for that fact the Monitor sought to, in any way mislead the Court or provide insufficient information.

JTIM therefore submits that it is premature to grant the orders sought.

I disagree.

While I am not prepared to cast aspersions with respect to the materials before Justice Hainey at this time the arguments raised by the Plaintiffs persuade me that there should be a pause in the payments pending the return of the comeback hearing.

The comments of Justice Riordan[1] and Schrager raise clear concerns about the legitimacy of the inter-company contracts. Their decisions post-date the decision of Justice Mongeon which was released pre-trial.

[1] Justice Riordan's factual findings were upheld on appeal.

Further, given the history of reduced or lack of payments after the 2004 order of Justice Farley I am not satisfied at this juncture that the adverse consequences described by Mr. McMaster will be borne out. Further, as noted, the relief concerning principal, interest and royalty payments was not sought before Justice Farley, nor granted.

In all of the above circumstances, pending the comeback hearing or further order, I agree with the Plaintiffs that it is equitable to suspend the payments referred to at Tab DD of Volume 4 of the Application Record; namely the Intercompany Royalty and interest payments (as well as any principal payments although as noted JTIM is not making these payments).

There is no real prejudice to JTIM or TM in ordering this interim suspension pending the return of the matter at the comeback hearing.

Based on the submissions I believe that the only relevant payments the Plaintiffs seek to suspend are noted at Tab DD above. If further clarification is required I can be spoken to as I appreciate that paras. 8(c) and 8(d) of Justice Hainey's order are somewhat broader in nature than the above-noted payments.

McEwen J.

TAB 3

Case Name:

JTI-Macdonald Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER of JTI-Macdonald Corp., Applicant

[2010] O.J. No. 3485

2010 ONSC 4212

70 C.B.R. (5th) 310

2010 CarswellOnt 5934

198 A.C.W.S. (3d) 897

Court File No. 09-CL-8287

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: April 16, 2010.
Judgment: July 27, 2010.

(19 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application by JTI-Macdonald for an order terminating Companies' Creditors Arrangement Act (CCAA) proceedings allowed -- JTI-Macdonald's business had a positive cash flow and was not in need of restructuring -- The sole purpose of the CCAA proceedings was to deal with alleged contraband tobacco activities -- JTI-Macdonald and the governments had agreed to settle all contraband claims -- The relief sought would not unduly prejudiced stakeholders and termination of the CCAA proceedings would likely improve the operating cash flow -- Furthermore, the settlements eliminated the need for the CCAA proceedings.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(1), s. 11(4)

Excise Act, R.S.C. 1985, c. E-14,

Counsel:

Michael MacNaughton, Sam Rappos, for the Applicant.

Counsel in Attendance:

David Scott, Q.C., Michael MacNaughton, G. Thibaudea, Sam Rappos, Counsel for JTI-Macdonald Corp.

Graham Smith, Counsel for JTI LLC.

Ronald Slaght, Q.C., Peter J. Osborne, Counsel for A.G. Canada.

Eugene C. Zolij, Brett Harrison, Counsel for the Province of Quebec.

Robert Thornton, L. Williams, Counsel for the Monitor.

ENDORSEMENT

1 **C.L. CAMPBELL J.**:-- On April 16, 2010 the Applicant sought an order terminating CCAA proceedings, including the discharge of the Monitor, the termination of Court-ordered charges, the termination of stay of proceedings and related relief.

2 JTI-Macdonald has been operating under the protection of the CCAA since the granting of the Initial Order of Farley J. dated August 24, 2004.

3 Unlike most CCAA proceedings, JTI-Macdonald's business was not and is not in need of re-structuring. It has positive cash flow, is profitable and has substantial cash resources.

4 JTI-Macdonald sought CCAA protection as a direct result of the issuance by the Minister of Revenue for the Province of Quebec of a Notice of Assessment against JTI-Macdonald and the collection action that followed thereafter. If that collection action had continued against JTI-Macdonald, the company would have been forced to cease operations and its business would have been destroyed. But for the MRQ's actions, JTI Macdonald would not now be under CCAA protection. At the same time, the MRQ commenced an oppression application against JTI-Macdonald and others relating to alleged contraband tobacco activities, which mirrored the claims asserted by the Attorney General of Canada in 2003 against JTI-Macdonald and others seeking damages in the amount of $1.5 billion.

5 The sole purpose of these CCAA proceedings has been to deal with the Contraband Claims. This has never been a case where there was an urgent need for stakeholders to agree on a life-saving restructuring of the business. This has never been a case where the compromise of non-Contraband Claims was proposed, raised or even hinted at. Instead, the real challenge was to develop a go-forward strategy in respect of the Contraband Claims, to identify the proper claimants, quantify their proper claims and establish the proper legal priority of their claims, all against the background of the MRQ assessment and the statutory collection measures instituted by the MRQ in August 2004.

6 Following the commencement of the CCAA proceedings, JTI-Macdonald focused on the development of a method for the adjudication of the Contraband Claims.

7 In May 2005, JTI-Macdonald moved for a Crown Claims Bar Order in order to determine whether any other governments in addition to the Government of Canada and the Province of Quebec intended to assert Contraband Claims, and to fashion a method for adjudicating those claims. The Crown Claims Bar Order was made on May 3, 2005. By the June 27, 2005 claims bar date in the Crown Claims Bar Order, eight governments (Canada, Quebec, Ontario, New Brunswick, Prince Edward Island, Nova Scotia, Manitoba and British Columbia) had filed or were deemed to have filed notices of claim in connection with Contraband Claims.

8 In July 2008, settlements were made between the Government of Canada and all provincial governments and each of Imperial Tobacco Canada Limited and Rothmans Benson & Hedges Inc. The settlements resolved contraband claims of governments against Imperial and Rothmans similar to the Contraband Claims asserted against JTI-Macdonald.

9 Following extensive discussions, JTI-Macdonald and the Governments agreed to settle all of the Contraband Claims. Coincident with the settlement JTI-Macdonald pleaded guilty to a regulatory infraction under the *Excise Act* (Canada) and paid a fine of $150 million. As part of the settlement, JTI-Macdonald and its affiliates have been released from all Contraband Claims and the existing MRQ and AG Canada Contraband Claim proceedings will be dismissed.

10 In addition, as part of the Global Settlement, all of the Governments have agreed to the termination of the CCAA proceedings and to the relief sought on this motion and the motion for leave to the MRQ to withdraw the 2004 bankruptcy application it caused to be issued against JTI-Macdonald.

11 The Global Settlement is the product of extensive and lengthy negotiations amongst sophisticated parties. It represents a comprehensive and encompassing resolution of all of the Contraband Claims issues between JTI-Macdonald and the Governments, among others. Each element of the Global Settlement, including the agreement in respect of the termination of the CCAA proceedings, is of critical importance.

12 The Order sought that was supported by the Monitor was either supported or not opposed by the federal government and those of the provinces and territories appearing.

13 The Court accepts the recommendations of the Monitor and concurs with its report dated April 13, 2010 that the relief sought does not unduly prejudice these stakeholders:

(a) The most significant claims asserted against the Applicant are claims by the Crowns who are also parties to the settlements. The settlements provide that the Crowns will consent to the granting of the Order sought, including the termination of the CCAA Proceeding;

(b) None of the other (non-Crown litigants have appeared in this CCAA Proceeding, which evidences the lack of importance they place upon the continued existence of this CCAA Proceeding;

(c) In all but the three Other Actions (discussed below), the non-Crown litigants are plaintiffs in multi-party, industry-wide class action litigation that would not be adversely impacted, in the Monitor's view, by allowing the Applicant to emerge from this CCAA Proceeding. The Applicant and the

Monitor have allowed the litigation to proceed in the ordinary course and accordingly, notwithstanding the stay of proceedings herein, the *status quo* of these litigation claims would essentially be maintained if the CCAA Proceedings were terminated;

(d) The non-Crown, non-class action litigation in the Other Actions appears to be of an insignificant total amount as compared to the annual cash flow of the Applicant and is continuing in the ordinary course. Accordingly, the *status quo* of these litigation claims would also be maintained if the CCAA Proceeding were terminated; and

(e) The trade creditors of the Applicant will remain unaffected as they have throughout the CCAA Proceeding. The Applicant has paid, and continues to pay, its suppliers in the ordinary course of business both before and after the filing date.

14 The Court is satisfied on the material filed that the Applicant will continue to meet its debt and trade obligations as they come due and indeed termination of the CCA A preceding is likely to improve the operating cash flow.

15 As described above, the Alleged Contraband Claims, and particularly the MRQ Assessment and the pre-judgment remedies available to the MRQ in connection therewith, were the primary reason for the commencement of the CCAA Proceeding. The resolution of the Alleged Contraband Claims through the settlements eliminates this category of claims and likewise the need for the CCAA Proceeding.

16 The Court is satisfied that in accordance with the terms of the settlement and termination of the CCAA Proceedings, it is appropriate to grant the order sought to permit MRQ to withdraw its bankruptcy petition which by agreement has been stayed since 2004.

17 JTI-Macdonald commenced the CCAA proceedings and obtained the CCAA stay of proceedings "because of its concerns regarding its continued viability whilst various legal proceedings were dealt with in the ordinary course of litigation (including, both criminal and civil proceedings) under a rather unforeseen and pressing circumstance of the "immediate" assessment and "contemporaneous" demand for taxes, penalties and interest amounting to approximately $1.4 billion by the MRQ."

18 JTI-Macdonald has achieved a settlement of the Contraband Claims that precipitated and have been the exclusive focus of the CCAA proceedings. As a result, JTI-Macdonald no longer requires protection from its creditors pursuant to the CCAA, as other than with respect to the Contraband Claims, JTI-Macdonald has carried on business in the ordinary course throughout the tenure of the CCAA proceedings. The termination of the CCAA proceedings will not impact Unaffected Claims that have been ongoing against JTI-Macdonald for sometime, as the CCAA stay of proceedings was routinely lifted on the consent of the Monitor and JTI-Macdonald to permit parties to continue their proceedings against JTI-Macdonald and other parties. As a result, JTI-Macdonald submits that the Court should grant an Order terminating the CCAA proceedings and the related and ancillary relief with respect thereto.

19 In the circumstances I am satisfied that the Court has the authority and it is appropriate on the material before the court to grant the relief sought pursuant to subsections 11(1) and 11(4) on the CCAA. The consent order signed shall issue.

C.L. CAMPBELL J.

TAB 4

Case Name:

JTI-MacDonald Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF JTI-MacDonald Corp., Applicant

[2009] O.J. No. 4534

61 C.B.R. (5th) 117

2009 CarswellOnt 6614

182 A.C.W.S. (3d) 826

Court File No. 04-CL5530

Ontario Superior Court of Justice
Commercial List

P.A. Cumming J.

Heard: October 20 and 21, 2009.
Judgment: October 30, 2009.

(39 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Crown claims -- Where Crown affected -- Motion by the British Columbia Crown for a claims bar order in CCAA proceedings relating to JTI-Macdonald dismissed -- JTI-Macdonald received protection under the Company Creditors' Arrangement Act in 2004 -- In 2008 the BC Crown had commenced a claim for recovery of health care costs against JTI-Macdonald; it sought a claims bar date by which provincial Crowns would have to file a notice for similar claims -- The order sought was unnecessary -- Until all provinces had passed legislation similar to British Columbia's and commenced actions, there were no claims relevant to the CCAA proceedings.

Motion by the British Columbia Crown for a claims bar order in CCAA proceedings relating to JTI-Macdonald. JTI-Macdonald received protection under the Company Creditors' Arrangement Act in 2004, following proceedings initiated by the federal Crown and seven provinces in which the

company was accused of tobacco smuggling activities in the 1990s. JTI-Macdonald had obtained a claims bar order relating to the federal and provincial Crowns' smuggling claims. The federal and provincial Crown claims totaled billions of dollars. In addition, in 2008 the province of British Columbia enacted new legislation, and made claims for health care recovery costs against JTI-Macdonald. The Crown of British Columbia sought an order which would fix a claims bar date by which any provincial Crown would have to file a notice of claim for health care costs. All provinces except Prince Edward Island had commenced or were planning to commence similar claims based on identical legislation. The total potential liability of JTI-Macdonald was in excess of $100 billion. The federal Crown and JTI-Macdonald opposed the motion.

HELD: Motion dismissed. The huge aggregate value of the potential health care claims was an important consideration in the CCAA proceedings. In effect, the order sought would not have any practical purpose, as the potential claimants for health care costs recovery were the same as those already involved in the smuggling litigation, and all provinces with such a claim had been identified. In any event, until all the potential claimants had passed legislation similar to British Columbia's and commenced actions, there were no claims relevant to the CCAA proceedings. The motion was premature.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 19(1), s. 121(1)

Company Creditors' Arrangement Act, R.S.C. 1985, c. C-36,

Tobacco Damages and Health Care Cost Recovery Act, S.B.C. 2000, c. 30, s. 2(1), s. 2(4)

Counsel:

Laura C. Donaldson and Daniel A. Webster, for Her Majesty the Queen in Right of the Province of British Columbia.

Ronald Carr and Robin Basu, for the Attorney General of Ontario.

Paul MacDonald, for the Minister of Revenue of Quebec.

Jeffrey Leon and Robyn Ryan Bell, for Her Majesty the Queen in Right of the Province of New Brunswick.

David W. Scott, Q.C., Michael J. MacNaughton, James D.G. Douglas and , Mary Arzoumanidis, for JTI-Macdonald Corp.

Graham Smith and Lauren Cappell, for JT Canada LLC Inc.

Ronald G. Slaght, Q.C. and Peter J. Osborne, for the Attorney General of Canada.

Robert Thornton and Leanne Williams, for the Monitor.

REASONS FOR DECISION

P.A. CUMMING J.:--

The Motion

1 Her Majesty the Queen in Right of the Province of British Columbia ("BC") brings a motion for an order (referred to as a "Crown HCCR Claims Bar Order") in this proceeding involving JTI-Macdonald Corp. (the "Company") whereby the Company received protection from its creditors under the *Company Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("*CCAA*") August 24, 2004.

2 The issue is whether this Court should fix a claims bar date in relation to the so-called Crown HCCR claims at this time. There is considerable background to this complex issue.

The Smuggling Claims

3 The Company sought *CCAA* protection in August, 2004 in response to a series of actions initiated by the Minister of Revenue of Quebec ("MRQ") relating to alleged smuggling activities of the Company and other tobacco companies in the early 1990s. The allegations of "Contraband Tobacco Activities and Fraudulent Conveyance/Preferences" (the "Crown smuggling claims") are made by the Attorney General of Canada and by seven provincial Crown claimants.

4 To date, the Company has sought and obtained a claims bar order in this *CCAA* proceeding relating specifically to just Crown smuggling claims. The Attorney General for Canada, the MRQ and six provincial Crowns (all provinces except Alberta, Saskatchewan and Newfoundland) have filed Notices of Claims in respect of this claims bar order (collectively, the eight governments with Crown smuggling claims are referred to as the "Crown claimants"). Based upon the Notices of Claims filed, the aggregate Crown smuggling claims against the Company total many billions of dollars.

5 The Company has disclosed that, as of December 31, 2003, it reported total assets of some $1.896 billion and liabilities (excluding contingent liabilities) of some $1.8 billion, with substantially all of the liabilities being secured debts (pursuant to so-called "Integrated Transactions") owed to related parties. The viability of the Company's secured debts are challenged by the Crown claimants.

6 There is an indemnity in place between R.J. Reynolds, a U.S. company and Japan Tobacco, put in place when Japan Tobacco acquired the international tobacco business of R.J. Reynolds ("RJR") in 1999, relating to the potential tax liability arising from alleged past smuggling activities in the early 1990's involving the Company and other companies formerly affiliated with RJR.

7 An elaborate 23 page Crown Claims Protocol was negotiated in August, 2008 between the Crown claimants, the Company, its affiliates, and some six other entities (including Japan Tobacco Inc. and RJR) which are the subject of the Crown smuggling claims. In brief, the Crown Claims Protocol provides that the Attorney General of Canada Crown smuggling claim shall proceed with the provincial Crown smuggling claims held in abeyance, findings of fact in the Canada smuggling claim being binding upon the provincial Crown smuggling claims parties and a final decision as to liability following a trial on the merits as alleged in the Canada smuggling claim being binding upon all Crown claimants as provided in the Protocol.

8 The federal and provincial governments announced July 31, 2008 that Imperial Tobacco Canada Ltd. and Rothmans, Benson & Hedges had resolved all potential civil claims that might exist in relation to those two companies' alleged role in the movement of contraband tobacco in the

early 1990s through a settlement which will result in the companies paying some $1.15 billion to governments.

Class actions against the Company

9 The Company is also a defendant in several class actions. These alleged claims represent potentially large unliquidated, unsecured, contingent claims against the Company.

The Health Care Cost Recovery Claims

10 British Columbia has enacted the *Tobacco Damages and Health Care Cost Recovery Act*, S.B.C. 2000, c. 30 (the "*TDHCCRA*"). On October 15, 2008 BC delivered a Notice of Claim to the Company and the Monitor in connection with its HCCR claim. The 53 page Statement of Claim filed by BC in the Supreme Court of British Columbia January 24, 2001, initiated pursuant to s. 2(1) and 2(4)(b) of the *TDHCCRA*, seeks the present value of the past and future costs of government health care benefits on an aggregate basis provided for its population resulting from tobacco related disease as a result of smoking cigarettes. The defendants include the Company together with some 12 other Canadian and foreign tobacco companies.

11 The proposed order under the motion at hand would fix a claims bar date by which any provincial Crown seeking to assert a claim pursuant to legislation akin to BC's *TDHACCRA* claim ("HCCR claim") against the Company must file a Notice of Claim in respect of such claim.

12 Ontario, Quebec and New Brunswick (and reportedly Saskatchewan although that province did not appear on the return of the motion at hand) support BC's position. The Company and the Attorney General of Canada oppose the motion.

13 BC states that the purpose of its motion and the requested Crown HCCR Claims Bar Order "is to identify any remaining Crowns who intend to make HCCR claims against [the Company] and to participate as creditors in the [*CCAA*] proceeding." All provinces (the "HCCR claimants") with the exception of Prince Edward Island have enacted, or are in the process of enacting legislation (Alberta), which is virtually identical to BC's *TDHCCRA* although some provinces (Newfoundland and Labrador, Nova Scotia, Manitoba and Saskatchewan) have not yet proclaimed the legislation in force.

14 The Crowns of BC (January 21, 2001), New Brunswick (March 13, 2008) and Ontario (September 29, 2009) have all taken the additional step of issuing a Statement of Claim (called the "BC HCCR claim", the "NB HCCR claim" -- with a Notice of Claim being filed by New Brunswick with the Company and Monitor November 27, 2008 -- and the "Ontario HCCR claim" respectively) against the Company pursuant to the enabling legislation.

15 The Ontario HCCR claim seeks some $50 billion in damages, representing the claimed tobacco-related health care costs borne by Ontario taxpayers since 1955. The provincial HCCR claims are, in essence, a form of products liability action. The allegations assert that the defendants committed numerous breaches of duty relating to the marketing and sale of their products over decades which resulted in an increased incidence of smoking and a resulting increase in health care expenditures. The legislation is retrospective and retroactive in its application and impact.

16 The provincial HCCR claims include many tobacco company defendants who are unrelated to the Company. The BC HCCR claim includes a conspiracy allegation. If successful, this could result in joint and several liability among several defendants.

17 The Company and Monitor have consented to a lifting of the stay of proceedings (provided by subparagraph 4(a) of the *CCAA* Initial Order) in respect of the HCCR claims commenced after the commencement of the *CCAA* proceeding, August 24, 2004, subject to the proviso that the lift of the stay of proceedings does not extend to any enforcement of judgment action.

18 The aggregate exposure of the defendants, including the Company, to HCCR claims in Canada is many billions of dollars.

19 The aggregate dollar value of the unliquidated, unsecured, contingent claims represented by the smuggling claims, the class action claims, and the HCCR claims is massive, potentially well in excess of $100 billion. If all the present contingent claims against the Company were to be accepted at face value it would seem there would be insufficient value in its assets to satisfy more than a very small fractional amount of those claims. (Any settlement would seem to probably necessitate the Company paying monies in satisfaction of the settlement to governments over an extended period of time, the payments, in effect, functioning like a surtax upon sales.)

Analysis

20 The huge aggregate dollar value claimed by the HCCR claimants is material to this *CCAA* proceeding and any decisions affecting the Company or its assets pending the presentation of any Plan of Arrangement. (Given that the extraordinary *TDHCCRA* -- like legislation of the Crown HCCR claimants is retrospective and retroactive in its impact, the HCCR claims are arguably pre-filing claims for purposes of the *CCAA*.) The HCCR claimants, if successful in their claims, have an interest as unsecured creditors in this proceeding. Similarly, they have an interest in any assets recovered by a successful challenge to the Integration Transactions and any possible contribution through the indemnity agreement held by Japan Tobacco Inc.

21 *CCAA* protection for the company was precipitated in 2004 by the large Crown smuggling claim related tax assessment and collection action by the MRQ of approximately $1.6 billion. It is to be noted that the *CCAA* proceeding as initiated did not contemplate a restructuring but rather a litigation scheme in the first instance before any restructuring Plan of Arrangement might be developed. That is, this was seen as a unique *CCAA* proceeding. See the Endorsement of Farley J. of this Court dated March 26, 2005. It was consistent with this background that the Crown Claims Bar Order dated May 3, 2005 relating to the Crown smuggling claims (fixing June 27, 2005 as the Crown Claims Bar Date) provided that any Crowns who wished to make a smuggling claim against the Company must file a Notice of Claim with the Monitor or be forever barred from or making such a claim.

22 The moving party asserts that a Crown Claims Bar Order with respect to HCCR claims asserted against the Company would have the benefit of ensuring that potential HCCR claimants are formally identified expeditiously and made aware of the process underway by the Company in this *CCAA* proceeding and its potential impact upon their rights and recovery.

23 However, in reality theses concerns are already met. BC filed the motion at hand December 4, 2008. As stated above, all provinces except for Prince Edward Island, have now introduced or enacted legislation (if not all are yet proclaimed to be in force) mirroring and identical in legal impact to BC's *TDHCCR.* and claims are being advanced in the civil courts under such legislation. Therefore, for practical purposes, HCCR claimants are now formally identified with the possible exception of Prince Edward Island. If the Provincial Crown claimants are successful in their HCCR claims then, as BC's counsel suggests, it is probable that any global damages would be apportioned

on a provincial population basis. (Prince Edward Island has less than one-half of one percent of the overall Canadian population so its absence at this point in time as an HCCR claimant is of no practical significance.)

24 Second, the fact is that the provincial claimants in respect of the Crown smuggling claims and the HCCR claims are largely one and the same. The major HCCR claimants are fully involved as parties to this *CCAA* proceeding. Indeed, given that BC's HCCR claim preceded the Initial Order initiated by the Company under the *CCAA* because of the smuggling claims, BC is participating in the overall *CCAA* proceeding as a Crown claimant with dual claims. (BC is participating, of course, by its agreement, in the limited scope Crown Claims Protocol within this *CCAA* proceeding which relates only to the Crown smuggling claims "but not to any other claims or potential claims of the Crown claimants or of any other person or entity" (section 3 of the Crown Claims Protocol)). Moreover, all HCCR parties (indeed, all provinces) are named on the service list in this *CCAA* proceeding.

25 The present stated position of the Company, as set forth by its affiant, Mr. Michel A. Poirier, CEO of the Company, is that the Company does not seek to compromise the HCCR claims but rather intends to continue to defend those claims "outside" the *CCAA* proceedings.

26 Canada raises an objection to the BC proposed Crown HCCR Claims Bar Order, asserting that it includes a prospective element to the relief it seeks on this motion such as to ignore principles of parliamentary sovereignty which can be exercised retrospectively, and alter property rights retroactively. *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at pp. 30, 31. Neither the legislature nor the court can bind or restrict the acts of a legislature in the future in the constitutionally valid exercise of its legislative authority. Thus, the decision of a provincial government whether to proclaim in force enabling legislation to provide the basis for a HCCR claim is one to be made by the legislators and not by the courts. (There is perhaps irony that the Attorney General of Canada raises this concern of protection of the sovereignty of the provincial legislatures within their sphere of constitutional competence and that the provincial Crowns do not share the concern but rather take the contrary position.)

27 BC counters that it is not seeking to bar any governments from passing any legislation in the future. Rather, BC says it is simply asking to require any provincial Crowns seeking to assert HCCR claims against the Company to do so within the context of this *CCAA* proceeding, "*and more specifically, to ... file their claims by a fixed date or be denied the right to claim a share in the assets available to pay allowed claims.*" (My emphasis). It is this attempt to deny governments the right to assert a claim that may arise from legislation not yet enacted that arguably offends the principle of Parliamentary sovereignty. Legislation must be passed before a cause of action exists enabling a claim to be brought and until such legislation is enacted there is no legal basis for the assertion of any HCCR claim by a provincial government.

28 Claims are defined in the *CCAA* by reference to a debt provable in bankruptcy. Section 121(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("*BIA*") defines claims provable in bankruptcy as being debts or liabilities to which the debtor is subject on the day on which the bankrupt person becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of an obligation incurred before the date on which the bankrupt becomes bankrupt. (The new subsection 19(1) of the *CCAA*, proclaimed in force September 18, 2009, aligns with the scheme under the *BIA* in respect of claims "provable in bankruptcy".)

29 Until the underlying special purpose provincial legislation, like the *TDHCCRA*, is passed and proclaimed in force, creating a HCCR claim, a province has no cause of action to assert, no claim recoverable by legal process, and no claim provable in bankruptcy capable of being asserted in a *CCAA* proceeding. Prince Edward Island, for example, is in this position. (In contrast, those provinces which have enacted and proclaimed in force *TDHCCRA* -- type legislation, thereby have a cause of action, such as BC, NB, and Ontario (which causes of action arguably are not post-filing claims because of the retroactive impact of the *TDHCCRA* -- type legislation), and consequentially, have claims provable in bankruptcy.

30 The Company asserts throughout its submissions that the type of debts that are compromised in a *CCAA* proceeding are those in existence at the time of the *CCAA* filing, as that is the time that the debts are to be compromised have crystallized. *Re Doman Industries Ltd.* (2004), 1 C.B.R. (5th) 7 (B.C.S.C.). The Company's factum submits that "[]t is evident that any claim asserted by any government, save for BC, is a post-filing claim" and hence, the Company asserts, the non-BC HCCR claims are not provable claims.

31 In my view, it is inappropriate to attempt to determine "provable claims" at this early stage. However, it is to be noted that BC and the provinces supporting its motion argue that the *TDHCCRA* and all identical statutes of the follow-on provinces create new causes of action but have the effect of establishing these causes of action on a date well in advance of the date the Company filed for protection under the *CCAA*. The provinces argue that all provisions of the legislation operate retroactively and this includes the section of each statute which creates the cause of action.

32 The claims arising out of allegations of smuggling of contraband tobacco products are distinguishable from the situation with the putative HCCR claims. The Crown smuggling claims arose by statute or at common law but in all cases each cause of action existed at the time the claims bar order was sought. The existing claims bar order in this CCAA proceeding relating to the Crown smuggling claims did not impair or challenge the jurisdiction of any legislature to enact legislation in the future. Rather, the claims bar order simply required that any such existing smuggling claims of governments be filed by a fixed date so as to give notice to preserve their existing claims for purposes of the *CCAA* proceeding.

33 For the reasons set forth hereafter, it is not necessary to decide this motion on the constitutional question raised by the Attorney General of Canada; hence, while making the statement as an aside that in my view there is considerable force to the concern raised in respect of the principle of parliamentary sovereignty, I need not make any finding in this regard.

34 In my view, BC's real concern is that it is opposed to any attempt by the Company to proceed with a Plan of Arrangement which deals simply with only one category of claims i.e. the Crown smuggling claims, such that BC is left out of such Plan in respect of its HCCR claim against the Company. There is no Plan of Arrangement being put forth or even seen at this point on the distant horizon. BC, and any other claimant, has the right to make submissions and challenge any Plan of Arrangement if and when one is brought forward.

35 There is no prejudice to BC, or to any other province which may choose to advance an HCCR claim, in dismissing this motion. The existing HCCR claims are proceeding having been unaffected (with the stay lifted) by this *CCAA* proceeding. There are no limitation of action issues in respect of the HCCR claims.

36 Conversely, (and leaving aside the constitutional issue) the fact is that the existing and anticipated HCCR claims will involve multiple defendants, both domestic and foreign (and who have objected to being brought within this *CCAA* proceeding). Given the multiple defendants, the HCCR claims will necessarily have to proceed in the civil courts. It might well unnecessarily complicate and delay these civil court proceedings, as well as this *CCAA* proceeding, to make a Crown HCCR Claims Bar Order at this time relating to HCCR claims against the Company.

37 The motion at hand is, at the least, premature, even in respect of existing HCCR causes of action. It is premature to set a bar date and establish a procedure for the determination of HCCR claims. The existing BC HCCR claim is proceeding before the Supreme Court of British Columbia, being case managed by Madam Justice Wedge. The pleadings are closed and the defendants are actively engaged in document discovery. The affiant to the moving party's motion, Mr. Brian Etheridge, senior solicitor in the Health and Social Services Group, Legal Services Branch, Ministry of the Attorney General of British Columbia, opines in his affidavit dated December 4, 2008 that "... the parties are proceeding with the expectation that the trial will commence in September, 2011." That proceeding, at least in terms of a trial decision, may well have been determined prior to the determination of the matters in process in respect of the Crown smuggling claims under the Crown Claims Protocol in this *CCAA* proceeding.

38 It seems obvious that it would be both efficient and expeditious to have a single trial in respect of all HCCR claims initiated pursuant to *TDHCCR*-like legislation rather than one in each of nine or ten provinces. Thus, a "Crown HCCR Claims Protocol" (outside this *CCAA* proceeding) with the same function as seen with the existing Crown Claims Protocol for the Crown smuggling claims within this *CCAA* proceeding, would be advantageous and preferable. However, this possible development would be best taken outside this *CCAA* proceeding for all of the reasons given. That is, the two distinctive types of claims, the Crown smuggling claims and the Crown HCCR claims, are best managed on separate and parallel tracks. There are underlying public policy and political issues at play in respect of the HCCR claims. There will probably be several years of litigation and negotiation ahead before any resolution of these matters may be foreseeable.

Disposition

39 For the reasons given, I exercise my discretion under the *CCAA* to dismiss British Columbia's motion at hand for a Crown HCCR Claims Bar Order, without prejudice to the right of British Columbia, or any other affected party, to bring a motion requesting like relief at a time in the future if and when it is perceived that relief is necessary to protect rights and to achieve a fair and equitable result in this *CCAA* proceeding.

P.A. CUMMING J.

TAB 5

Case Name:

JTI-Macdonald Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF JTI-Macdonald Corp.

[2005] O.J. No. 1202

10 C.B.R. (5th) 208

138 A.C.W.S. (3d) 12

2005 CarswellOnt 1201

Court File No. 04-CL-5530

Ontario Superior Court of Justice
Commercial List

J.M. Farley J.

Heard: March 22, 2005.
Judgment: March 26, 2005. Released: March 29, 2005.

(10 paras.)

Civil procedure -- Disposition without trial -- Stay of action -- Creditors and debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act.

Application by the Minister of Revenue for the Province of Quebec to vary the initial order made to lift the stay in the within Companies' Creditors Arrangement Act proceedings so as to permit the determination of certain Quebec litigation between the Minister and JTI-Macdonald.

HELD: Application allowed in part. The parties were directed to come up with a litigation roadmap. A gag order as to any of the discussions was put in place. The Minister was not at any disadvantage by the stay continuing to restrict him from proceeding pursuant to the Quebec Revenue Act. The Minister was permitted to file responding materials as to JTI-Macdonald's appeal to the Quebec Superior Court. The stay was lifted for that sole and limited purpose.

Statutes, Regulations and Rules Cited:

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

Quebec Revenue Act, s. 93.1.6.

Counsel:

Frank Newbould Q.C., Michael MacNaughton, and Tanya Kozak, for JTI-Macdonald Corp.

Paul Macdonald, Andrew Kent and Eugene Czolij, for Minister Revenue of Quebec

Brian Empey, for JT Canada LLC

R.G. Slaght Q.C., for Attorney General of Canada

John Finnigan and Leanne Hoyles, for Ernst & Young Inc., the Monitor

---

ENDORSEMENT

1 J.M. FARLEY J. (endorsement):-- The Minister of Revenue for the Province of Quebec (MRQ) moved to vary the Initial Order made August 24, 2004 to lift the stay in these CCAA proceedings so as to permit the determination of certain Quebec litigation between MRQ and JTI-Macdonald Corp. (JTI-M). Specifically the MRQ wanted the following paragraph 4A to be added to the Initial Order for:

> THIS COURT ORDERS that nothing in this Order shall have the effect of staying, impairing or delaying the conduct of the following proceedings (the "Quebec Proceedings"):
>
> (a) the Action bearing File No. 500-11-023681-048 commenced on August 12, 2004 by the Deputy Minister of Revenue for the Province of Quebec against JTI-Macdonald and others in the Quebec Superior Court; and
> (b) the Action bearing File No. 500-17-023034-047 commenced on November 4, 2004 by JTI-Macdonald against the MRQ and others in the Quebec Superior Court; and
> (c) proceedings arising out of the Notice of Objection filed by JTI-Macdonald on November 5, 2004 in respect of the Notice of Assessment issued by MRQ against JTI-Macdonald on August 10, 2004, including without limitation proceedings that may be commenced in the Court of Quebec.
>
> however, the taking of any Proceedings (other than the exercise of set off rights in accordance with s.18.1 of the Companies' Creditors Arrangement Act) to enforce or collect any amount owing or found to be owing by JTI-Macdonald in the Quebec Proceedings shall be stayed as set out in paragraph 4(a) and (b) hereof.

2 This appears to be awkwardly worded. As argued, it appears that the foregoing should be adjusted to: "... or found to be owing by JTI-Macdonald in the Quebec Proceedings as set out in paragraph 4A(a) and (b) hereof shall be stayed".

3 The MRQ asserts that, contrary to the assertion of JTI-M, there has been little or no material progress in working out a litigation roadmap for the litigation affecting (or likely to affect JTI-M). Of course, it takes more than one to reach an agreement. The fact that, despite urging from the Court, there has been no agreement to date is unfortunate. MRQ also asserts that there is concern that the contents of these discussions may be leaked. That, too, is unfortunate. One would have thought that JTI-M and all interested parties would have equally seen the desire and need for a coordinated approach to this element in these CCAA Proceedings and been assisted in coming to such a litigation roadmap by the efforts of their experienced counsel. To my mind, a healthy application of the 3 Cs (communication, cooperation (at least in procedural matters) and common sense) by parties and counsel alike should be able to come up with a reasonable solution (even recognizing that there are third parties in some of the litigation) provided that no one attempts to get a substantive or otherwise leg up on the others.

4 I note that there is proposed to be a Crown Claims Bar Order which, if granted by the Court, is aimed at smoking out any claims by other governmental instrumentalities relating to the alleged smuggling activities of JTI-M. That motion will be dealt with in the near future once the present interested parties have had a chance to digest the contents of the motion record served one day before the hearing of this motion. I must say that I am puzzled by the last minute service of motions in any autopsy litigation. At present, this litigation is autopsy, not real time, litigation. Therefore I fail to see the necessity for the Crown Claims Bar Order to have been served the day before the hearing of the motion of the MRQ; equally the same comment goes for the service of this MRQ motion the day before the previous hearing in late February (not withstanding that this MRQ motion had been booked December 13, 2004).

5 In the end result it appears to me that there should be a renewed effort by all concerned to come up with a litigation roadmap and I so direct. It may be of assistance to wait until other governmental entities have been smoked out if there is granted a Crown Claims Bar Order; fresh players may be able to move the presently established players off entrenched positions. If the Monitor in its neutral role feels that it would be of assistance then a mediator/moderator being retained would be helpful. Lastly there is to be a gag order as to any of the discussions, save and except that at the end of this process it will be permissible for any participant to advise the Court of its bottom line position that it has put to all other participants (but this is not to include any discussion of any lead up to that bottom line position) and the reaction of the others to it. If appropriate in the circumstances, the Monitor and/or the mediator/moderator may provide the Court with a recommendation.

6 Allow me to further comment that a CCAA stay order should be taken in context. It is to be used as a shield, not a sword. To my mind, any provision that allows an applicant with the consent of a Monitor to lift the stay should not be used to allow such an applicant to hit out in an offensive way, even when this hitting out may be characterized as merely a defensive measure. To proceed with such litigation activity should require the direct and specific approval of the Court. What has been done by JTI-M in this regard cannot be undone (JTI-M's Notice of Objection to the assessment on November 5, 2004 and its November 4, 2004 appeal to the Superior Court of Quebec). However under these circumstances it is appropriate to even up matters so that the MRQ is not put in any disadvantages position or as it claims it is unable to disclaim any scandalous or quasi-scandalous

allegations against it. The MRQ is not at any disadvantage by the stay continuing to restrict the MRQ from proceeding pursuant to s. 93.1.6 of the Quebec Revenue Act; that duty is in suspension and can be dealt with in due course. However the MRQ is permitted to file responding materials as to JTI-M's appeal to the Quebec Superior Court and the stay is lifted for that sole and limited purpose. This is in accord with the views I expressed in the first Always Travel lift stay motion in the Air Canada proceedings as it will crystallize the dispute and also have the side benefit of allowing the MRQ to disclaim the allegations against it.

7 Having dealt with the foregoing, what then of the MRQ motion?

8 The MRQ at para. 27 of its factum stated:

> 27. This motion raises the following legal issues:
>
> I. Does this Honourable Court, or any claims officers that may be appointed by it, have jurisdiction to adjudicate upon JTI-Macdonalds tax liability under the Assessment?
> II. Should the issues raised in the Quebec Litigation be adjudicated by the Quebec Courts?
>
> to these 2 issues, it added a third in argument:
>
> III. Should the CCAA Stay be lifted so as to allow the Quebec Courts to deal with these disputes?

9 I am of the view that once there has been a final determination of any debt, let alone a debt which arises because of an assessment under a taxing statute, the Courts (including the CCAA Court (or a CCAA claims officer)) has no jurisdiction to relitigate the validity or amount of that debt. See Re Norris (1989), 69 O.R. (2d) 285, 1989 CarswellOnt 784 (C.A.) at para. 6; (1989). Of course that should not be confused with a compromise of any such debt pursuant to a creditor approved and Court sanctioned Plan of Compromise and Arrangement. However, if there is no such finalization for whatever reason, there would not appear to be any lack of jurisdiction in a CCAA Court determining what a finalized value, if any, of such a claim would be. It is in my view premature to determine at this stage what should be the best way of approaching the MRQ claim in question. See again my views in Always Travel/Air Canada.

10 In closing, I note the submissions of the MRQ that these CCAA proceedings are not involved in a restructuring, but rather in a litigation scheme. I think that it sufficient to observe that all the litigation claims (now extant or forthcoming) must be determined before there is a "restructuring" plan developed; if all the present claims were accepted by JTI-M at face value, the equity would be under water so far that it would be resting at the bottom of a deep ocean and certainly there would not be sufficient value in the enterprise to satisfy all claims 100%.

J.M. FARLEY J.

cp/e/qlgxc

TAB 6

Case Name:

JTI-Macdonald Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF JTI-Macdonald Corp.

[2004] O.J. No. 3671

5 C.B.R. (5th) 76

133 A.C.W.S. (3d) 390

2004 CarswellOnt 3647

Court File No. 04-CL-5530

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: August 24, 2004.
Judgment: August 24, 2004.

(6 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Stay of proceedings against debtor.

Application by JTI-Macdonald for relief under the Companies' Creditors Arrangement Act. It sought protection because of concerns about its continued viability while various legal proceedings that affected it were in progress. These proceedings were generated by an immediate assessment and contemporaneous demand for $1.4 billion in taxes, penalties and interest. JTI-Macdonald proposed that, notwithstanding the litigation stay, it would be able to carry on its business activities. This included the payment of trade creditors and ongoing taxes and duties, subject to the general oversight of Ernst & Young as monitor.

HELD: Application allowed. JTI-Macdonald was entitled to relief under the Act as it was an applicant. The order was granted as requested. It included a comeback provision to revisit the terms of this order.

Statutes, Regulations and Rules Cited:

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

Counsel:

Frank J.C. Newbould, Q.C. and Michael MacNaughton, for JTI-Macdonald Corp.

Robert Thornton, for Ernst & Young Inc.

Jay Carfagnini, for JTI Canada LLC Inc.

ENDORSEMENT

1 **FARLEY J.** (endorsement):-- It appears to me that JTI-Macdonald Corp. meets the threshold requirement of an applicant pursuant to the CCAA.

2 The application is not a usual one. The applicant's counsel were completely up front that the stay protection of the CCAA was required because of its concerns re its continued viability whilst various legal proceedings were dealt with in the ordinary course of litigation (including, both criminal and civil proceedings) under a rather unforeseen and pressing circumstance of the "immediate" assessment and "contemporaneous" demand for taxes, penalties and interest amounting to approximately $1.4 billion by the MRQ. In the meantime, notwithstanding the stay of litigation (a temporal one but including all enforcement proceedings), it is proposed that the applicant carry on business in the ordinary course including paying trade creditors and ongoing taxes and duties, all subject to the general oversight of Ernst & Young Inc., as Monitor (which acknowledges that it fully recognizes its duties and obligations to all stakeholders including the MRQ in its appointment as an officer of the Court). Specifically as to ordinary course transactions with related companies (e.g. buying tobacco products), any such transactions are subject to the prior approval of the Monitor.

3 It may well be that the MRQ took the action that it did because of concern about possible depletion of (or bullet proof isolation of) the applicant's assets - so as to put same beyond the reasonable reach of the taxing authorities. In that case it would seem to me that it would be desirable and prudent for both sides in this matter to sit down in bona fide discussions to explore the reasonable demands and fair concerns of each side and thereby eliminate to the maximum extent any miscommunication, ambiguities or suspicion.

4 The only attendees this morning were representatives of the applicant, a related company and the Monitor. There is the usual comeback clause. No affected (or otherwise interested) stakeholder should hesitate to utilize that comeback provision. The onus remains solely with the applicant to justify on any such return that the relief granted (including the terms of the Order) were appropriate in the circumstances. The counsel for the applicant acknowledged that the draft order (as well as the

material in support) was prepared in significant haste and under pressure and therefore there may well be certain elements of the order which reasonably require change or deletion.

5 I advised counsel for the applicant that they should communicate directly with counsel for the MRQ that if the MRQ wished to come back even earlier than the time provision in the comeback clause, that request would be accommodated.

6 Order to issue as per my signature.

FARLEY J.

cp/e/nc/qw/qlsxk

TAB 7

Case Name:

Tamerlane Ventures 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 Tamerlane Ventures Inc. and Pine Point Holding Corp.

[2013] O.J. No. 3936

2013 ONSC 5461

6 C.B.R. (6th) 328

2013 CarswellOnt 12213

232 A.C.W.S. (3d) 32

Court File No. CV-13-10228-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: August 23, 2013.
Judgment: August 28, 2013.

(34 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act matters -- Application of the Act -- Compromises and arrangements -- With secured creditors -- Alteration or modification -- Applications -- Application by mining company and subsidiaries for protection under the Companies' Creditors Arrangement Act -- Applicants and secured lender negotiated consensual CCAA filing -- Secured lender agreed to provide DIP financing, subject to fixed sunset date for CCAA proceeding beyond which receiver selected by lender would be appointed -- Applicants were insolvent -- It was appropriate to extend stay of proceedings to applicants' foreign subsidiaries -- Removal of court's discretion after sunset date was inappropriate -- Parties agree to add term that initial order was subject in all respects to court's discretion.

Application by mining company and subsidiaries for protection under the Companies' Creditors Arrangement Act. The applicants had total consolidated assets with a net book value of $24,814,433. The applicants were indebted to the secured lender for USD $10,000,000. The applicants' unsecured creditors were principally trade creditors. As the applicant was in the exploration stage with its assets, it did not generate cash flow from operations. Its only potential source of cash was from financing activities, which were been problematic in light of the market for junior mining companies. After the applicants failed to make regularly scheduled monthly interest payments in respect of the secured debt, the secured lender served a notice of intention to dispose of collateral. The parties negotiated a consensual CCAA filing, under which the secured lender agreed to provide DIP financing. The applicant's requested that the stay apply to its US and Peruvian subsidiaries, who were non-parties to the application. During the negotiations the secured lender firmly stated that as a key term of consenting to any CCAA initial order, it required a fixed "sunset date" for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and a provision in the initial order directing that a receiver selected by the secured lender would be appointed after that date.

HELD: Application allowed. There was no doubt that the applicants were insolvent and qualified for filing under the CCAA and obtaining a stay of proceedings. It was appropriate that the stay of proceedings extend to the US and Peruvian subsidiaries. Given the lack of alternate financing, any restructuring was not possible without DIP financing. It was apparent from looking at the history of the matter that the secured lender had every intention of exercising its rights under its security to apply to court to have a receiver appointed. It was understandable that the directors agreed to the terms required by the secured lender. What was unusual in the proposed initial order was that the discretion of the court to do what it considers appropriate after the sunset date was removed. Such an order was not appropriate. The initial order was approved with the modification agreed to by the parties that the order was subject in all respects to the discretion of the Court.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.2(4)

PPSA, s. 63

Counsel:

S. Richard Orzy, Derek J. Bell and Sean H. Zweig, for the Applicants.

Robert J. Chadwick and Logan Willis, for Duff & Phelps Canada Restructuring Inc., the proposed Monitor.

Joseph Bellissimo, for Renvest Mercantile Bankcorp Inc.

---

1 F.J.C. NEWBOULD J.:-- The applicants applied on August 23, 2013 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

Tamerlane business

2 At the time of the application, Tamerlane Ventures Inc. ("Tamerlane") was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. ("Tamerlane Pine Point"), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

3 The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

4 The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

5 The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

6 The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

7 As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of $24,814,433. The assets included consolidated current assets of $2,007,406, and consolidated non-current assets with a net book value of $22,807,027. Non-current assets included primarily the investment in the Pine Point property of $20,729,551 and the Los Pinos property of $1,314,936.

8 Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of $12 to $15 million using a 0.3% copper cut-off grade, or $17 to $21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of $30 to $56 million based on market comparables, with a value as high as $229 million considering precedent transactions.

Secured and unsecured debt

9 Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. ("Global Resource Fund" or "secured lender") made as of

December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD $10,000,000 . The secured indebtedness under the credit agreement is guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

10 The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

11 The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD $850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

Events leading to filing

12 Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

13 It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for $1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

14 As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

15 Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a $1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was $11,631,948.90.

16 On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

17 On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was $12,100,254.26.

18 Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

Discussion

19 There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. I am satisfied from the record, including the report from the proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made.

20 The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

21 Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Re Lehndorff* (1993), 9 B.L.R. (2d) 275 and Pepall J. (as she then was) in *Re Canwest Publishing Inc.* (2010), 63 C.B.R. (5th) 115. Recently Morawetz J. has made such orders in *Cinram International Inc. (Re.),* 2012 ONSC 3767, *Sino-Forest Corporation (Re),* 2012 ONSC 2063 and *Skylink Aviation Inc. (Re),* 2013 ONSC 1500. I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

22 Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or all of the applicants' assets. The proposed Monitor supports the SIST and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

23 The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of $300,000, a financial advisor charge of $300,000, a directors' charge of $45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

DIP facility and charge

24 The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these *CCAA* proceedings. The applicants will require additional

borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

25 The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net $1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

26 Section 11.2(4) of the CCAA lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the CCAA process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the CCAA proceedings. That involves the sunset clause, to which I now turn.

Sunset clause

27 During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

28 The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

29 Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these CCAA proceedings is conditional on these terms.

30 Section 11 of the CCAA authorizes a court to make any order "that it considers appropriate in the circumstances." In considering what may be appropriate, Deschamps J. stated in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379:

> 70. ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of

> the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

31 There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

> 71. It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.

32 The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Re Crystallex International Corp.* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

33 It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd*. (2011), 74 C.B.R. (5th) 300 and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

34 What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

F.J.C. NEWBOULD J.

TAB 8

Indexed as:

Lehndorff General Partner Ltd. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF The Courts of Justice Act, R.S.O. 1990, c. C. 43
AND IN THE MATTER OF a 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 The Lehndorff Vermogensverwaltung GmbH in in its capacity as limited partner of Lehndorff United Properties (Canada)
Applicants

[1993] O.J. No. 14

9 B.L.R. (2d) 275

17 C.B.R. (3d) 24

37 A.C.W.S. (3d) 847

1993 CarswellOnt 183

Court File No. B366/92

Ontario Court of Justice - General Division
Toronto, Ontario

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993

(36 pp.)

Alfred Apps, Robert Harrison and Melissa J. Kennedy, for the Applicants. L. Crozier, for the Royal Bank of Canada. R.C. Heintzman, for the 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 the Fuji Bank Canada. Robert Thorton for certain of the advisory boards.

FARLEY J.:-- 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 title-holder to certain of their assets as bare trustee and nominee; and
(f) certain other ancillary relief.

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 issued 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 Vermogensverwaltung 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 lendor 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.

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 maybe 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 Kennoch Development Ltd. (1991), 8 C.B.R. (3d) 95 (N.S.S.C.T.D.). The court will be concerned when major creditors have not been alerted even in the most minimal fashion (Re Inducon Development Corporation (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

"Instant" debentures are now well recognized and respected by the courts: see Re United Maritime Fisherman Co-Op (1988), 67 C.B.R. (N.S.) 44, at pp. 55-6, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 at pp. 165-6; Re Stephanie's Fashions Ltd. (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) at pp. 250-1; 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. 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.

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; in Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., (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; Meridian Developments Inc. v. Nu-West Group Ltd., (1984) 5 W.W.R. 215 at pp. 219-20; Norcen Energy Resources v. Oakwood Petroleums Limited. et al. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Alta., Q.B.), at pp. 12-13 (C.B.R.); Re Ouintette Coal Limited (1990), 2 C.B.R.(3d) 303 (B.C.C.A), at pp. 310-1, affirming Ouintette Coal Limited v. Nippon Steel Corporation et al. (1990) 2 C.B.R. (3d) 291, 47 B.C.L.R. 193 (B.C.S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.).; Elan, supra at p. 307 (O.R.); Fine's Flowers v. Creditors of Fine's Flowers (1992), 7 O.R. (3d) 193 (Gen. Div.), at p. 199 and "Re-Organizations under the Companies' Creditors Arrangement Act", Stanley E. Edwards, (1947), 25 Cdn. Bar Rev. 587 at p. 592.

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 Elan, supra at pp. 297 and p. 316; Stephanie's, supra, at pp. 251-2 and Ultracare, 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, 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 Ouintette, supra, at pp. 108-110; Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (B.C.C.A.), at pp. 315-318, (C.B.R.) and Stephanie's, supra, at pp. 251-2.

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 CCAA 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 Chef Ready, supra, at p. 318 and Re Assoc. Investors of Can. Ltd. (1987), 67 C.B.R. (N.S.) 237 at pp. 245; rev'd on other grounds at (1988), 71 C.B.R. 72. 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 Assoc. Investors, supra, at p. 318; Re Amirault Co. (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

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.

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 or 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.

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 affects 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, supra at pp. 12-7 (C.B.R.) and Ouintette, supra, at pp. 296-8 (B.C.S.C.) and pp. 312-4 (B.C.C.A.) and Meridian, 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 Chef Ready, 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.

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 Wynden Canada Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C. in Bankruptcy) at pp. 290-1 and Ouintette, supra, at pp. 311-2 (B.C.C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see Re Northland Properties Limited et al. (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 In Re Nathan Feifer et al. v. Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Qué. C.A.)). 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 Corporation (1992), 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 Ouintette, supra, at pp. 312-4 (B.C.C.A.).

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 In the Matter of the Proposal of Norman Slavik, unreported, [1992] B.C.J. No. 341. 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:

> 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.

It appears to me that Dickson J. in International Donut Corp. v. 050863 N.B. Ltd., unreported, (1992) N.B.J. No. 339 (N.B.Q.B.T.D.) was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated:

> 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).

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 at pp. 4-7.

> 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 (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, Chap. C. 43, which provides as follows:

s. 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), [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 Rule 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

...

The Power to Stay in the Context of CCAA Proceedings:

By its formal title the CCAA 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 CCAA 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 Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1 (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 at p. 113 (B.C.C.A.).

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the new 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. 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 et al. v. Rank et al., (1947) O.R. 775 (H.C.) that McRuer C.J.H.C. considered that the Judicature Act 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 et al. v. Township of Bosanquet (1974) 5 O.R. (2d) 53 (H.C.) and Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. (1982) 29 C.P.C. 60 (H.C.) at pp. 65-6.

Montgomery J. in Canada Systems, supra, at pp. 65-6 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, [1972] 1 W.L.R. 326 (sub nom. Lane v. Willis; Lane v. Beach) (C.A.).
>
> ...
>
> 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.'"

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-a-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. 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.

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. Depburn, Limited Partnerships, De Boo (1991), at p. 1-2 and 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.

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.

It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See Lindley on Partnership, 15th ed. (1984), at p. 33-5; Seven Mile Dam Contractors v. R. in Right of British Columbia (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 E. Milne, (1985) 23 Alta. Law Rev. 345, at p. 350-1. 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] 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.

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), 11 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. 524-5. 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-a-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.

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. I 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.

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

FARLEY J.

* * * * *

APPENDIX A

THE STAY

4. THIS COURT ORDERS that each of the Applicants shall remain in possession of its property, assets and undertaking and of the property, assets and undertaking of the Limited Partnerships in which they hold a direct interest (collectively the "Property") until March 15, 1993 (the "Stay Date") and shall be authorized, but not required, to make payment to Conventional Mortgage Creditors and to trade creditors incurred in the ordinary course prior to this Order including, without limitation, fees owing to professional advisors, wages, salaries, employee benefits, crown claims, unremitted source deductions in respect of income tax payable, Canada Pension Plan contributions payable, unemployment insurance contributions payable, realty taxes, and other taxes, if any, owing to any taxing authority and shall continue to carry on its business in the ordinary course, except as otherwise specifically authorized or directed by this Order, or as this Court may in future authorize or direct.

5. THIS COURT ORDERS that without in any way restricting the generality of paragraph 4 hereof, each of the Applicants, whether on behalf of a Limited Partnership or otherwise, be and is hereby authorized and empowered, subject to the existing rights of Creditors and any security granted in their favour, to:

   (a) borrow such additional sums as it may deem necessary,
   (b) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order provided that such additional security expressly states that it ranks subsequent in priority to all then existing security including all floating charges, whether crystallized or uncrystallized,
   (c) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order which may rank ahead of existing security if the consent is obtained of all secured creditors having an interest in the collateral in respect of which the additional security is granted to the granting of the additional security, and
   (d) dispose of any of its Property subject, however, to the terms of any security affecting same, provided that no disposition of any Property charged in favour of any secured lender shall be made unless such secured lender

consents to such disposition and to the manner in which the proceeds derived from such disposition are distributed,

the whole on at least three (3) business days' prior notice to all of the Senior Creditors and the Monitor and on such terms as to notice to any other affected creditor as this Court may direct, but nothing in this Order shall prevent any Applicant, whether on behalf of a Limited Partnership or otherwise, from borrowing further funds or granting further security against the Londonderry Mall substantially in accordance with any existing agreements in order to fund the project completion and leasing costs of the Londonderry Mall and nothing in this Order shall prevent any Senior Creditor from advancing further funds to any of the Applicants or the Limited Partnerships under any existing security, subject to the existing rights of such Senior Creditor and any subordinate creditor including pursuant to any postponements or subordinations as may be extant in respect thereof.

6. THIS COURT ORDERS that, until the Stay Date, the General Partner Company and LUPC shall cause the monthly interest and, as applicable, amortization owing by LUPC under CT1 and CT3, but not the arrears thereof, to be paid as and when due and to cause LUPC to perform all of its obligations to CT in respect of CT2 under its existing arrangement in respect of the segregation and application of the net operating income of the Northgate Mall.
7. THIS COURT ORDERS that, subject to paragraphs 4 and 6 and to subparagraph 5(d) hereof, the Applicants and Limited Partnerships be and are hereby directed, until further Order of this Court:

   (a) to make no payments, whether of capital, interest thereon or otherwise, on account of amounts owing by the Applicants to the Affected Creditors, as defined in the Plan, as of this date; and
   (b) to grant no mortgages, charges or other security upon or in respect of the Property other than for the specific purpose of borrowing new funds as provided for in paragraph 5 hereof.

   but nothing in this Order shall prevent the General Partner Company or LUPC from making payments to Senior Creditors of interest and/or principal in accordance with existing agreements and nothing in this Order shall prevent the General Partner Company or the Limited Partnerships from making any funded monthly interest payments for loans secured against the Londonderry Mall.

8. THIS COURT ORDERS that until the Stay Date, the existing collateral position of Creditors in respect of marketable securities loans or credit facilities shall be frozen as at the date of this Order and all margin requirements in respect of such loans or credit facilities shall be suspended.
9. THIS COURT ORDERS that the Applicants shall be authorized to continue to retain and employ the agents, servants, solicitors and other assistants and consultants currently in its employ with liberty to retain such further assistants and

consultants as they acting reasonably deem necessary or desirable in the ordinary course of their business or for the purpose of carrying out the terms of this Order or, subject to the approval of this Court.

10. THIS COURT ORDERS that, subject to paragraph 13 hereof, until the Stay Date or further Order of this Court:

(a) any and all proceedings taken or that may be taken by any of the Creditors, any other creditors, customers, clients, suppliers, lessors (including ground lessors), tenants, co-tenants, governments, limited partners, co-venturers, partners or by any other person, firm, corporation or entity against or in respect of any of the Applicants or the Property, as the case may be, whether pursuant to the Bankruptcy and Insolvency Act, S.C. 1992, c. 27, the Winding up Act, R.S.C. 1985, c. W-11 or otherwise shall be stayed and suspended;

(b) the right of any person, firm, corporation or other entity to take possession of, foreclose upon or otherwise deal with any of the Property, or to continue such actions or proceedings if commenced prior to the date of this Order, is hereby restrained;

(c) the right of any person, firm, corporation or other entity to commence or continue realization in respect of any encumbrance, lien, charge, mortgage, attornment of rents or other security held in relation to the Property, including the right of any Creditor to take any step in asserting or perfecting any right against any Applicant or Limited Partnership, is hereby restrained, but the foregoing shall not prevent any Creditor from effecting any registrations with respect to existing security granted or agreed to prior to the date of this Order or from obtaining any third party consents in relation thereto;

(d) the right of any person, firm, corporation or other entity to assert, enforce or exercise any right, option or remedy available to it under any agreement with any of the Applicants or in respect of any of the Property, as the case may be, arising out of, relating to or triggered by the making or filing of these proceedings, or any allegation contained in these proceedings including, without limitation, the making of any demand, the sending of any notice or the issuance of any margin call is hereby restrained;

(e) no suit, action or other proceeding shall be proceeded with or commenced against any of the Applicants or in respect of any of the Property, as the case may be;

(f) all persons, firms, corporations and other entities are restrained from exercising any extra-judicial right or remedy against any of the Applicants or in respect ,of any of the Property, as the case may be;

(g) all persons, firms, corporations and other entities are restrained from registering or re-registering any of the Property which constitutes securities into the name of such persons, firms, corporations or other entities or their nominees, the exercise of any voting rights attaching to such securities, any right of distress, repossession, set off or consolidation of accounts in rela-

tion to amounts due or accruing due in respect of or arising from any indebtedness or obligation as at the date hereof; and

(h) notwithstanding paragraph 9(g) hereof, a Creditor may set off against its indebtedness to an Applicant, as the case may be, pursuant to any existing interest rate swap agreement any corresponding indebtedness of such Applicant, as the case may be, to such Creditor under the same interest rate swap agreement,

but nothing in this Order shall prevent suppliers of goods and services involved in completing the construction of the Londonderry Mall from commencing or continuing with any construction lien claims they may have in relation to the Londonderry Mall and nothing in this Order shall prevent the Bank of Montreal ("BMO") and the Applicants from continuing to operate the existing bank accounts of the Applicants and of the Limited Partnerships maintained with BMO, in the same manner as those bank accounts were operated prior to the date of this Order including any rights of set off in relation to monies deposited therein and nothing in this Order shall prevent CIBC from realizing upon its security in respect of CIBC1 and nothing in this Order shall prevent or affect either FB or CT in the enforcement of the security it holds on the Sutton Place Hotel and the Carleton Place Hotel, respectively.

11. THIS COURT ORDERS that no Creditor shall be under any obligation to advance or re-advance any monies after the date of this Order to any of the Applicants or to any of the Limited Partnerships, as the case may be, provided, however, that cash placed on deposit by any Applicant with any Creditor from and after this date, whether in an operating account or otherwise and whether for its own account or for the account of a Limited Partnership, shall not be applied by such Creditor, other than in accordance with the terms of this Order, in reduction or repayment of amounts owing as of the date of this Order or which may become due on or before the Stay Date or in satisfaction of any interest or charges accruing in respect thereof.

12. THIS COURT ORDERS that all persons, firms, corporations and other entities having agreements with an Applicant or with a Limited Partnership, as the case may be, whether written or oral, for the supply or purchase of goods and/or services to such Applicant or Limited Partnerships, as the case may be, including, without limitation, ground leases, commercial leases, supply contracts, and service contracts, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such agreements without the written consent of such Applicant or Limited Partnership, as the case may be, or with the leave of this Court. All persons, firms, corporations and other entities are hereby restrained until further order of this Court from discontinuing, interfering or cutting off any utility (including telephone service at the present numbers used by any of the Applicants or Limited Partnerships, as the case may be, whether such telephone services are listed in the name of one or more of such Applicants or Limited Partnerships, as the case may be, or in the name of some other person), the furnishing of oil, gas, water, heat or electricity, the supply of equipment or other

services so long as such Applicant or Limited Partnerships, as the case may be, pays the normal prices or charges for such goods and services received after the date of this Order, as the same become due in accordance with such payment terms or as may be hereafter negotiated by such Applicant or Limited Partnerships, as the case may be, from time to time. All such persons, firms, corporations or other entities shall continue to perform and observe the terms and conditions contained in any agreements entered into with an Applicant or Limited Partnerships, as the case may be, and, without further limiting the generality of the foregoing, all persons, firms, corporations and other entities including tenants of premises owned or operated by any of the Applicants or Limited Partnerships, as the case may be, be and they are hereby restrained until further order of this Court from terminating, amending, suspending or withdrawing any agreements, licenses, permits, approvals or supply of services and from pursuing any rights or remedies arising thereunder.

13. THIS COURT ORDERS that, upon the failure by any of the Applicants to perform their obligations pursuant to this Order, any Creditor affected by such failure may, on at least one day's notice to each of the Applicants and to all Senior Creditors and the Monitor, bring a motion to have the provisions of paragraphs 10, 11 or 12 of this Order set aside or varied, either in whole or in part.

14. THIS COURT ORDERS that from 9:00 o'clock a.m. on December 24, 1992 to the time of the granting of this Order, any act or action taken or notice given by any Creditors receiving such Notice of Application in furtherance of their rights to commence or continue realization, will be deemed not to have been taken or given, as the case may be, subject to the right of such Creditors to further apply to this Court in respect of such act or action or notice given, provided that the foregoing shall not apply to prevent any Creditor who, during such period, effected any registrations with respect to security granted prior to the date of this Order or who obtained third party consents in relation thereto.

15. THIS COURT ORDERS that all floating charges granted by any of the Applicants prior to the date of this Order, whether granted on behalf of any of the Limited Partnerships or otherwise, shall be crystallized, and shall be deemed to be crystallized, effective for all purposes immediately prior to the granting of this Order.

16. THIS COURT ORDERS that the Applicants shall be entitled to take such steps as may be necessary or appropriate to discharge any construction, builders, mechanics or similar liens registered against any of their property including, without limitation, the posting of letters of credit or the making of payments into Court, as the case may be, and no lender to any Applicant shall be prevented from doing likewise or from making such protective advances as may be necessary or appropriate, in which case such lender, in respect of such advances, shall be entitled to the benefit of any existing security in its favour as of the date of this Order in accordance with its terms.

17. THIS COURT ORDERS that the Applicants on or before January 1, 1993, shall provide the Senior Creditors with projections as to the monthly general, administrative and restructuring ("GAR") costs for the months of January, February and

March, 1993, together with a cash-flow projection for LUPC for the period commencing on January 1, 1993 through to April 30, 1993 inclusive.

18. THIS COURT ORDERS that, notwithstanding the terms of this Order, the gross operating cash flow generated during the period commencing on the date of this Order to and until the Stay Date (the "Interim Period") by the Londonderry Mall shall be reserved and expended on the property in accordance with existing agreements, but all property management or other similar fees payable to any Applicant shall continue to be paid therefrom subject to the terms of any existing loan agreements affecting same.

TAB 9

CITATION: JTI-Macdonald Corp., Re, 2019 ONSC 1625
COURT FILE NO.: CV-19-615862-00CL
DATE: 2019/03/12

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERIAL LIST

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 JTI-MACDONALD CORP.

Applicant

BEFORE: Hainey J.

COUNSEL: *Robert I. Thornton, Leanne M. Williams, Rachel Bengino and Mitch Grossell,* for the Applicant

Scott A. Bomhof and Adam M. Slavens, for Respondents JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald TM

Pamela L.J.Huff, Linc A. Rogers and Christopher Burr, for the Proposed Monitor, Deloitte Restructuring Inc.

HEARD: March 8, 2019

ENDORSEMENT

Background

[1] On March 8, 2019 JTI-Macdonald Corp. ("JTIM" or "Applicant") sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* ("CCAA"). I granted the Initial Order and endorsed the record as follows:

> I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2] These are my Reasons.

Facts

[3] As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding ("Quebec Class Action"), JTIM and two other defendants are liable for damages

totaling $13.5 billion ("Quebec Judgment"). If this judgment is not stayed, its enforcement could destroy the company because JTIM does not have sufficient funds to satisfy the judgment.

[4] According to JTIM, enforcement of the Quebec Judgment would destroy the company's value for its 500 employees and 1,300 suppliers. It would also impact approximately 28,000 retailers that sell JTIM's products and 790,000 consumers of its products. Enforcement of the Quebec Judgment would also jeopardize federal and provincial taxes and duties in excess of $1.3 billion paid annually in connection with JTIM's operations (of which $500 million per year is paid directly by JTIM and another $800 million per year is paid by third parties and consumers).

[5] JTIM is also a defendant in a number of significant health care costs recovery actions ("HCCR Actions"). The total claims in the HCCR Actions exceed $500 billion.

[6] JTIM wishes to seek a "collective solution" to the Quebec Judgment and the HCCR Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the CCAA.

[7] In its application JTIM seeks protection from its creditors and the following additional relief under the CCAA:

(a) declaring that it is a company to which the CCAA applies;

(b) granting a stay of proceedings against it, and the Other Defendants in the Pending Litigation, as defined and described in the Notice of Application;

(c) appointing Deloitte Restructuring Inc. ("Proposed Monitor") as Monitor in these CCAA proceedings;

(d) granting an Administrative Charge, Directors' Charge and Tax Charge;

(e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay post-filing interest of certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant's business;

(f) approving the engagement letter dated April 23, 2018 (the "CRO Engagement Letter") appointing Blue Tree Advisors Inc. as the Applicant's Chief Restructuring Officer ("CRO");

(g) authorizing it to apply for leave and, if successful, to appeal the Quebec Judgment to the Supreme Court of Canada; and

(h) sealing Confidential Exhibit "1" of Robert Master's affidavit.

Issues

[8] I must decide the following issues:

(a) Should the Court grant protection to JTIM under the CCAA?

(b) Is it appropriate to grant the requested stay of proceedings?

(c) Should the Proposed Monitor be appointed as Monitor in these proceedings?

(d) Should the Court grant the requested charges?

(e) Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

(f) Should Blue Tree Advisors be appointed as CRO?

(g) Should JTIM be authorized to continue its application for leave to appeal of the Quebec Judgment to the Supreme Court of Canada?

Analysis

Should the Court grant protection to JTIM under the CCAA?

[9] The CCAA applies to an insolvent company whose liabilities exceed $5 million.

[10] JTIM is a company incorporated pursuant to the *Canada Business Corporations Act*.

[11] JTIM's liabilities clearly exceed $5 million. It faces a judgment for $13.5 billion. According to Robert McMaster, JTIM's Director, Taxation and Treasury, the company does not have sufficient funds to satisfy the Quebec Judgment which is currently payable. Accordingly, JTIM is an insolvent company to which the CCAA applies.

Is it appropriate to grant the requested stay of proceedings?

[12] The Court may grant a stay of proceedings pursuant to s. 11.02 of the CCAA in respect of a debtor company if it is satisfied that circumstances exist that make the order appropriate. In order to determine whether a stay order is appropriate the Court should consider the purpose behind the CCAA. The primary purpose of the CCAA is to maintain the *status quo* for a period while the debtor company consults with its creditors and stakeholders with a view to continuing the company's operations for the benefit of the company and its creditors.

[13] JTIM cannot pay the amount of the Quebec Judgment. Any steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders. In my view, it is appropriate for this reason to grant the requested stay of proceedings in favour of JTIM.

[14] JTIM also requests a stay of proceedings in favour of the other defendants in other litigation relating to tobacco claims in which JTIM is a defendant, including the Quebec Class Action and the HCCR Actions. The Court has discretion under s. 11 of the CCAA to impose a stay of

proceedings with respect to non-applicant third parties. In *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461, Newbould J stated as follows at para. 21:

> Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

[15] I came to the same conclusion in *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429, where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

[16] Having considered these factors, I am satisfied that granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions. If these actions continue to proceed against the other defendants but not JTIM there could be significant economic harm for all of JTIM's stakeholders.

[17] Accordingly, I have concluded that the balance of convenience favours exercising my discretion under the CCAA to grant a stay of proceedings to the other defendants.

Should the Proposed Monitor be appointed as the Monitor?

[18] I am satisfied that Deloitte Restructuring Inc. ("Deloitte") should be appointed the Monitor in these proceedings pursuant to s. 11.7 of the CCAA. Deloitte regularly acts as the Monitor in CCAA proceedings and it is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

Should the requested charges be granted?

Administrative Charge

[19] JTIM requests that I grant an administrative charge in favour of JTIM's counsel, the CRO, the Monitor and its legal counsel in the amount of $3 million.

[20] The Court has jurisdiction to grant an administrative charge pursuant to s. 11.52 of the CCAA. In *Canwest Global Publishing Inc.*, 2012 ONSC 633, Pepall J. set out the following list of factors the Court should consider when granting an administrative charge:

(a) the size and the complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[21] Having considered these factors, I am satisfied that the requested administration charge should be granted for the following reasons:

(a) JTIM's restructuring will require extensive involvement by the professional advisors who are subject to the administrative charge;

(b) the professionals subject to the administration charge have contributed, and will continue to contribute, to the restructuring of JTIM;

(c) there is no unwarranted duplication of roles so that the professional fees associated with these proceedings will be minimized;

(d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and

(e) the Proposed Monitor believes that the amount of the administration charge is reasonable

Directors' Charge

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of $4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

Tax Charge

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of $127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

[24] In *Cinram International Inc., Re,* 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

(a) whether the goods and services were integral to the business of the applicants;

(b) the debtors' need for the uninterrupted supply of the goods or services;

(c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and

(d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

Should Blue Tree Advisors be appointed as CRO?

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

[27] I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

[28] JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. Section 137(2) of the *Courts of Justice Act* gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[29] The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a CCAA proceeding would treat as confidential.

Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?

[30] At para. 75 of its Factum, JTIM submits as follows:

> 75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

[31] In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

Conclusion

[32] For the reasons set out above the Application is granted.

HAINEY J.

Date Released: March 12, 2019

TAB 10

Case Name:

Canwest Publishing Inc. (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 Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.

[2010] O.J. No. 188

2010 ONSC 222

63 C.B.R. (5th) 115

184 A.C.W.S. (3d) 684

2010 CarswellOnt 212

Court File No. CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

January 18, 2010.

(66 paras.)

Bankruptcy and insolvency law -- Assignments and petitions into bankruptcy -- Voluntary assignments -- By corporations and partnerships -- Canwest Global Canadian newspaper entities' application for a Companies' Creditors Arrangement Act protection order allowed -- The order applied to the applicants' limited partnership -- The limited partnership was the applicants' administrative backbone, exposing it to the demands of creditors would make a successful restructuring impossible -- The applicants could treat certain suppliers as critical suppliers but they could not be paid without the Monitor's consent -- The proposed DIP facility, financial advisor charge, directors and officers charge and management incentive plan charges were approved -- Companies' Creditors Arrangement Act, s. 4, s. 5, s. 11.2(1), s. 11.2(4), s. 11.4, s. 11.52.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Affiliated debtor companies -- Canwest Global Canadian newspaper entities' application for a Companies' Creditors Arrangement Act protection order allowed -- The order applied to the applicants' limited partnership -- The limited partnership was the applicants' administrative backbone, exposing it to the demands of creditors would make a successful restructuring impossible -- The applicants could treat certain suppliers as critical suppliers but they could not be paid without the Monitor's consent -- The proposed DIP facility, financial advisor charge, directors and officers charge and management incentive plan charges were approved -- Companies' Creditors Arrangement Act, s. 4, s. 5, s. 11.2(1), s. 11.2(4), s. 11.4, s. 11.52.

The Canwest Global Canadian newspaper entities applied for an order for protection pursuant to the Companies' Creditors Arrangement Act (CCAA). The applicants also sought a stay of proceedings and to have the order extend to protect the Canwest Limited Partnership/Canwest SociÚtÚ en Commandite (the Limited Partnership). The applicants proposed to present the plan only to the secured creditors and sought approval of a $25 million DIP facility. The applicants asked they be authorized but not required to pay pre-filing amounts owing in arrears to critical suppliers, including newsprint and ink suppliers. The applicants sought a $3 administration charge, a $10 million charge in favour of the financial advisor and a $35 directors and officers charge. The applicants also sought a $3 million charge to secure obligations arising out of amendments to two key employees' employment agreements and a management incentive plan.

HELD: Application allowed. The applicants' chief place of business was Ontario, they qualified as debtor companies under the CCAA and they were affiliated companies with total claims against them that far exceeded $5 million. The Limited Partnership was the applicants' administrative backbone. Exposing the assets of the Limited Partnership to the demands of creditors would make a successful restructuring impossible. Debtors had the statutory authority to present a plan to a single class of creditors and it was appropriate in the circumstances. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability. The applicants could treat certain suppliers as critical suppliers but they could not be paid without the Monitor's consent. The administration charge, financial advisor charge and directors and officers charge were granted as requested. The management incentive charge was granted as requested and a sealing order was made over the sensitive personal and compensation information, as it was an important commercial interest that should be protected.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. c. 36, s. 4, s. 5, s. 11.2(1), s. 11.2(4), s. 11.4, s. 11.52, s. 11.7(2)

Counsel:

Lyndon Barnes, Alex Cobb and Duncan Ault, for the Applicant LP Entities.

Mario Forte, for the Special Committee of the Board of Directors.

Andrew Kent and Hilary Clarke, for the Administrative Agent of the Senior Secured Lenders' Syndicate.

Peter Griffin, for the Management Directors.

Robin B. Schwill and Natalie Renner, for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders.

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

REASONS FOR DECISION

S.E. PEPALL J.:--

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act*[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper busi-

ness of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated

liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand im-

mediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors

holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6] and *Re Lehndorff General Partners Ltd*[7].

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

s. 4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s. 5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(d) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card

programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

(a) the size and complexity of the businesses being restructured;
(b) the proposed role of the beneficiaries of the charge;
(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;
(e) the position of the secured creditors likely to be affected by the charge; and
(f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the

effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

S.E. PEPALL J.

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (S.C.J.).

6 [2009] O.J. No. 4286, 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

8 [1999] O.J. No. 4232, 1999 CarswellOnt 4673 (S.C.J.).

9 Ibid at para. 16.

10 (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C., [2002] S.C.C.A. No. 389, refused (March 6, 2003).

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (S.C.J.).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522.

19 Supra, note 7 at para. 52.

TAB 11

Case Name:

Pacific Exploration & Production Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Pacific Exploration & Production Corporation, Pacific E&P Holdings Corp., Meta Petroleum Corp., Pacific Stratus International Energy Ltd., Pacific Stratus Energy Colombia Corp., Pacific Stratus Energy S.A., Pacific Off Shore Peru S.R.L., Paciifc Rubiales Guatemala S.A., Pacific Guatemala Energy Corp., PRE-PSIE Coöperatif U.A., Petrominerales Colombia Corp., and Grupo C&C Energia (Barbados) Ltd., Applicants

[2016] O.J. No. 4505

2016 ONSC 5429

270 A.C.W.S. (3d) 243

40 C.B.R. (6th) 64

2016 CarswellOnt 13733

Court File No.: CV-16-11363-00CL

Ontario Superior Court of Justice
Commercial List

G.A. Hainey J.

Heard: August 23, 2016.
Judgment: August 29, 2016.

(32 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motion by applicants for order sanctioning plan of compromise and arrangement with related relief allowed -- Plan involved restructuring of Pacific Exploration & Production Corporation and subsidiaries, reducing indebtedness by $5.1 billion and annual interest by $258 million, and maintaining operation as going concern -- Plan was supported by consenting lenders, approximately 98 per cent of creditors, and Monitor -- Court sanctioned plan as fair, reasonable, and representing appropriate balancing of parties' interests in light of other commercial alternatives -- Court also approved third party releases, stay for non-applicant parties, and extension of stay period.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6, s. 11, s. 22

Counsel:

Tony Reyes, *Virginie Gauthier*, *Alexander Schmitt*, and *Orestes Pasparakis*, for the Applicants.

John Finnigan and *Rebecca Kennedy*, for the Monitor, PricewaterhouseCoopers Inc.

Scott Bomhof and *Lily Coodin*, for Bank of America, Agent for certain Bank Lenders.

Brendan O'Neill, *Celia Rhea*, and *Ryan Baulke*, for the Ad Hoc Committee.

Timothy Pinos and *Joseph Bellissimo*, for the Shareholder Consortium.

Jennifer Whincup, for BNY Mellon.

Michael Rotsztain, for Wilmington Trust, N.A. & Bank Syndicate.

Caitlin Fell and *Andy Kent*, for the Plan Sponsor, The Catalyst Capital Group Inc.

Mark Gelowitz, for the Independent Committee.

John Salmas for Blackhill Advisors, CRO.

George Michailopoulos, unrepresented shareholder.

REASONS FOR JUDGMENT

G.A. HAINEY J.:--

Background

1 The applicants seek an order (the "Plan Sanction Order")[1]:

(a) sanctioning the applicants' Plan of Compromise and Arrangement dated June 27, 2016, as amended to August 17, 2016 (the "Plan") pursuant to the *Companies'*

Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"); and

(b) extending the Stay Period to and including October 31, 2016.

2 According to the applicants, the Plan and the restructuring of Pacific Exploration & Production Corporation ("Pacific") and its subsidiaries ("Pacific Group") to be implemented thereby (the "Restructuring Transaction") results from significant efforts by the applicants to achieve a resolution of their financial condition. If implemented, the Restructuring Transaction will reduce Pacific's indebtedness by approximately US $5.1 billion, reduce its annual interest expense by approximately US $258 million and leave the US $250 million of Exit Notes as the only long-term debt in Pacific's capital structure other than facilities to support letters of credit or oil and gas hedging. The Plan will maintain Pacific Group as a going concern for the benefit of all stakeholders, preserving employment and economic activity in the many communities in which it operates.

3 The applicants and their boards of directors believe that the Restructuring Transaction achieves the best possible outcome for the Pacific Group and its stakeholders in the circumstances and achieves results that are not attainable under any other scenario.

4 The Plan is supported by the Catalyst Capital Group Inc., the Plan Sponsor, the Ad Hoc Committee, the Consenting Lenders, the other parties to the Support Agreement (who together with the Ad Hoc Committee and supporting Bank Lenders, hold approximately 84% by value of all Bank Claims and Noteholder Claims) and the Monitor.

5 At a creditors' meeting held on August 17, 2016, the Plan was approved by 98.4% (by number) and 97.2% (by dollar value) of Affected Creditors voting in person or by proxy at the meeting.

6 The Monitor supports the sanctioning of the Plan and believes it is fair and reasonable and that it represents the best option available to the Pacific Group and the Affected Creditors.

7 For these reasons the applicants submit that the Plan should be sanctioned pursuant to s. 6 of the *CCAA*.

Adjournment Request

8 On August 16, 2016, one week before the scheduled hearing of this motion, a group of stakeholders (the "Shareholder Consortium") put forward a recapitalization and refinancing proposal (the "Alternative Proposal") which the Shareholder Consortium submits provides the applicants and its stakeholders with a superior alternative to the Plan sought to be sanctioned on this motion.

9 The applicants disagree that the Alternative Proposal is superior to the Plan and have formally rejected it.

10 The Shareholder Consortium requested that I adjourn the motion to permit further consideration of the Alternative Proposal.

11 The applicants and all other interested parties and stakeholders appearing on the motion strongly opposed the adjournment request and characterized it as a "last minute effort to de-rail the Restructuring Transaction".

12 I agree with this characterization of the Alternative Proposal. There was a process in place to obtain proposals that contained a clear timetable for the submission of proposals which the Share-

holder Consortium was well aware of. This last minute Alternative Proposal ignores the timelines that have been in place for many months. Further, the Alternative Proposal has been considered and rejected by the applicants. The adjournment request is denied because I am satisfied that the Plan, which results from extraordinary efforts by the applicants and the other interested parties to arrive at the best result for the Pacific Group and its stakeholders, should not be de-railed at this late stage of the process by the Shareholder Consortium's Alternative Proposal.

Issues

13 I must decide the following issues:

a) Should the Plan be sanctioned?

b) Should the third party releases be approved?

c) Should there be a stay of proceedings in favour of the other Non-Applicant parties?

d) Should the Stay Period be extended to October 31, 2016?

Should the Plan be sanctioned?

14 Section 6 of the *CCAA* provides that a compromise or arrangement is binding on a debtor company and all of its creditors if a majority in number, representing two-thirds in value of the creditors present and voting at a meeting of creditors, approve the compromise or arrangement and the compromise or arrangement has been sanctioned by the court.

15 Pacific's Affected Creditors, in both number and value, voted in favour of the Plan thereby satisfying the first requirement of s. 6 of the *CCAA*. The Monitor has confirmed that 98.4% in number and 97.2% in value of the Affected Creditors voted in favour of the Plan.

16 As the voting requirement under s. 6 of the *CCAA* has been satisfied, I must determine whether to approve and sanction the Plan.

17 The criteria I must consider in determining whether to sanction a *CCAA* plan are as follows:

a) There must be strict compliance with all statutory requirements;

b) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the *CCAA*; and

c) The plan must be fair and reasonable.

18 I am satisfied on the record before me that there has been strict compliance with the statutory requirements of the *CCAA*.

19 I am also satisfied that throughout the course of these proceedings the applicants have acted in good faith and with due diligence and they have strictly complied with the requirements of the *CCAA* and the orders of this Court. This is confirmed in the reports of the Monitor.

20 I have concluded that the Plan is fair and reasonable because it represents a reasonable and fair balancing of the interests of all parties in light of the other commercial alternatives available. In assessing the Plan's fairness and reasonableness I am guided by the objectives of the *CCAA* which are "to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators". Reorganization, if commercially feasible, is in most cases preferable to liquidation.

21 The factors that I have considered in concluding that the Plan is fair and reasonable include the following:

a) The claims were properly classified pursuant to s. 22 of the *CCAA*;

b) The Plan received overwhelming support from the applicants' creditors;

c) The Monitor is of the view that the applicants' creditors would be worse off if the Plan is not sanctioned;

d) The Plan appears to be the best alternative available under the current circumstances;

e) There is no oppression of the rights of the applicants' creditors under the Plan;

f) Since the applicants' creditors are not being paid in full there is no unfairness to the applicants' shareholders. Their treatment is consistent with the provisions of the *CCAA*;

g) The Plan is in the public interest as it continues the Pacific Group as a going-concern thereby preserving employment for thousands of people and generating economic activity in the many local communities in which it operates.

22 For all of these reasons I am satisfied that the Plan should be sanctioned.

Should the third party releases be approved?

23 It is well established that courts have jurisdiction to sanction plans pursuant to the *CCAA* that contain releases in favour of third parties. Courts will generally approve third party releases in the context of plans of arrangement where the releases are rationally tied to the resolution of the debtor's claims and will benefit creditors generally. I am satisfied in this case that the third party releases should be approved. In arriving at this conclusion I have considered the following factors:

a) Whether the parties to be released from claims are necessary to the Restructuring Transaction;

b) Whether the claims released are rationally connected to the purpose of the Plan and necessary for it to succeed;

c) Whether the Plan would fail without the releases;

d) Whether the third parties being released contributed in a tangible and realistic way to the Plan;

e) Whether the releases benefit the debtors as well as the creditors generally;

f) Whether the creditors who voted on the Plan had knowledge of the nature and effect of the releases; and

g) Whether the releases are fair and reasonable and not overly broad.

24 The releases were negotiated as part of the overall framework of the compromises contained in the Plan. They facilitate the successful completion of the Plan and the Restructuring Transaction. The releases are a significant part of the various compromises that were required to achieve the Plan and are a necessary element of the global consensual restructuring of the applicants. The releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the applicants. They were also well-publicized and there does not appear to be any objections to them.

25 For these reasons the third party releases are approved.

Should there be a stay of proceedings of the other Non-Applicant parties?

26 Section 11 of the *CCAA* provides the court with authority to impose a stay of proceedings with respect to non-applicant parties. In determining whether to grant the Non-Applicant Stay requested I must be satisfied that it is fair and reasonable in the circumstances. I am satisfied that I should grant the Non-Applicant Stay for the following reasons:

a) A significant portion of the value of the Pacific Group is held in the Non-Applicants and their business and operations are significantly intertwined and integrated with those of the applicants.

b) The exercise of the rights stayed by the Non-Applicant Stay which arise out of the applicants' insolvency or the implementation of the Plan would have a negative impact on the applicants' ability to restructure, potentially jeopardizing the success of the Plan and the continuance of the Pacific Group;

c) The granting of the Non-Applicant Stay is a condition of the Plan. If the applicants are prevented from concluding a successful restructuring with their creditors, the economic harm would be far-reaching and significant;

d) Failure of the Plan would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the Non-Applicant Stay; and

e) If the Plan is approved, the applicants will continue to operate for the benefit of all of their stakeholders, and their stakeholders will retain all of their remedies in the event of future breaches by the applicants or breaches that are not related to the released claims.

27 For these reasons the Non-Applicant Stay is granted.

Should the stay period be extended to October 31, 2016?

28 The applicants have requested an extension of the stay period until and including October 31, 2016. The applicants anticipate that this extension will give them sufficient time to complete all of the transactions, documents and steps required to implement the Plan and to emerge successfully from these *CCAA* proceedings.

29 I am satisfied that under the circumstances the stay extension requested is appropriate. I am prepared to grant the requested stay extension for the following reasons:

a) The applicants have made substantial progress towards completion of the Restructuring Transaction;

b) The applicants require the ongoing benefit of the stay proceedings in order to complete the *CCAA* proceedings including the implementation of the Plan;

c) The applicants intend to implement the Plan as expeditiously as possible;

d) The requested extension is not overly lengthy and avoids the additional time and expense that would be incurred if the applicants are required to return to court in the interim;

e) The applicants' cash flow forecast projects that they will have access to all necessary financing during the extended stay period;

f) The applicants have acted in good faith and with due diligence towards the completion of the Restructuring Transaction and the implementation of the Plan; and

g) The Monitor, the Ad Hoc Committee, the steering committee of Bank Lenders and the Plan Sponsor all support the requested stay extension.

30 A stay is therefore granted up to and including October 31, 2016.

Conclusion

31 For the reasons outlined above the applicants' motion is granted.

32 It should be noted that the parties to the Restructuring Support Agreement reserve whatever rights they may have under that agreement following the sanction of the Plan. Nothing contained in the orders granted today, or s. 6.3 (a) of the Indemnity Agreement approved thereby, is a determination of what those rights may be.

G.A. HAINEY J.

1 I have used the same defined terms in my reasons for judgment as are contained in the applicants' factum.

TAB 12

Case Name:

Target Canada Co. (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 Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

[2015] O.J. No. 247

2015 ONSC 303

2015 CarswellOnt 620

248 A.C.W.S. (3d) 753

22 C.B.R. (6th) 323

Court File No.: CV-15-10832-00CL

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

Heard: January 15, 2015.
Judgment: January 16, 2015.

(85 paras.)

Counsel:

Tracy Sandler and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario)

Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants").

Jay Swartz, for the Target Corporation.

Alan Mark, Melaney Wagner, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez").

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust.

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants.

ENDORSEMENT

1 G.B. MORAWETZ R.S.J.:-- Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under

the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks

café. Each store typically employs approximately 100 -- 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

d) Should the Court approve protections for employees?

e) Is it appropriate to allow payment of certain pre-filing amounts?

f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco.*

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency

of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp*., 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corpora-

tion and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court- ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*(2002), 211 D.L.R (4th) 193, [2002] 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

G.B. MORAWETZ R.S.J.

TAB 13

Case Name:

Calpine Canada Energy Ltd. (Re)

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company, applicants

[2006] A.J. No. 412

2006 ABQB 153

19 C.B.R. (5th) 187

152 A.C.W.S. (3d) 833

2006 CarswellAlta 446

Docket: 0501 17864

Alberta Court of Queen's Bench
Judicial District of Calgary

Romaine J.

Judgment: February 24, 2006.

(36 paras.)

Creditors and debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Application to determine whether a Call on Production agreement was an 'eligible financial contract' within the meaning of s. 11.1 of the Companies' Creditors Arrangement Act allowed -- Cross-application to determine whether the stay imposed by the initial order should be removed because the entity was a partnership dismissed -- The COP agreement was not an eligible financial

contract and thereby was stayed by the initial order and the balance of convenience favoured the stay.

Application and cross-application to determine whether a Call on Production (COP) agreement was an 'eligible financial contract' within the meaning of s. 11.1 of the Companies' Creditors Arrangement Act (CCAA) and whether the stay imposed by the initial order should be removed or lifted because the entity was a partnership and not a corporation -- Calpine Canada Partnership sold certain oil and natural gas rights and assets to Pengrowth -- As per the sale, Pengrowth and Calpine entered into a COP agreement -- Calpine sought, and were granted, an initial order under the CCAA which restrained persons from terminating or suspending their obligations under agreements with them during the term of the order, as long as they paid the normal prices for the goods and services provided under such agreements -- Pengrowth took the position that Calpine's filing for protection under the CCAA constituted a 'Triggering Event' as defined in the COP agreement that allowed suspension and termination of the agreement -- Pengrowth alleged that the COP agreement was an eligible financial contract, and thus exempt from the application of the stay -- Calpine brought a motion for a declaration that the stay of proceedings applied to the COP agreement and that the agreement was not an eligible financial contract -- HELD: Application allowed and cross-application dismissed -- The COP agreement was not an eligible financial contract and thereby was stayed by the initial order -- Analyzing the COP agreement as a whole, it lacked the characteristics of an eligible financial contract -- The COP agreement in its essential terms was analogous to a standard gas utility contract -- The balance of convenience favoured a stay and it was just, reasonable and appropriate to exercise the court's jurisdiction to continue the stay against Calpine as a partnership.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.1, s. 11.1(1), s. 11.1(1)(h), s. 11.1(k), s. 11.1(m)

Counsel:

Larry B. Robinson, Q.C.; Sean F. Collins, and Derek Kearl, McCarthy Tetrault LLP for the Applicants/Cross Respondents

Joseph Pasquariello and Jay A. Carfagnin, Goodmans LLP for the Applicants/Cross Respondents

Douglas S. Nishimura, Burnet, Duckworth & Palmer LLP for the Respondents/Cross Applicants - Pengrowth Corporation and Progress Energy Ltd.

Patrick McCarthy, Q.C. and Joseph Krueger, Borden Ladner Gervais LLP for the Monitor

---

REASONS FOR JUDGMENT

ROMAINE J.:--

Introduction

1 The issues in this application and cross-application are:

a) whether a Call on Production ("COP") Agreement between Pengrowth Corporation and Calpine Canada Natural Gas Partnership is an "eligible financial contract" within the meaning of Section 11.1 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, and

b) whether the stay imposed with respect to the Calpine Energy Services Canada Partnership by the initial order under the *Companies' Creditors Arrangement Act* should be removed or lifted because this entity is a partnership and not a corporation.

2 I have decided that the COP Agreement is not an eligible financial contract and thereby is stayed by the initial order. I declined to lift the stay on the partnership. These are my reasons.

A. Is the COP Agreement an eligible financial contract within the meaning of Section 11.1 of the CCAA?

Facts

3 By agreement effective September 14, 2002, the Calpine Canada Natural Gas Partnership (the "CCNG Partnership") sold certain oil and natural gas rights and assets located on lands in British Columbia to Pengrowth. It was a term of the purchase and sale agreement that Pengrowth and the CCNG Partnership would enter into a COP Agreement upon closing of the purchase and sale. The COP Agreement is dated October 1, 2000.

4 The COP Agreement provides the CCNG Partnership with a reoccurring right of first refusal to purchase any portion of the gas or oil produced from the lands that were sold on market terms and conditions. The agreement remains in force for as long as gas and oil are produced from the lands, unless terminated sooner by the parties. It provides for a fixed delivery point and a price for the production spelled out by reference to current market prices. It does not compel Pengrowth to produce gas or oil from the lands. The CCNG Partnership has the right to reduce the volumes of production it is entitled to purchase on notice to Pengrowth, and thereafter Pengrowth may market such released volumes elsewhere.

5 On the same date the COP Agreement was executed, the Calpine Energy Services Canada Partnership (the "CESCA Partnership") replaced the CCNG Partnership as purchaser of the gas and oil, and shortly after that, Progress Energy Ltd. was partially novated into the agreement by Pengrowth with the consent of the CCNG Partnership.

6 On December 20, 2005, the Calpine applicants sought, and were granted, an initial order under the CCAA which, together with other relief, restrained persons from terminating or suspending their obligations under agreements with the applicants during the term of the order, as long as the applicants paid the normal prices for the goods and services provided under such agreements.

7 On December 21, 2005, Pengrowth provided notice to the CESCA Partnership that, effective December 23, 2005, it would suspend delivery of natural gas to the CESCA Partnership under the COP Agreement. In that notice, Pengrowth took the position that Calpine's filing for protection un-

der the CCAA constituted a "Triggering Event" as defined in the COP Agreement that allowed suspension and termination of the agreement as of December 27, 2005. In another letter later the same day, Pengrowth alleged that the COP Agreement was an eligible financial contract, and thus exempt from the application of the stay set out in paragraph 9(d) of the initial order.

8 The Calpine applicants brought a motion for a declaration that the stay of proceedings contained in the initial order applies to the COP Agreement, that this agreement is not an eligible financial contract within the meaning of the CCAA, and for damages against Pengrowth and Progress as a result of their improper termination of services under the agreement. Pengrowth and Progress in turn brought an application to vary the initial order by removing or lifting the stay with respect to the CESCA Partnership on the basis that the CCAA does not apply to partnerships. The question of damages against Pengrowth and Progress was not addressed at the hearing of these motions.

Analysis

9 The Alberta Court of Appeal considered the definition of "eligible financial contract" under the CCAA in the case of ***Re Blue Range Resource Corp.***: [2000] A.J. No. 1032. In that case, the first to consider the definition, there were seven contracts at issue involving Blue Range, which was then under the protection of the CCAA. Two of them were "master agreements" that contemplated that the parties would enter into gas purchase and sale agreements from time to time, to be evidenced at the time of specific sales by confirmation letters. The other agreements were gas purchase and sale agreements between third parties and the wholly-owned subsidiary of Blue Range and guarantees by Blue Range of its subsidiary's obligations under these contracts. According to the Court of Appeal, all of these agreements contained netting out or set-off provisions, although subsequent commentary on the case suggests that some of these provisions were limited. The Court characterized the key issue as whether the long term gas purchase and sale contracts in the case were forward commodity contracts, as it was conceded in the appeal that, if they were, the master agreements and guarantees would be caught by the language of subsections 11.1(k) and (m) of the Act.

10 Fruman, J.A. started her analysis by describing the agreements in question in general terms, noting that the sellers were looking for price certainty and limited downside exposure, predicting that the market price for gas would decline, and that the buyers were gambling that the price would rise such that on delivery they would purchase gas at a price that was below market value. She described at paragraphs 18 to 20 how, at any particular time, the contract might be "in the money" when the market price of gas exceeded the purchase price specified in the contract, or "out of the money" when the market price was less than the purchase price. She described this as the contract being "marked to market", assigning a positive or negative value to the contract. As she noted, gas producers, to hedge risk, might enter into a series of such contracts at different prices for delivery on different dates, some of which would be "in the money" and others of which would be "out of the money". As she stated, "(t)ermination and netting out or set-off provisions permit the purchaser to terminate all the agreements upon a triggering event", thereby allowing the calculation of a termination amount payable by one party to the other. She comments further at paragraph 23:

> Forward commodity contracts and other derivatives have a financial value that can readily be calculated; they are commercial hedging contracts that can be used to manage various types of risk, including changes in commodity prices, exchange rates, interest rates and market risks.

11 Fruman, J.A. rejected the distinction between physically-settled and financially-settled contracts in determining whether a contract falls within the definition of eligible financial contracts: at para. 36. However, she also recognized that if the term "forward commodity" contract was interpreted to include physically-settled transactions, it could potentially include every contract to buy or sell on a future date, any "thing produced for use or sale" : para. 39. As the Court of Appeal recognized at para. 39, interpreting the term "eligible financial contract" so broadly would defeat the very purpose of the CCAA, to provide an insolvent corporation with the time and opportunity to reorganize its affairs as a viable operation. Fruman, J.A. concluded, at para. 39:

> Section 11.1(1) is an exception to a statutory protection which must "be interpreted in light of [the] underlying rationale and not used to undermine the broad purpose of the legislation. . .": Driedger, 3d ed., at 369-70. See *National Trustco v. Mead* (1990), 71 D.L.R. (4th) 488 at 497-99 (S.C.C.). This dictates a narrower construction of provisions which are excepted from a stay order: *Re Smith Brothers Contracting Ltd.* (1998) 53 B.C.L.R. (3d) 264 at 272 (S.C.).

12 The Court found a narrower construction of the term "forward commodity contract" in the concept of "commodity", which it defined as being interchangeable and:

> . . .readily identifiable as fungible commodities capable of being traded on a futures exchange or as the underlying asset of an over-the-counter derivative transaction. Commodities must trade in a volatile market, with a sufficient trading volume to ensure a competitive trading price, in order that forward commodity contracts may be "marked to market" and their value determined.[*Blue Range* at para. 45]

Even so, the Court recognized that not every contract involving the purchase and sale of gas was a forward commodity contract within the meaning of the exception set out in Section 11.1 of the CCAA : at para. 50.

13 Fruman, J.A. referred to industry and expert definitions of forward commodity contracts to aid her in her analysis. Specifically, she focussed on two definitions, as follows:

> [Mark E.] Haedicke and [Alan B.] Aronowitz, ["Gas Commodity Markets" in Energy Law and Transactions Vol. IV (New York: Matthew Bender & Co. Inc., 1999)] at 88:74-75 define a "forward contract" for the energy industry as:
>
> > A customized contract to buy or sell a commodity for delivery at a certain future time for a certain price. It is customized by individual negotiations between two parties, rather than standardised and traded on a board of trade. The parties to the forward contract usually know each other, and in most cases the contract is settled by actual delivery of the commodity.
>
> James Joyce, a specialist in energy risk assessment who provided an expert report in this case, identified the key elements of a forward commodity contract in the natural gas industry to include:
>
> a) a buyer of natural gas;

b) a seller of natural gas;
c) a defined contract term longer than the next day;
d) a defined volume of natural gas;
e) a defined delivery and receipt point (including any transportation requirements, as applicable); and;
f) a defined price or pricing mechanism.

[*Blue Range* at paras. 48 and 49]

14 As the Court noted, the Joyce definition would not capture standard gas utility contracts that do not commit a purchaser to a specific volume of gas for a specified price. However, the contracts at issue in the Blue Range appeal met all of the elements of both the Haedicke and Joyce definitions, and the Court of Appeal found that they were therefore forward commodity contracts : at paras. 50 and 51.

15 Fruman, J.A. indicated that there is a final test - the fairness of the result. In her analysis of the Blue Range contracts, she found that both parties were fairly treated even though the appellants were allowed to terminate the contracts : *Blue Range*, at paras. 52-53.

16 Fruman, J.A.'s approach was accepted by the Ontario Court of Appeal in the next case to consider the definitions eligible financial contracts, ***Re Androscoggin Energy LLC***, [2005] O.J. No. 592 (CA), in which that Court also rejected the distinction between "physically-settled" and "financial settled" contracts adopted by both the Alberta and Ontario chambers judges.

17 In the Ontario case, the appellants had entered into long term contracts to supply gas to Androscoggin, a corporation under CCAA protection. Androscoggin operated a gas-fuelled co-generation plant. The contract price at which the appellants had agreed to supply gas was below the current market price of gas. The Court of Appeal agreed with the chambers judge that the contracts should not be characterized as eligible financial contracts, but on a different basis, stating:

> The contracts in issue before Fruman J.A. served a financial purpose unrelated to the physical settlement of the contracts. The reasons in *Blue Range Resource Corp*. indicate that the contracts Fruman J.A. examined enabled the parties to manage the risk of a commodity that fluctuated in price by allowing the counterparty to terminate the agreement in the event of an assignment in bankruptcy or a CCAA proceeding, to offset or net its obligations under the contracts to determine the value of the amount of the commodity yet to be delivered in the future, and to re-hedge its position. Unlike the contracts found to be EFCs in *Blue Range Resource Corp.*, *supra*, the contracts in issue here possess none of these hallmarks and cannot be characterized as EFCs. However, mere *pro forma* insertion of such terms into a contract will not result in its automatic characterization as an EFC. Regard must be had to the contract as a whole to determine its character. [emphasis added] *Androscoggin*, at para. 15.

18 Analysing the COP Agreement as a whole, it is clear that it lacks the characteristics or hallmarks of an eligible financial contract. It does not fall within the definitions of "forward commodity contracts" cited by Fruman, J.A. in *Blue Range* when the terms "certain price" and "defined price" in those definitions are read as synonymous with "pre-determined" or "fixed" (as I believe is the intent), rather than the broader "able to be determined" meaning submitted by Pengrowth. It is clear

that the COP Agreement does not meet the fixed price requirement, but instead depends upon market pricing. In the same vein, the term of the contract is uncertain, not "defined" as required by the Joyce definition, and the volume of gas to be produced, and therefore purchased under the COP Agreement cannot be defined in any real sense. Moreover, although in a sense the COP Agreement gives the CESCA Partnership some certainty of source of supply, Pengrowth is neither obliged to produce, nor obliged to produce at any specific rate.

19 The COP Agreement, due to its nature, cannot be "marked to market", which is contrary to the characteristic noted at paragraph 46 of *Blue Range* that "(f)orward gas contracts ... have a calculable cash equivalent". The COP Agreement, again due to its nature, has no offsetting or netting provisions. Both the *Blue Range* and *Androscoggin* decisions refer extensively to the importance of such netting-out provisions to the concept of eligible financial contracts: *Blue Range* at paras. 8, 9, 13, 20, 21, 27, 30 and 53; *Androscoggin* at para. 15. Without suggesting that such provisions are necessary in every case before a contract is found to be an eligible financial contract, or that every contract that includes such provisions must be a priori be an eligible financial contract, the importance of such provisions to the determination of whether the contract is truly a derivative or risk management instrument cannot be overemphasized.

20 The price of gas under the COP Agreement is the current market price as determined by various industry measurements, less toll charges. This is not a predetermined, fixed price that in the normal course could prudently be hedged by an off-setting contract. The respondents did not adduce evidence of any hedging of the COP Agreement. While tey certainly had no obligation to do so, the lack of such evidence tends to support the conclusion that the COP Agreement is not the type of contract that is part of the forward contract trade.

21 The history or context of the COP Agreement is also note worthy. It was entered into as a condition of the purchase and sale of the lands, an obligation upon Pengrowth that would always be burdensome to it and valuable to the Calpine applicants, given the toll "kicker" in favour of the CCNG Partnership. In that sense, the COP Agreement forms part of the consideration for the sale of the lands, and is not just a stand-alone supply contract.

22 The COP Agreement in its essential terms is analogous to the type of contract specifically exempted from the category of eligible financial contract by Fruman, J.A. at para. 50 in *Blue Range*, a standard gas utility contract. The demand, price and quantity of gas to be purchased is based solely upon the purchaser's needs from time to time at prices that fluctuate.

23 Pengrowth and Progress also submit that the COP Agreement can be characterized as a series of spot contracts for the supply of gas, and that since spot contracts are also listed in s. 11.1(1)(h) of the *Act*, the COP Agreement qualifies as an eligible financial contract even if it is not a forward commodity contract. However, in the same way that all forward commodity contracts are not eligible financial contracts given the underlying purpose of the CCAA, neither are all spot contracts. As noted at para. 36, footnote 14 in *Blue Range*, spot contracts contemplate only immediate, physical delivery and have no financial character. While spot contracts because of their nature are unlikely to be an important issue in a CCAA context, their inclusion in the list of types of contracts referred to in s. 11.1(1) highlights the importance of the Ontario Court of Appeal's direction to have regard to the contract as a whole when determining its character.

24 Given that the CCAA's predominate purpose as a remedial statute dictates a narrower construction of section 11.1(1) than the mere enquiry if a contract could fall within one of its "compre-

hensive and intimidating" list of categories, (*Blue Range*, at para. 10), and given the ingenuity and innovation of those who deal in the derivatives market, there can be no "bright-line" definition that will determine whether a contract falls within the exception set out in the CCAA . While some contracts clearly will fall within the exception, either by their nature or by reason of existing case law, there are others that do not fit so clearly and that may necessitate a more searching analysis by CCAA parties and the court.

25 The respondents point out that the COP Agreement contains a provision for termination upon an insolvency of CESCP, Calpine Corporation or any general partner of CESCP. They submit that this is a critical hallmark of a eligible financial contract which was notably missing in *Re Androscoggin*, but is present here. The lack of a termination-upon-insolvency provision in *Re Androscoggin* was a secondary ground for both the chambers and appeal courts to find that the CCAA stay should not be lifted, because the terms of the contracts in that case did not entitle the applicants to terminate except for non-payment. This finding did not make the presence or absence of a termination-upon-insolvency provision a necessary hallmark of an eligible financial contract. The presence of such a provision in this case does not outweigh the other factors to which I have referred.

26 The respondents also point out that intermediary Calpine entities are involved in the process of transporting the gas, or its equivalent volume, to an eventual end-user, and that some of these intermediaries may be characterized as risk management and gas marketing companies. That being said, they concede that a Calpine entity is likely the end-user of the gas, to the extent that this concept has meaning in the complex business of gas transportation. It is not unexpected that Calpine has risk management subsidiaries, as do most fully integrated gas and electricity companies. The characterization of the purchaser as a forward contract merchant, or not, is not determinative of the Canadian definition of eligible financial contracts, as it is in the United States. As pointed out by Rupert H. Chantrand and Robin B. Schwill in "Shades of Blue: Derivatives in Re *Blue Range Resource Corp.*, 16 B.F.L.R. 427 at p. 431, gas purchasers rarely if ever are the direct end-users of the gas they purchase, whether or not their contract provides for physical settlement.

27 There may well be criticism of a broad spectrum approach to the determination of whether a contract that is otherwise on a strict interpretation of section 11.1(1) an eligible financial contract is in reality such a contract in character and in the context of the CCAA itself. Such an approach may lead to uncertainty and a greater risk of litigation, at least until a body of case law is established. With respect to such concerns, a simple test that allows the purpose of the CCAA to be undermined with respect to certain types of commodity producers and those who deal with them is not the answer. In the absence of a more refined definition of eligible financial contract, the courts and CCAA parties will have to continue to deal with the difficult nature of the issue.

28 The last part of the analysis directed by the Court of Appeal in *Blue Range* is the fairness of result test. While this test is not always easy to apply, it appears clearer in this situation than in many. If the respondents were allowed to terminate the COP Agreement, they would derive a benefit from being able to enter into long-term, fixed price contracts for the gas produced from the lands, or selling in the spot market without the burden of transportation costs. The Calpine applicants would derive no benefit from the termination. Although the COP Agreement has value to the Calpine applicants, no amount would be payable to the CESCA Partnership on its termination. They would lose a valuable contractual asset without compensation. Moreover, the COP Agreement was part of the consideration extracted when Calpine sold the lands to Pengrowth. Therefore, termination of the contract would deprive the Calpine applicants and their creditors of the ongoing benefit

of the sale of the lands. Finally, the CESCA Partnership would lose a relatively secure supply of gas at market price.

29 On balance, termination would not meet the fairness of result test. If, however, termination of the COP Agreement remains stayed, the respondents are no worse off than other suppliers of goods and services to the Calpine applicants. The respondents have not adduced evidence that a failure to be able to terminate the contract will cause any prejudice to their hedging strategy. Calpine's creditors as a group will benefit from the value of this contractual asset.

B. Should the stay imposed by the Initial Order extend to the Calpine Energy Services Canada Partnership?

30 The initial order of December 20, 2005 grants the usual stay of proceedings sought in CCAA applications for the benefit of, not only the corporate Calpine entities that applied, but also the CESCA Partnership, CCNG Partnership and the Calpine Canadian Saltend Limited Partnership. Pengrowth and Progress apply pursuant to the come-back provision of the initial order to vary it with respect to the CESCA Partnership. The onus is on the Calpine applicants to justify the extension of the stay to the CESCA Partnership.

31 At the time of the initial application, the Calpine applicants provided an overview of the Calpine group that made it clear that, at least from a corporate organizational prospective, the business affairs of the partnerships are significantly inter-twined with the Calpine corporations and, in some cases, with each other. Calpine submitted that the partnerships are important to the value of the Canadian operations of the Calpine group, and that their value and their key contractual assets should be preserved during the reorganization of the Canadian operations.

32 Currently, the Monitor and Calpine are working together to prepare an analysis of inter-corporate debt which will enable the court and Calpine's creditors to better evaluate a proposed plan of restructuring. As indicated by Farley, J. in *Re: Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (OCJ-GD) at page 4, "(o)ne 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". While it is early in this CCAA proceeding to make the determination that this is the case with certainty, the evidence adduced so far by Calpine appears to indicate that the treatment of the Calpine group as an integrated system will result in greater value.

33 Although the CCAA does not give a court the power to stay proceedings against non-corporate entities, this court has the inherent jurisdiction to grant a stay of proceedings where it is just and convenient to do so: *Lehndorff*, supra at pg. 7; *Compeau v. Olympia & York Developments Ltd.* [1992] O.J. No. 1946 at pp. 4-7.

34 It is clear that Calpine has a more than arguable case that a stay involving the Partnerships is necessary and appropriate. It is also likely, given the extremely complex corporate and debt structure of the Calpine group, the cross-border nature of these proceedings, and the evidence I have heard so far in the proceedings of the value of partnership assets, that irreparable harm may accrue to the Calpine group if the stay is not granted. The balance of convenience certainly favours a stay. I find that it is just, reasonable and appropriate in this case to exercise this court's inherent jurisdiction to stay proceedings against the Calpine partnerships.

C. Future Sales or Credit

35 Although relief under this heading was not sought in their Notice of Motion, Pengrowth and Progress have asked for a direction that they are not obliged to deliver gas to the CESCA Partnership on credit and are entitled to immediate payment for any gas delivered after the date of the initial order.

36 This application is premature, and I adjourn consideration of the issue until the parties have had time to discuss the implications of my decisions relating to the COP Agreement.

ROMAINE J.

TAB 14

CITATION: Imperial Tobacco Canada Limited, et al, Re, 2019 ONSC 1684
COURT FILE NO.: CV-19-616077CL
DATE: 20190315

SUPERIOR COURT OF JUSTICE - ONTARIO

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 IMPERIAL TOBACCO CANADA LIMITED, AND IMPERIAL TOBACCO COMPANY LIMITED, Applicants

BEFORE: McEwen J.

COUNSEL: *Deborah Glendinning, Marc Wasserman, John A. MacDonald,* and *Michael De Lellis*, for the Applicants

David Byers and *Maria Konyukhova*, for the British American Tobacco p.l.c, B.A.T. Industries p.l.c., and British American Tobacco (Investments) Limited

Jay Swartz, Robin Schwill, and *Natasha MacParland*, for the Proposed Monitor, FTI Consulting Canada Inc.

Jonathan Lisus and *Matthew Gottlieb,* for the Proposed Tobacco Claimant Representative

HEARD: March 12, 2019

ENDORSEMENT

[1] On March 12, 2019 I granted the Initial Order, as amended, with reasons to follow. I am now providing those reasons.

Background

[2] Imperial Tobacco Canada Limited ("ITCAN") and its subsidiary Imperial Tobacco Company Limited ("ITCO") (together, the "Applicants") seek an Initial Order for a stay of all existing and prospective proceedings pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), primarily so that they can effect a global resolution of multiple claims that have been brought or may be brought against ITCAN and related companies in Canada. They also seek the same relief on behalf of their related companies.

[3] The timing of this Application stems from the recent judgment of the Quebec Court of Appeal in *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 (the "Quebec Appeal Judgment"), in which the Applicants and co-defendants were found liable for damages totalling approximately $13.5 billion. Based on the filed record, enforcement of the Quebec Appeal Judgment would likely spell the end of the Applicants' business because

ITCAN does not have sufficient funds to satisfy the judgment. ITCAN's share of the judgment exceeds $9 billion.

[4] Amongst other submissions, the Applicants stress that enforcement of the Quebec Appeal Judgment places in serious jeopardy the continued employment of the Applicants' 466 full-time and 98 contract employees across Canada who receive wages and salaries of approximately $70 million per year. The Applicants also point to the fact that they generate taxes payable to various levels of government across Canada totalling approximately $4 billion per year. They further stress that, based on industry publications, if the Applicants and other legal producers of tobacco products in Canada cease to operate then the illegal tobacco trade could expand to fill the void.

[5] In addition to the Quebec Appeal Judgment, ITCAN (and in some cases related companies) face more than 20 large proceedings across Canada. In Ontario alone there are four actions claiming damages in excess of $330 billion. The actions across the country include government actions to recover healthcare costs incurred in connection with smoking related diseases; smoking and health class actions seeking damages on behalf of individuals; and a class action brought by Ontario tobacco growers in relation to certain pricing practices of ITCAN. Most of these cases are in the preliminary stages.

[6] The Applicants submit that in the above circumstances the proposed Initial Order is necessary and reasonable as it seeks an overall solution with respect to the Quebec Appeal Judgment and other outstanding and potential proceedings.

Analysis

[7] ITCAN and ITCO are incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. ITCO is a privately held subsidiary of ITCAN. Their registered head offices are located in Brampton, Ontario. Their liabilities clearly exceed $5 million as a result of the Quebec Appeal Judgment. According to the affidavit filed by Mr. Eric Thauvette, the vice-president and chief financial officer of ITCAN, the Applicants do not have sufficient funds to pay the Quebec Appeal Judgment that is currently payable.

[8] Based on the above, the Applicants are insolvent companies to which the CCAA applies. I am also of the view that it is appropriate to grant the stay of proceedings requested by the Applicants. This court, pursuant to the provisions of s. 11.02 of the CCAA, may grant a stay of proceedings if it is satisfied that circumstances exist that make such an order appropriate.

[9] It is settled law that the principal purpose of the CCAA is to maintain the *status quo* while a debtor company has the opportunity to consult with its creditors and stakeholders with a view to continue the company's operations. In the circumstances of this case, ITCAN cannot pay the amount of the Quebec Appeal Judgment and the Judgment is currently enforceable. Enforcement would cause the Applicants serious harm. As I have outlined above, it would also jeopardize tax revenue and legal trade in tobacco. It is therefore appropriate to grant the stay of proceedings requested by the Applicants as all stakeholders would likely be detrimentally affected if the Quebec Appeal Judgment was enforced. These stakeholders include employees, retirees, customers, landlords, suppliers, the provincial and federal governments, and contingent litigation creditors. Specifically, a stay creates a level playing field amongst the litigation claimants.

[10] Insofar as the proposed monitor is concerned I am satisfied that FTI Consulting Canada Inc. ("FTI") is a suitable monitor and should be appointed in these proceedings pursuant to s. 11.7 of the CCAA. FTI is an experienced monitor who frequently acts in this capacity in CCAA proceedings. FTI is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

[11] I also agree with the Applicants that the CCAA extension should be extended to the non-Applicants British American Tobacco p.l.c. ("BAT") and B.A.T. International Finance p.l.c., B.A.T. Industries P.L.C., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, and entities related to or affiliated with them (the "BAT Affiliates"), Liggett & Myers Tobacco Company of Canada Limited ("Liggett & Myers"), and other non-Applicant subsidiaries noted in the Application Record.

[12] I have jurisdiction to extend the stay: *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461 and *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429. In my view, it is reasonable to do so in circumstances where most of the outstanding proceedings against ITCAN also name BAT and the BAT Affiliates as co-defendants. Further, Liggett & Myers and the other non-Applicant subsidiaries are highly integrated with the Applicants and indispensable to the Applicants' business and restructuring. As submitted, certain of them hold trademarks or other assets of ITCAN, provide services to ITCAN, share the cash management system with ITCAN, and /or have guaranteed ITCAN debts from time to time. It is reasonable to extend the stay to these entities. Failure to do so would undermine the intent of the stay. Further, given the stay of proceedings that I have granted with respect to the Applicants, I see no prejudice to claimants in existing and potential proceedings if the stay is extended.

[13] I am further satisfied that the charges requested below by the Applicants are reasonable and should be granted.

[14] The Administration Charge in the amount of $5 million is fair and reasonable. The restructuring will be an extremely extensive and expensive undertaking. It will involve a great deal of effort by the professional advisors who are subject to this charge. I do not see any duplication of the roles. Furthermore, the Administration Charge is supported by the Applicants' parent and other related companies, which are secured creditors. The amount is reasonable given the size of this matter.

[15] I am further satisfied that the Tobacco Claimant Coordinator Charge is reasonable. I pause here to note that the Applicants had proposed that a Tobacco Claimant Coordinator be described as the "Tobacco Claimant Representative". To avoid any confusion that might suggest that the Honourable Warren K. Winkler, Q.C., whom I have appointed, may be seen to displace existing counsel, or to take some sort of role that may be considered binding in nature with respect to any of the litigants affected by this order, the title was amended to Tobacco Claimant Coordinator.

[16] Given the immense size and complexity of this matter, I am of the view that a charge is reasonable with respect to the Honourable Warren K. Winkler, Q.C. as per the terms of the Interim Order so that he, along with others, can begin a claims process. It is also reasonable to allow him to retain the independent counsel requested and provide for a charge of $1 million.

[17] It is reasonable that the Administration and Tobacco Claimant Coordinator Charges rank as first charges *pari passu* given their importance.

[18] The Directors' and Officers' Charge sought should also be approved to ensure that the Applicants enjoy ongoing stability during these CCAA proceedings.

[19] The directors and officers reasonably insist that a charge be put in place. I agree with their concerns. They also have significant knowledge and experience. The Applicants and related companies require that the directors and officers can continue on with the management of the businesses.

[20] The proposed charge of $16 million, which stands second in priority to the aforementioned Administration and Tobacco Claim Coordinator Charges, is also reasonable.

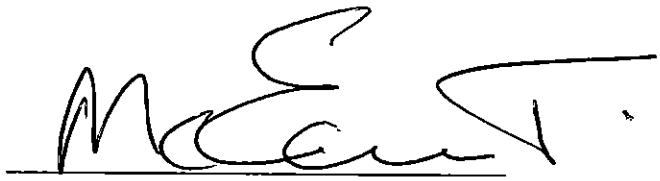
[21] Last, insofar as the charges are concerned, I am also satisfied that the charge concerning Sales and Excise Taxes in the maximum amount of $580 million is also reasonable as a third charge. It is important that this charge be granted so that the directors and officers do not face personal liability for the taxes. I reviewed the Applicants' record and I am satisfied that the amount is fair and reasonable.

[22] All of the charges are supported by FTI.

[23] In addition to the above specific comments, I am further satisfied that the remaining terms of the proposed Interim Order ought to be granted. The Applicants will be carrying on business during the CCAA proceedings. The filed materials demonstrate that the Applicants and their affiliated companies expect that the Applicants will continue to carry on their business in a profitable fashion and be able to meet both their pre-filing and post-filing obligations. It is in the best interests of all stakeholders to allow for the payment of these obligations.

[24] BAT, the BAT Affiliates, and FTI all support the Applicants' position, including their intention and ability to meet their current payables in the ordinary course of conducting business.

[25] For all of the reasons above, the Application was granted and the Interim Order was signed, as amended.



McEwen J.

Date: March 15, 2019

TAB 15

Court File Number: CV-19-616779-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

In the Matter of the Companies' Creditors Arrangement Act
~~Plaintiff(s)~~

AND

IN THE Matter of a Plan of Compromise or Arrangement
of Rothmans, Benson & Hedges Inc. ~~Defendant(s)~~ (Applicant)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:
See attached		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

Rothmans, Benson and Hedges Inc. (the "Applicant") seeks an Initial Order pursuant to the Companies Creditors Arrangement Act ("CCAA") providing for, among other things, a stay of all existing and prospective proceedings against or in respect of any member of the Philip Morris International Inc. group of companies (the PMI Group) that relate to or involve RBH or a Tobacco Claim as that term is defined in the Material.

The application is precipitated by the judgment of the Quebec Court of Appeal dated March 1, 2019 upholding

March 22, 2019
Date

Judge's Signature

☑ Additional Pages 3

Court File Number: CV-19-616779-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

in most respects the judgment of the Quebec Superior Court and awarding compensatory and punitive damages against RBH and its co-defendants Imperial Tobacco Canada Limited (ITCAN) and JTI-Macdonald Corp. (JTIM), of approximately $13.529 billion.

This application follows earlier CCAA applications by both ITCAN and JTIM and is similar in most respects. On March 8, 2019, Hainey J. issued an Initial Order in respect of JTIM and on March 12, 2019, McEwen J. issued an Initial Order in respect of ITCAN.

Based on the material filed* and the submissions of counsel, I am satisfied that the draft Initial Order provided at Tab 3 of the Application Record should issue.

RBH is incorporated under the Canada Business Corporations Act and has its Head Office in Ontario. Based on the Quebec Court of Appeal judgment as well as other pending litigation against it involving tobacco, RBH is insolvent under the balance sheet test - that is the realizable value of its assets is less than its obligations due and accruing due, including contingent liabilities.

* including the First Report of Ernst & Young, the Monitor dated March 27, 2019

carries on business in Ontario

Judges Initials

Court File Number: CV-19-616779-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Further RBH's liabilities clearly exceed $5 million. Accordingly the court has jurisdiction under the CCAA to grant the relief requested.

RBH requires CCAA relief to enable it to pursue a CCAA plan of arrangement while continuing to operate its business and keep creditors and contingent creditors on an equal footing to allow it to deal fairly with the claims against it, with a view to a global settlement. As a result I am satisfied a stay pursuant to s. 11.02 of the CCAA is appropriate to maintain the status quo and prevent prejudice to creditors. Leave is granted to allow RBH to file its leave application to the Supreme Court in respect of the Quebec Court of Appeal judgment. At the same time I am satisfied that a stay of proceedings in Canada as against other members of the PMI Group that relate to RBH, the Business or Property or a Tobacco Claim as defined in the material, I have considered the factors set out in Pacific Exploration & Production Corp., Re, 2016 ONSC 5429 at para. 26 in respect of extending the stay to non-applicant third parties. In the circumstances, the balance of

Judges Initials RAP.

Court File Number: CV-19-616779-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

convenience favours granting the stay to enable a global solution to the claims.

I am also satisfied that the requested administration charge should be granted. The costs of the CCAA proceedings will be significant. Similarly I am satisfied ~~with~~ that the charges for Sales + Excise Taxes and indemnification of directors and officers are appropriate. Further the cash collateral * in the amount of $31.1 million * as security for the letters of credit * and bank guarantees * provided to the provincial and federal government in respect of Excise Taxes is approved. It maintains the status quo. RBH is also permitted to engage in the normal course intercompany transactions within the PMI Group.

The service and notice provisions in the draft order are approved. Ernst + Young is appointed as the Monitor.

In addition to the above, I agree with and adopt the reasons of my colleagues, Hainey J. in DTI-Macdonald Corp. 2019 ONSC 1625 and McEwen J. in Imperial Tobacco Canada Limited, 2019 ONSC 1684 in respect of the issues herein.

The Comeback Motion referred to in para. 49 of the Initial Order will take place on April 4 and 5, 2019. Order signed by me.

Judges Initials

Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 ROTHMANS, BENSON & HEDGES INC. ("Applicant")

UNOFFICIAL TRANSCRIBED ENDORSEMENT OF JUSTICE PATTILLO

March 22, 2019

Rothmans, Benson & Hedges Inc. (the "Applicant") seeks an Initial Order pursuant to the Companies' Creditors Arrangement Act ("CCAA") providing for, among other things, a stay of all existing and prospective proceedings against or in respect of any member of the Philip Morris International Inc. group of companies (the PMI Group) that relate to or involve RBH or a Tobacco Claim as that term is defined in the material.

This application is precipitated by the Judgment of the Quebec Court of Appeal dated March 1, 2019 upholding in most respects the judgment of the Quebec Superior Court and awarding compensatory and punitive damages against RBH and its co-defendants Imperial Tobacco Canada Limited (ITCAN) and JTI-Macdonald Corp ("JTIM") of approximately $13.529 billion.

This application follows earlier CCAA applications by both ITCAN and JTIM and is similar in most respects. On March 8, 2019, Hainey J. issued an Initial Order in respect of JTIM and on March 12, 2019, McEwen J. issued an Initial Order in respect of ITCAN.

Based on the material filed, including the First Report of Ernst & Young, the Monitor dated March 22, 2019, and submissions of counsel, I am satisfied that the draft Initial Order provided at Tab 3 of the Application Record should issue. RBH is incorporated under the Canada Business Corporations Act, carries on business in Ontario, and has its Head Office in Ontario. Based on the Quebec Court of Appeal Judgment as well as other pending litigation against it involving tobacco, RBH is insolvent under the balance sheet test – that is the realizable value of its assets is less than its obligations due and accruing due, including contingent liabilities.

Further, RBH's liabilities clearly exceed $5 million. Accordingly, the court has jurisdiction under the CCAA to grant the relief requested.

RBH requires CCAA relief to enable it to pursue a CCAA plan of arrangement while continuing to operate its business and keep creditors and contingent creditors on an equal footing to allow it to deal fairly with the claims against it, with a view to a global settlement. As a result, I am satisfied a stay pursuant to s.11.02 of the CCAA is appropriate to maintain the status quo and prevent prejudice to creditors. Leave is granted to allow RBH to file its leave application to the Supreme Court in respect of the Quebec Court of Appeal Judgment. At the same time, I am satisfied that a stay of proceedings in Canada as against other members of the PMI Group that relate to RBH, the Business or Property or a Tobacco Claim as defined in the material should also issue. I have considered the factors set out in *Pacific Exploration and Production Corp., Re.*, 2016 ONSC 5429 at para. 26 in respect of extending the stay to non-applicant third parties. In the circumstances, the balance of convenience favours granting the stay to enable a global solution to the claims.

I am also satisfied that the requested administration charge should be granted. The costs of the CCAA proceedings will be significant. Similarly, I am satisfied that the charges for Sales & Excise Taxes and indemnification of directors and officers are appropriate. Further the cash collateral in the amount of $31.1 million as security for the letters of credit and bank guarantees provided to the provincial and federal government in respect of Excise Taxes is approved. It maintains the status quo. RBH is also permitted to engage in the normal course intercompany transactions within the PMI Group.

The service and notice provisions in the draft order are approved. Ernst & Young is appointed as the Monitor.

In addition to the above, I agree with and adopt the reasons of my colleagues Hainey J. in *JTI-Macdonald Corp.*, 2019 ONSC 1625 and McEwen J. in *Imperial Tobacco Canada Limited*, 2019 ONSC 1684 in respect of the issues herein.

The Comeback Motion referred to in para. 49 of the Initial Order will take place on April 4 and 5, 2019. Order signed by me.

Pattillo J.

TAB 16

Case Name:

Canadian Airlines Corp. (Re)

IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.
Between
The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs, and
Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., defendants

[2000] A.J. No. 1692

19 C.B.R. (4th) 1

2000 CanLII 28202

Docket: 0001-05071, 0001-05044

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Oral Judgment: May 4, 2000.

(41 paras.)

Application by holders of senior secured notes in corporation for order lifting stay of proceedings against them in Companies' Creditors Arrangement Act proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

Counsel:

G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q. C., and H.M. Kay, Q. C., for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C, and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

---

1 **PAPERNY J.** (orally):-- Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAC") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured

Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or
2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and-they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court

scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, Meridian Development Inc. v. Toronto Dominion Bank (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in Campeau v. Olympia & York Developments Ltd. (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in Re Alberta-Pacific Terminals Ltd (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
> (5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
> (6) The court has a broad discretion to apply these principles to the facts of the particular case.

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization:

> Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:
>
> 1. When the plan is likely to fail;
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
> 4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101 (Oat. CA.) at 115, as just one of several cases supporting this proposition. Re Philip's Manufacturing Ltd. (1992), 9 C.B.R. (3d) 25 (B.C.C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as

> regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Re-gional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would he in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a re-ceiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CALL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not

the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: Meridian Development Mc. v. Toronto Dominion Bank, supra, and Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (NS.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C.S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and en-danger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

PAPERNY J.

TAB 17

Case Name:

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.

Between
ICR Commercial Real Estate (Regina) Ltd., Appellant,
and
Bricore Land Group Ltd., Bricore Investment Group Ltd., 624796 Saskatchewan Ltd., 603767 Saskatchewan Ltd., 583261 Saskatchewan Ltd. and Horizon West Management Ltd., Respondents

[2007] S.J. No. 313

2007 SKCA 72

[2007] 9 W.W.R. 79

299 Sask.R. 194

33 C.B.R. (5th) 50

159 A.C.W.S. (3d) 671

2007 CarswellSask 324

Dockets: 1443 and 1452

Saskatchewan Court of Appeal

Klebuc C.J.S., Jackson and Smith JJ.A.

Heard: June 7, 2007.
Judgment: June 25, 2007.

(82 paras.)

Civil procedure -- Costs -- Solicitor and client or substantial indemnity -- As damages or punishment for improper conduct -- Appeal from Supreme Court decision that awarded substantial in-

demnity costs to respondent -- Appeal allowed -- There was no basis upon which to order substantial indemnity costs.

Insolvency law -- Administration of estate -- Actions by or against estate -- Appeal from a Supreme Court decision that denied the appellant leave to commence an action against the bankrupt -- The claim arose on a "post-filing" basis after a restructuring order had been made under the Companies' Creditors Arrangement Act -- Appeal dismissed -- The order applied to post-filing creditors -- The appellant did not reach the necessary threshold required to allow the action to proceed.

Appeal from a Supreme Court decision that denied ICR leave to commence an action against Bricore. The claim by ICR arose on a "post-filing" basis after a restructuring order had been made under the Companies' Creditors Arrangement Act. The restructuring failed. The principal assets of the companies were sold and the net proceeds were being held for distribution. The post-filing claim was asserted against (i) the companies, which were subject to the CCAA order, and (ii) against the companies' Chief Restructuring Officer. ICR claimed a real estate commission with respect to the sale of a building belonging to Bricore. Bricore and four related companies (collectively "Bricore") were all subject to an initial order granted by a Supreme Court judge in January, 2006, pursuant to s. 11(3) of the CCAA. The Chief Restructuring Officer (CRO) was appointed by the chambers judge in May, 2006 (the "CRO Order"). The Supreme Court judge remained the supervising CCAA judge from the time of the Initial Order. The Initial Order and the CRO Order imposed a stay of proceedings against Bricore and prohibited the commencement of new actions against Bricore and the CRO without leave of the Court. ICR applied to the supervising judge for directions and, in the alternative, for leave to commence actions against Bricore and the CRO. The supervising judge found that the Initial Order and the CRO Order applied to ICR and that leave of the Court was required. He refused leave and also awarded substantial indemnity costs against ICR. On appeal, ICR raised four issues. First, it alleged that the stay of proceedings imposed did not mean leave to commence an action against Bricore was required. Second, it contended that s. 11.3 of the CCAA did not require that a post-filing claimant was subject to the stay of proceedings imposed by the Initial Order. Third, it claimed that if leave was required, the supervising judge erred when he refused ICR leave to commence an action against Bricore and against the CRO. Finally, ICR contended that the supervising judge erred when he awarded costs on a substantial indemnity basis.

HELD: Appeal allowed in part. The supervising judge erred when he awarded costs on a substantial indemnity basis. All other aspects of the appeal were dismissed. The Initial Order applied to post-filing creditors. Leave was required. Ultimately, it was within the discretion of the supervising CCAA judge as to whether the proposed action ought to be allowed to proceed in the face of the stay. ICR did not reach the necessary threshold required to allow the action to proceed. It did not structure its affairs or establish a claim with the specificity that justified the development of a remedy to allow it to participate in the liquidation of the Bricore assets. With respect to costs, there was no basis upon which to order substantial indemnity costs with respect to the application to lift the stay in relation to Bricore, as bad faith was not alleged on its part. With respect to the CRO, the only basis upon which the stay could be lifted was to make an allegation of "bad faith." In the absence of some other factor, ICR could not be faulted for making the very allegation that it was required to make in order to bring its application within the ambit of the stay of proceedings that had been granted.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), s. 11(4), s. 11(6), s. 13

On appeal from Q.B.G. No. 8 of 2006, J.C. Saskatoon

Counsel:

Fred C. Zinkhan for the Appellant.

Jeffrey M. Lee for the Respondents.

Kim Anderson for the Monitor, Ernst & Young.

The judgment of the Court was delivered by

JACKSON J.A.:--

I. Introduction

1 This appeal concerns a claim arising on a "post-filing" basis after a restructuring order had been made under the *Companies' Creditors Arrangement Act*[1] (the "*CCAA*"). The restructuring failed. The principal assets of the companies have been sold and the net proceeds are being held for distribution. The post-filing claim is asserted against: (i) the companies, which are subject to the *CCAA* order; and (ii) against the companies' Chief Restructuring Officer.

2 The post-filing claimant is ICR Commercial Real Estate (Regina) Ltd. ("ICR"). ICR claims a real estate commission with respect to the sale of a building belonging to Bricore Land Group Ltd. Bricore Land and four related companies (collectively "Bricore") are all subject to an initial order ("Initial Order") granted by Koch J. on January 4, 2006 pursuant to s. 11(3) of the *CCAA*. The Chief Restructuring Officer, Maurice Duval (the "CRO"), was appointed by Koch J. on May 23, 2006 (the "CRO Order"). Koch J. has been the supervising *CCAA* judge since the Initial Order.

3 The Initial Order and the CRO Order impose the usual stay of proceedings against Bricore and prohibit the commencement of new actions against Bricore and the CRO, without leave of the Court.

4 ICR applied to Koch J. for directions and, in the alternative, for leave to commence actions against Bricore and the CRO. By fiats dated April 9, 2007 and April 25, 2007, Koch J. held that the Initial Order and the CRO Order prohibiting the commencement of actions apply to ICR and that leave of the Court is required. He refused leave and also awarded substantial indemnity costs against ICR.

5 On May 23, 2007, ICR applied in Court of Appeal chambers for leave to appeal, pursuant to s. 13 of the *CCAA*, and received leave to appeal the same day. The appeal was heard on June 7, 2007 and dismissed in relation to the lifting of the stay application and allowed in relation to the costs order on June 13, 2007, with reasons to follow. These are those reasons.

II. Issues

6 The issues are:

1. Does the stay of proceedings imposed by the supervising *CCAA* judge J. under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?
2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?
3. If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?
4. Did the supervising *CCAA* judge make a reviewable error in refusing leave to commence an action against the CRO?
5. Did the supervising *CCAA* judge err in awarding costs on a substantial indemnity basis?

III. Background

7 ICR's claim to a real estate commission arises as a result of these brief facts. Bricore owned four commercial real estate properties in Saskatoon and three such properties in Regina (the "Bricore Properties"). ICR argued that it had marketed one of the Regina properties, known as the Department of Education Building (the "Building"), to the City of Regina.

8 Bricore sold the Building, at a purchase price of $700,000,[2] to a proposed purchaser, which assigned its interest to 101086849 Saskatchewan Ltd. 101086849 Saskatchewan in its turn sold the Building to the City of Regina for a price of $1,075,000.[3] The certificate of title to the Building issued in early January, 2007 to 101086849 Saskatchewan, and the certificate of title issued to the City of Regina in late January, 2007. The Building came to be sold pursuant to a series of Court Orders made by Koch J., which I will now summarize.

9 As I have indicated, the Initial Order was made on January 4, 2006. On February 13, 2006 Koch J. appointed CMN Calgary Inc. as an Officer of the Court to pursue opportunities and to solicit offers for the sale or refinancing of the Bricore Properties. He also authorized Bricore to enter into an agreement with CMN Calgary dated as of January 30, 2006 entitled "Exclusive Authority To Solicit Offers To Purchase."

10 In May 2006, it was determined that Bricore could not be reorganized and, therefore, all the Bricore Properties should be sold. On May 23, 2006, Koch J. appointed Maurice Duval, C.A., of Saskatoon, Saskatchewan as an officer of the Court to act as CRO, and to assist with the sale of the assets.

11 The CRO Order confers these powers on the CRO pertaining to the proposed sale of the Bricore Properties:

(e) subject to the stay of proceedings in effect in these proceedings, the power to take steps for the preservation and protection of the Bricore Properties, including, without restricting the generality of the foregoing, (i) the right to make payments to persons, if any, having charges or encumbrances on the Bricore Properties or any part or parts thereof on or after the date of this Order, which payments shall include payments in respect of realty taxes owing in respect of any of the Bricore Properties, (ii) the right to make repairs and improvements to the Bricore Properties or any parts thereof and (iii) the right to make payments for ongoing services in respect of the Bricore Properties;

. . .

(g) subject to paragraphs 7C, 7D and 7E hereof, **the power to work with, consult with and assist the court-appointed selling officer (CMN Calgary Inc.) to negotiate with parties who make offers to purchase** the Bricore Properties in a manner substantially in accordance with the process and proposed timeline for solicitation of such offers to purchase the Bricore Properties recommended by the Monitor in the Monitor's Third Report. ...[4] [Emphasis added.]

12 On June 19, 2006, Koch J. authorized the CRO to accept an offer to purchase the Bricore Properties, including the Building, made by an undisclosed purchaser (the "Proposed Purchaser"), which offer to purchase was filed with the Court and temporarily sealed. The order directed that any further negotiations between the CRO and the Proposed Purchaser were to be completed by August 1, 2006.

13 Negotiations were protracted resulting in a further series of orders:

(a) August 1, 2006: Koch J. extended the timeframe for due diligence and further negotiations to be completed by August 15, 2006;[5]
(b) August 18, 2006: Koch J. authorized the CRO to accept an Amended Offer to Purchase made the 15th day of August, 2006. The Amended Offer to Purchase contemplated the sale by Bricore to the Proposed Purchaser of six of the seven Bricore Properties including the Building;[6]
(c) September 25, 2006: The closing date for the proposed sale by Bricore to the Proposed Purchaser of the six properties was extended from October 15, 2006 to November 15, 2006;[7]
(d) October 10, 2006: Koch J. approved the sale of the six properties to their respective purchasers; in the case of the Building, it was sold to 101086849 Saskatchewan Ltd.[8]

Koch J. ultimately approved the sale of the Building to 101086849 Saskatchewan Ltd. as of November 30, 2006.

14 ICR said it had introduced the City of Regina to the opportunity to purchase the Building and it was therefore entitled to a real estate commission based on the sale price to the City of Regina. Once its claim was denied by the Monitor, ICR applied to Koch J. on March 22, 2007 contend-

ing that (a) "prior Orders of this Court requiring leave to commence action" against Bricore and the CRO "do not apply in the circumstances"; and (b) in the alternative, "it is entitled to an order granting leave to commence the proposed proceedings." In support of its notice of motion, ICR filed a draft statement of claim and a supporting affidavit with exhibits.

15 This is the substance of ICR's draft statement of claim against Bricore and the CRO:

> 4. At all material times Duval's actions in relation to the matters in issue in the within proceedings were carried out in his capacity as chief restructuring officer for the Bricore Group.
>
> ...
>
> 7. Duval, pursuant to Order of the Court under the *Companies' Creditors Arrangement Act*, was authorized in accordance in such order to market various assets of the Bricore Group, including the [Building]. [sic]
> 8. In the course of his efforts to market the [Building], Duval enlisted the aid of the plaintiff and its commercial realtors, licensed as brokers under *The Real Estate Act*.
> 9. The plaintiff, in its efforts to market the properties of the Bricore Group under the direction of Duval, including the [Building], introduced a prospective purchaser to Duval, namely the City of Regina.
> 10. By agreement dated September 27, 2006 made between the Plaintiff, the Bricore Group and Duval, it was agreed that the Plaintiff would be protected as the agent of record to a commission for the sale of any of the Bricore Group Properties for which the Plaintiff had located a purchaser.
> 11. The Plaintiff says that at the time of execution of the said Agreement by Duval on September 28, 2006, the City of Regina was in the process of doing its "due diligence" on the [Building] and it was expected that a sale of the [Building] to the City of Regina would be completed in the near future.
> 12. The Plaintiff says that, contrary to the Agreement entered into between the Plaintiff and the Defendants, Duval, **without the Plaintiff's knowledge and in bad faith,** proceeded to arrange to sell the [Building] to a third party, namely 101086849 Saskatchewan ltd., which became the owner of the [Building] on or about January 3, 2007.[9] [Emphasis added.]

16 While the words "bad faith" are not repeated in the affidavit evidence, Paul Mehlsen, the principal of ICR, swore an affidavit in support of the application for leave, stating that he had examined the statement of claim and that to the best of his knowledge the allegations contained therein are true. His affidavit also states:

> 13. Insofar as the attached letter states that "ICR is protected as agent of record", this is commonly understood in the industry as meaning that in the event a sale of the property took place in the protected period to a purchaser introduced by the agent of record, then they would receive the usual commission for such sale, which in this case would be 5%.

14. It would appear from the attached exhibit "A" that Larry Ruf arranged to have the Respondent, Maurice Duval, agree to the arrangement, as well as adding that the protection would extend to the closing of any sale or December 31, 2006, whichever was the earlier.
15. Attached hereto and marked as exhibit "B" to this my Affidavit is a true copy of an email dated October 31, 2006 from Larry Ruf to Evan Hubick, Jim Kambeitz and Jim Thompson of the proposed plaintiff, ICR. Such email states in part:

> I can confirm, on behalf of the CRO, that protection for the potential deals referenced in your letter of September 27, 2006 will be honoured to November 30, 2006.[10]

17 Exhibit "A" is a letter dated September 27, 2006 from Mr. Jim Thompson of ICR to Mr. Larry Ruf of Horizon West Management Inc. It reads, in material part, as follows:

> Please be advised that we have had ongoing discussions with potential buyers and tenants as follows:
>
> 1. 1500 - 4th Avenue [Department of Education Building] - we have been in regular contact with the City of Regina Real Estate Department for over a year regarding the possibility of this site being acquired by the City. In July a large contingent of City employees including a number from the Works and Engineering Department toured the building over several hours. We have had continuous follow up with a Real Estate Department official who confirmed recently that there still is an interest in the property and officials are in the due diligence stage. In addition, we have exposed the property to Alfords Furniture and Flooring who have an ongoing interest.
>
> . . .
>
> The purpose of this memo is to reinforce our ongoing efforts to market and represent the Bricore assets in Regina. We are aware that the properties are under contract to sell and request that ICR be protected in the specific situations as outlined.
>
> In the event we are not able to carry on in a formal fashion we would ask that you sign where indicated to acknowledge that ICR is protected as the agent of record for the Tenants/Buyers noted herein for a period to extend to December 31, 2006.[11]

The words "December 31, 2006" are struck out and these words are added: "Date of closing of a sale or December 31, 2006 whichever is earlier." Mr. Ruf's name is crossed out and the signature of Maurice Duval, Chief Restructuring Officer is added in its place.

18 Mr. Ruf, on behalf of Bricore, refuted ICR's claim in a sworn affidavit stating:

3. At no time did I approach ICR Regina in 2006 to initiate discussions regarding the sale or lease of the Department of Education Building.
4. I received two or three unsolicited telephone calls regarding the Department of Education Building in September of 2006 from representatives of ICR Regina (including Paul Mehlsen, Jim Kambeitz and Evan Hubick). During those calls, representatives of ICR Regina informed me that they knew of certain parties who would be interested in purchasing the Department of Education Building. In response to each of these inquiries, I informed representatives of ICR:

(a) that I had no authority to participate in communications regarding a sale of the Department of Education Building, and that all such inquiries should be directed to Maurice Duval, the court-appointed Chief Restructuring Officer of Bricore Group; and

(b) that further information on the status of the restructuring of Bricore Group could be obtained on the website of MLT.[12]

19 The CRO filed a report in response to ICR:

6. At the time of my review of the September 27, 2006 letter from ICR Regina, I was working very hard to attempt to negotiate and conclude the final closing of the sale of the Bricore Properties to the purchasers identified in the Accepted Offer to Purchase. I fully expected that sale to close (as it ultimately did effective November 30, 2006). However, I determined that, in the event that such sale failed to close, Bricore Group would need to identify other potential purchasers of the Bricore Properties very quickly. I therefore decided that it would be appropriate for Bricore Group, by the CRO, to agree to protect ICR Regina for a commission in the unlikely event that the sale contemplated by the Accepted Offer to Purchase did not close, and it subsequently became necessary for Bricore Group instead to conclude a sale of the Bricore Properties to one or more of the prospective purchasers of the three Bricore Properties located in Regina (as specifically identified in Mr. Thompson's September 27, 2006 letter). For that reason, and that reason only, I agreed to sign the September 27, 2006 letter.
7. In signing the September 27, 2006 letter, my intention, as court-appointed CRO of Bricore Group, was to strike an agreement that, in the unlikely event that:

(a) the sale of the Bricore Properties identified in the Accepted Offer to Purchase fell apart; and

(b) it subsequently became necessary for Bricore Group to sell the Bricore Properties to one or more of the prospective purchasers identified in the September 27, 2006 letter;

then Bricore Group would agree to pay a commission to ICR Regina. In regard to the Department of Education Building located at 1500 - 4th Avenue in Regina (the "Department of Education Building"), the two prospective purchasers in respect of which ICR Regina was protected for a commission were the City of Regina and Alford's Furniture and Flooring. The reference to closing date was to the closing of the Avenue Sale, which occurred effective November 30, 2006.

8. In January of 2007, after much effort and expenditure of resources, the sale of the Bricore Properties contemplated in the Accepted Offer to Purchase was unconditionally closed (effective November 30, 2006). The entity named as purchaser of the Department of Education Building in the final closing documents was a numbered Saskatchewan company controlled by Avenue Commercial Group of Calgary. Such entity was a nominee corporation operating entirely at arm's length from the City of Regina and Bricore Group. At all times after June 2006, the CRO had no authority to sell the property, as it was already sold.
9. It was subsequently brought to my attention that the numbered company which purchased the Department of Education Building had promptly "flipped" such property to the City of Regina. I knew nothing of such a proposed flip prior to learning of it from ICR Regina.[13]

20 To rebut this, Mr. Mehlsen of ICR swore a further affidavit deposing:

3. As indicated in my Affidavit sworn March 22, 2007, ICR had an ongoing relationship with the Bricore Companies prior to 2006. This relationship continued after the Initial Order in January 2006 in that ICR continued to show Bricore Properties for lease or sale, including the [Building].
4. Attached hereto and marked as Exhibit E to this my Affidavit is a true copy of an e-mail from my contact at the City of Regina ... dated April 13, 2006 advising that the City was interested in purchasing the [Building].
5. I immediately passed this information along to Larry Ruf, as evidenced in the e-mail dated April 13, 2006 attached hereto and marked as Exhibit "F" to this my affidavit.
6. In reply to paras. 2 and 12 of Mr. Duval's Report, it was not known to ICR that all of the Bricore Properties were sold as claimed; rather, it was known that some of the Bricore Properties had been sold, but not the subject property, [the Building], as it was the "ugly duckling" of the Bricore Properties and therefore had been excluded from the reported sale. ICR's efforts were directed at the sale of [the Building] and leasing the other two Regina properties.
7. In response to para. 13 of Mr. Duval's Report, it is true that there were no direct communications between ICR and Mr. Duval as all communications were with Larry Ruf, who indicated that he acted under the authority and with the knowledge of Mr. Duval.
8. As a result of contact in early summer with Mr. Ruf, ICR actively marketed the [Building] by placing signage on the property, developing an "information" or "fact" sheet detailing aspects of the building, and showed the property to the City of Regina and other prospective purchasers.

. . .

11. Because of delays on the part of the City of Regina in its due diligence and the fact that ICR has been working without any formal agreement, I caused the letter of September 27, 2006 (exhibit "A" to my Affidavit sworn March 22, 2007) to be sent.

12. At no time did either Mr. Ruf or Mr. Duval advise that the [Building] was sold and that ICR's role was merely that of a "backup offer". The signed letter of September 27, 2006 and Mr. Ruf 's e-mail of October 31, 2006 make no mention of these events and this was never disclosed to myself or ICR.

. . .

14. In hindsight, it would appear that the confidential information concerning the intention of the City of Regina to purchase the [Building] that was provided by myself and representatives of ICR to Mr. Ruf and Mr. Duval was communicated to the [Proposed Purchaser], who then incorporated 101086849 Saskatchewan Ltd. to take advantage of this opportunity. Attached hereto and marked as exhibit "I" to this my Affidavit is a true copy of a Profile Report from the Corporate Registry indicating that 101086849 Saskatchewan Ltd. was incorporated by solicitors as a "shelf company" on May 31, 2006, with new Directors in the form of Garry Bobke and Steven Butt taking office on August 17, 2006.
15. My understanding is that the [Proposed Purchaser] initially excluded the [Building] from their offer to purchase the Bricore Group properties and made a separate offer through 101086849 Saskatchewan Ltd. when they were made aware of the confidential information about the City of Regina's plans to purchase the property.[14]

21 In refusing ICR leave to commence action, Koch J. wrote:

> [1] On January 4, 2006, I granted an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") protecting the respondent corporations Bricore Land Group Ltd. et al. (collectively "Bricore"), from claims of their respective creditors. The order (paragraph 5) explicitly provides in accordance with the authority conferred upon the Court pursuant to s. 11(3) of the *CCAA* that "no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property". The initial period of 30 days has been extended many times. The stay of proceedings continues in effect. Ernst & Young Inc. was appointed monitor. That appointment continues.
>
> ...
>
> [16] Although the interpretation of s. 11.3 of the *CCAA* is not necessarily well settled in all aspects, it appears that the import of s. 11.3, which was introduced as an amendment to the Act in 1997, is this:
>
> (a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. If s. 11.3 is interpreted too literally, it can render the stay provisions ineffective, leaving the collective good of the restructuring process subservient to the self-interest of a single creditor. Clearly, s. 11.3 must be construed so as not to defeat the overall

objectives of the Act. See *Smith Brothers Contracting Ltd. (Re)* (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.).

(b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).

(c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re), supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. Counsel have cited the case of *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, 2006 SCC 35. The circumstances in that case are somewhat analogous but it is of limited assistance because the *CCAA* does not contain a provision equivalent to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which expressly provides that no action lies against the superintendent, an official receiver, an interim receiver or a trustee in certain circumstances without leave of the Court.

[17] For reasons outlined *supra*, I do not find the cause of action ICR asserts against Bricore to be tenable, not even as against Bricore Land Group Ltd. Therefore, the application to lift the stay of proceedings to permit the proposed action against Bricore is dismissed.

[18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court- appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.

[19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to

> accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.[15]

IV. Issue #1: Does the stay of proceedings imposed by the supervising *CCAA* judge under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?

22 ICR argues that, as a post-filing creditor, the Initial Order does not apply to it, either as a matter of law or on the basis of a proper interpretation of the Initial Order.

23 The authority to make an order staying and prohibiting proceedings against a debtor company is contained in s. 11(3) of the *CCAA*:

> 11.(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

24 Pursuant to s. 11(3) of the *CCAA*, Koch J. granted the Initial Order providing for a stay and prohibition of new proceedings in these terms:

> 5. During the 30-day period from and after the date of filing of this application on January 4, 2006 or during the period of any extension of such 30-day period granted by further order of the Court (the "Stay Period"), no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property. Any and all Enforcement or Proceedings already commenced (as at the date of this Order) against or in respect of Bricore Group or the Property are hereby stayed and suspended.
> 6. During the Stay Period, no person shall assert, invoke, rely upon, exercise or attempt to assert, invoke, rely upon or exercise any rights:
>
> a) against Bricore Group or the Property;
> b) as a result of any default or non-performance by Bricore Group, the making or filing of this proceeding or any admission or evidence in this proceeding, or

c) in respect of any action taken by Bricore Group or in respect of any of the Property under, pursuant to or in furtherance of this Order.

. . .

11. Notwithstanding any of the provisions of this Order:

a) no creditor of Bricore Group shall be under any obligation, by reason only of the issuance of this Order, to advance or re-advance any monies or otherwise extend any credit to Bricore Group, except as such creditor may agree; and
b) Bricore Group may, by written consent of its counsel of record, agree to waive any of the protections that this Order provides to them, whether such waiver is given in respect of a single creditor or class of creditors or is given in respect of all creditors generally.

...

13. Any act or action taken or notice given by creditors or other Persons or their agents, from and after 12:01 a.m. (local Saskatoon time) on the date of the filing of the application for this Order to the time of the granting of this Order, to commence or continue Enforcement or to take any Proceeding (including, without limitation, the application of funds in reduction of any debt, set-off or the consolidation of accounts) is, unless the Court orders otherwise, deemed not to have been taken or given.

"Proceeding" is defined in para. 22 of Schedule "A" to the Initial Order as "a lawsuit, legal action, court application, arbitration, hearing, mediation process, enforcement process, grievance, extrajudicial proceeding of any kind or other proceeding of any kind."

25 The authority to extend an initial order is contained in s. 11(4) of the *CCAA:*

11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

Koch J., pursuant to this subsection, extended the stay many times and the stay continues in force.

26 As authority for the proposition that the Initial Order does not stay proceedings with respect to claims that arise after the Initial Order, ICR's counsel cites Professor Honsberger's *Debt Restructuring Principles & Practice*:

> The scope of an order staying proceedings extends only to claims that arose prior to the order. A proceeding based on a claim that arose after an order was made staying proceedings is not affected by the stay.[16] [Footnote omitted.]

The only case footnoted is *Ramsay Plate Glass Co. v. Modern Wood Products Ltd.*[17] *In my respectful view, the facts in Ramsay Glass* narrow its application.

27 In *Ramsay Glass*, the initial *CCAA* order, dated April 12, 1951, suspended all proceedings against Modern Wood Products Ltd. Modern Wood Products made an offer of compromise that was accepted by its existing creditors and approved by the Court on May 21, 1951. Ramsay Glass sought to enforce a claim against Modern Wood Products that arose in 1953. Modern Wood Products sought to strike Ramsay Glass's claim on the basis that its proceedings were stayed by the April 1951 order.

28 In dismissing the application to strike, Prevost J. wrote:

> CONSIDERING that said claim is not provable in bankruptcy and that under *The Bankruptcy Act* an order staying proceedings would not apply to such a claim: *Richardson & Co. v. Storey*, 23 C.B.R. 145, [1942] 1 D.L.R. 182, Abr. Con. 301; *In re Bolf*, 26 C.B.R. 149, [1945] Que. S.C. 173, Abr. Con. 303;
>
> CONSIDERING that s. 10 of *The Companies' Creditors Arrangement Act* and the judgments rendered under its authority should receive the same interpretation in this respect as s. 40 of *The Bankruptcy Act*;
>
> CONSIDERING that the present claim is in no way affected by the judgment rendered on April 12, 1951 by Boyer J. under *The Companies' Creditors Arrangement Act*, ordering suspension of all proceedings against defendant company the present claim being posterior to said date and having not been made the subject of any compromise or arrangement homologated by this Court;
>
> CONSIDERING that the present claim arose in 1953, two years after the judgment of Boyer J. homologating the compromise following the non-payment by defendant company of merchandise purchased by it from plaintiff company during said year;[18]

I do not interpret *Ramsay Glass* as permitting a post-filing claimant to commence an action against a debtor company without obtaining leave while the *CCAA* stay is in effect. In my opinion, *Ramsay Glass* can be read as authority for the proposition that a post-filing creditor need not apply for leave after the stay has been lifted. In that respect, it parallels *360networks Inc., Re;*[19] *Stelco Inc., (Re);*[20] *and Campeau v. Olympia & York Developments Ltd.*[21]

29 In 360networks, a creditor (Caterpillar Financial Services Limited) had both pre-filing and post-filing claims. Caterpillar applied, *inter alia*, for an order lifting the stay of proceedings. Tysoe J. wrote:

> 8 On the hearing of the applications, Caterpillar continued to take the position that all of its claims could properly be determined within the *CCAA* proceedings on the first of its two applications. I agree that the Deficiency Claim and the Secured Creditor Claim are properly determinable within the *CCAA* proceedings, but it is my view that it would not be appropriate to make determinations in respect of the Trust Claim or the Post-Filing Claim in the *CCAA* proceedings. The only remaining thing to be done in the *CCAA* proceedings is the determination of the validity of claims for the purposes of the Restructuring Plan (with Caterpillar's claims being the only unresolved ones). **Neither the Trust Claim nor the Post-Filing Claim falls into this category of claim because each of these types of claim is not affected by the Restructuring Plan.** Indeed, the Post-Filing Claim was not asserted in Caterpillar's proof of claim and surely cannot be adjudicated upon within Caterpillar's appeal of the disallowance of its proof of claim. The B.C. Court of Appeal has recently affirmed, in *United Properties Ltd. v. 642433 B.C. Ltd.*, [2003] B.C.J. No. 852, 2003 BCCA 203 (B.C.C.A.), that it is appropriate for the court to decline jurisdiction to resolve a dispute in *CCAA* proceedings which, although it may relate to them, is not part and parcel of the proceedings. [Emphasis added.]
>
> . . .
>
> 11 Counsel for Caterpillar relies for the first ground on the fact that s. 12 of the *CCAA* authorizes the court to deal with secured and unsecured claims. However, s. 12 deals with the determination of claims for the purposes of the CCAA and does not authorize the court to determine claims which fall outside of *CCAA* proceedings, such as the Trust Claim and the Post-Filing Claim.[22]

In the result, Tysoe J. lifted the stay so as to permit an action to be commenced to resolve all of Caterpillar's claims. The significance of the decision for our purposes is that the Court in *360networks* considered the stay as applying to claims that arose after the initial order.

30 In *Stelco,* Farley J., relying on *360networks,* also held that the post-filing creditor's claim in that case "continues to be stayed and is to be dealt with in the ordinary course of litigation after Stelco's *CCAA* protection is terminated."[23]

31 *Campeau* does not deal with a post-filing creditor, but it does address the situation where a creditor, whose claim is not accepted as part of the plan of arrangement, wants to commence action. Blair J. (as he then was) refused an application brought by Robert Campeau and the Campeau Corporations to lift the stay of proceeding imposed by the initial order. In doing so, he wrote:

> 24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding - in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of

prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York - whose alleged misdeeds are the real focal point of the attack on both sets of defendants - is able to participate.

25. In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

    1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.
    2. In this sense, the Campeau claim - like other secured, undersecured, unsecured, and contingent claims - must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings - i.e. the action and the CCAA proceeding - the scales tip in favour of dealing with the Campeau claim in the context of the latter:

       see *Attorney General v. Arthur Andersen & Co.* (United Kingdom) (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim, [1992] O.J. No. 1330, supra.* **I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan".** This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.[24] [Emphasis added.]

Campeau is further authority for the proposition that a supervising *CCAA* judge can refuse a prospective creditor, who is not part of the plan of arrangement, leave to commence proceedings and that the creditor may commence action after the stay is lifted.

32 Each of *360networks*[25], *Stelco*[26] *and Campeau*[27] *supports the proposition that while a stay of proceedings is extant, an application to lift the stay must be made to permit an action to be commenced against a debtor that is subject to a CCAA* order, regardless of whether the claim arises before or after the initial order, or whether the prospective creditor is able to take part in the plan of arrangement.

33 Prevost J. in *Ramsay Glass* points out that under the *Bankruptcy and Insolvency Act*[28] (*the* "*BIA*") the stay of proceedings does not extend to a claim not provable in bankruptcy. This is so, however, because of the definition of "claim provable in bankruptcy" and ss. 69.3(1) and s. 121. (See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*.[29]) While s. 12 of the *CCAA* defines "claim" by reference to "claim provable in bankruptcy," it has not been interpreted as limiting the extent of the stay.

34 On the face of ss. 11(3) and (4) of the *CCAA*, the authority to safeguard the company is not limited to staying existing actions, but extends to "prohibiting, until otherwise ordered by the court, the commencement of ... any other action, suit or proceeding against the company." Unlike the *BIA* there are no words limiting this phrase to debts or claims in existence at the time of the initial order.

35 With respect to the wording of the Initial Order, there can be no question that it applies to post-filing creditors. The broad wording of paras. 5 and 6 of the Initial Order and the definition of "proceeding" confirm this. No distinction is made between creditors in existence at the time of the Initial Order and those who become creditors after. Paragraph 11(b) also establishes a mechanism for post-filing creditors to seek relief by obtaining an exemption from the protection afforded Bricore, which would include the prohibition of proceedings. The obvious implication is that the prohibition of proceedings applies to post-filing creditors, subject, of course, to obtaining leave of the Court to commence action.

V. Issue #2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?

36 ICR argued that by the addition of s. 11.3 in 1997[30] to the *CCAA*, Parliament intended to grant a post-filing creditor the right to sue without obtaining leave.

37 In my respectful view, s. 11.3 cannot be interpreted in the way in which ICR contends. Indeed, a more logical and internally consistent reading of s. 11.3 and the other sections of the *CCAA* is to permit the supervising judge to determine, as a matter of discretion, whether an action commenced by a post-filing creditor should be permitted to proceed.

38 Section 11.3 forms part of a comprehensive series of sections addressing the question of stays added in 1997 and 2001:[31]

> No stay, etc., in certain cases
>
> 11.1 (2) No order may be made under this Act **staying or restraining** the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association. (Added by S.C. 1997, c. 12, s. 124)
>
> No stay, etc., in certain cases
>
> 11.11 No order may be made under this Act **staying or restraining**

(a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Co-operative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act;*
(b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or
(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*. (Added by S.C. 2001, c. 9, s. 577.)

No stay, etc. in certain cases

11.2 No order may be made under section 11 **staying or restraining any action, suit or proceeding** against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company. (Added by S.C. 1997, c. 12, s. 124)

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
(b) requiring the further advance of money or credit. (Added by S.C. 1997, c. 12, s. 124)

[Emphasis added.]

39 In ss. 11.1(2), 11.11 and 11.2, Parliament uses the words "staying or restraining" to describe those circumstances limiting the scope of the stay power, but these words are not repeated in s. 11.3. This application of the *expressio unius* principle supports the obvious implication that s. 11.3 does not limit the authority of the court to stay all proceedings.

40 While the debates of the House of Commons in Hansard do not comment on s. 11.3, several text book authors assist with the task of interpretation. Professor Honsberger states:

> A distinction is made between the compulsory supply of goods and services and the extension of credit by suppliers to a debtor company in CCAA proceedings.
>
> Suppliers may be enjoined from cutting off services or discontinuing the supply of goods by reason of there being arrears of payment provided the debtor commences regular payments for current deliveries.

> However, no order made under s. 11 of the Act has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.
>
> . . .
>
> ... A court could make a similar order after the 1997 amendments provided it stipulated that the debtor company made immediate payment for "goods, services, use of leased or licensed property or other valuable consideration after the order is made.[32]

[Footnotes omitted.]

41 Professor McLaren similarly comments in his text "Canadian Commercial Reorganization":[33]

> 3.800 ... Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in issuing stays. Under s. 11.3(*a*), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(*a*) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.

42 Finally, Professor Sarra in *Rescue! The Companies' Creditors Arrangement Act*[34] provides this insight:

> While the court cannot compel a supplier to continue to extend credit to the debtor during a *CCAA* proceeding, the court can protect trade suppliers that choose to supply goods or credit during the stay period by granting them a charge on the assets of the debtor that will rank ahead of other claims. While section 11.3 of the *CCAA* states that no stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods, services or the use of leased or licensed property, or requiring the further advance of money or credit, trade suppliers were often continuing credit only to find that they had lost further assets during the workout period because of their priority in the hierarchy of claims. Hence the practice of post-petition trade credit priority charges developed, first recognized in Alberta.[35] [Footnotes omitted.]

43 *Smith Bros. Contracting Ltd. (Re)*[36] also supports a narrow reading of s. 11.3. After citing *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[37] and *Quintette Coal Limited. v. Nippon Steel Corporation*[38] with respect to the intention of Parliament and the object and scheme of the *CCAA*, Bauman J. in *Smith Bros.* wrote:

> 45 It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:
>
> > ... where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries ...
>
> 46 Parliament has now precluded that by adding s. 11.3(a) to the CCAA. It is instructive to note, however, that the subsection has been added against the backdrop of jurisprudence which has underlined the very broad scope of the court's jurisdiction to stay proceedings under s. 11.

47 To repeat the relevant portion of the section:

> 11.3 No order made under s. 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for ... use of leased or licenced property ... provided after the order is made;
>
> It is noted that the remedy which is preserved for creditors is a relatively narrow one; it is the right to require immediate payment for the use of the leased property.[39]

Thus, Bauman J. interpreted s. 11.3 in accordance with Parliament's intention and the object and scheme of the C*CAA* as creating a narrow right - the right to withhold services without immediate payment.

44 I agree with Bricore's counsel. When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the *CCAA*, s. 11.3 allows the supplier the right:

(a) to refuse to supply any such goods or services at all;
(b) to supply such goods or services on a "cash on demand" basis only;
(c) to negotiate with the insolvent corporation for the amendment of the *CCAA* Order to create a post-filing supplier's charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or
(d) to take the risk of supplying goods or services on credit.

Where the Initial Order imposes a stay of proceedings and prohibits further proceedings, s. 11.3 does not permit the supplier of goods or services to sue without obtaining leave of the court to do so.

VI. Issue #3: If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?

45 Having determined that the stay and prohibition of proceedings applies to ICR, notwithstanding its status as a post-filing creditor, the next issue is whether Koch J. erred in refusing to lift the stay on the basis that the claim was not tenable.

46 The claim against Bricore is presumably against Bricore both in its own right and pursuant to its indemnification agreement with the CRO. Paragraph 18 of the CRO Order requires Bricore to indemnify the CRO:

> 18. Bricore Group shall indemnify and hold harmless the CRO from and against all costs (including, without limitation, defence costs), claims, charges, expenses, liabilities and obligations of any nature whatsoever incurred by the CRO that may arise as a result of any matter directly or indirectly relating to or pertaining to any one or more of:
>
> (a) the CRO's position or involvement with Bricore Group;
> (b) the CRO's administration of the management, operations and business and financial affairs of Bricore Group;
> (c) any sale of all or part of the Property pursuant to these proceedings;
> (d) any plan or plans of compromise or arrangement under the CCAA between Bricore Group and one or more classes of its creditors; and/or
> (e) any action or proceeding to which the CRO may be made a party by reason of having taken over the management of the business of Bricore Group.[40]

47 The authority to lift the stay imposed by the Initial Order against Bricore is contained in s. 11(4) of the *CCAA*:

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> ...
>
> (c) prohibiting, **until otherwise ordered by the court**, the commencement of or proceeding with any other action, suit or proceeding against the company. [Emphasis added.]

48 This is a discretionary power, which invokes the standard of appellate review stated as follows:

> [22] ... [T]he function of an appellate court is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that members of the appellate court would have exercised the discretion differently. The function of the appellate court is one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evi-

> dence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order.[41]

It is often expressed as permitting intervention where the judge acts arbitrarily, on a wrong principle, or on an erroneous view of the facts, or when the appeal court is satisfied that there is likely to be a failure of justice as a result of the refusal. See: *Martin v. Deutch.*[42]

49 With respect to discretionary decisions made under the CCAA, there is a particular reluctance to intervene. The reluctance is justified on the basis of the specialization of the judges who have carriage of complex proceedings that are often replete with compromised solutions.[43] This does not mean that the Court of Appeal can turn a blind eye or permit an injustice, but it does provide the backdrop against which *CCAA* discretionary decisions are reviewed.

50 Unlike the *BIA*,[44] the *CCAA* contains no specific statutory test to provide guidance on the circumstances in which a *CCAA* stay of proceedings is to be lifted. Some guidance, nonetheless, can be found in the statute and in the jurisprudence.

51 Subsection 11(6) of the *CCAA* states:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

While the reference to "order" in the opening clause "[t]he court shall not make an order under s. (3) or (4)" may very well be to the Initial Order and not to the order lifting the stay, s. 11(6) and, in particular, its legislative history, are also relevant to an application to lift the stay.

52 Subsection 11(6) was brought into effect in 1997 by Bill C-5, which enacted "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act." When Bill C-5 received third reading on October 23, 1996, s. 11(6) took this form:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that:
>
> (i) the applicant has acted, and is acting, in good faith and with due diligence,
> (ii) a viable compromise or arrangement could likely be made in respect of the company, if the order being applied for were made, and
> (iii) no creditor would be materially prejudiced if the order being applied for were made.

After Bill C-5 received third reading, it was referred to the Standing Senate Committee on Banking, Trade and Commerce.[45] The Committee reported:

> A number of insolvency experts were of the opinion that the proposed amendment would make it virtually impossible to obtain extensions of the initial 30-day stay under the CCAA and force companies to file plans of arrangement within 30 days after the making of the initial stay order.
>
> Others suggested that some CCAA reorganizations would have turned out differently if the amendment had been in place.
>
> . . .
>
> Of the submissions received about proposed subsection 11(6), all but one condemned the provision.
>
> ...
>
> The CLHIA [Canadian Life and Health Insurance Association] argued that the amendment to the bill would be a significant improvement to the CCAA for four reasons:
>
> (a) it would give direction to the courts as to the tests that must be met before the extension order was granted;
> (b) it would more closely align the CCAA with the BIA;
> (c) the tests are well-established under the BIA and have received extensive scrutiny and study; and
> (d) the tests would direct the courts to consider how the stay would affect creditors. [Footnote omitted.]
>
> . . .
>
> The Committee shares the concerns expressed about the potential impact of proposed subsection 11(6) of the CCAA, particularly the concern that the CCAA may no longer be a sufficiently flexible vehicle for large, complex corporate reorganizations.
>
> While the Committee fully supports initiatives to align the provisions of the CCAA more closely with those of the BIA, these initiatives must be the subject of thorough discussion and analysis before [making] their way into legislation. Unfortunately, such discussion did not take place prior [to] the introduction of proposed subsection 11(6).[46]

Notwithstanding the submissions of the Canadian Life and Health Insurance Association, the Standing Committee recommended that Bill C-5 be amended by striking subparagraphs 11(6)(b)(ii) and (iii).

53 The House of Commons concurred in the Amendments recommended by the Senate on April 15, 1997.[47] Bill C-5, as thus amended, received Royal Assent on April 25, 1997 and was proclaimed in its present skeletal form on September 30, 1997.[48] Neither the amending legislation[49] nor the proposed Bill presently before the Senate[50] make any change to s. 11 in this regard.

54 The Senate's and Parliament's specific rejection of a limitation on the court's discretion is a strong indication of Parliamentary intention. The fact that Parliament did not see fit to limit the discretion in any significant manner, despite having been given the opportunity to do so, confirms the broad discretion given in ss. 11(3) and (4) to the supervising *CCAA* judge. Discretion is never completely unfettered, but an appellate court should be reluctant to impose rigid tests, standards or criteria where Parliament has declined to do so. Some guidance can be taken from the jurisprudence.

55 In *Canadian Airlines Corp., Re*[51] *Paperny J. (as she then was) indicated that the obligation of the supervising CCAA* judge is to "always have regard to the particular facts" and "to balance" the interests. As Farley J. said in *Ivaco Inc., Re*,[52] the supervising *CCAA* judge must also be concerned not to permit one creditor to mount "an indirect but devastating attack on the CCAA stay" so as to give one creditor an inappropriate advantage over other unsecured creditors as well as over secured creditors with priority.

56 In *Ivaco Inc. (Re)*[53] Ground J. stated this to be the criteria to determine whether a stay should be lifted:

> 20 It appears to me that the criteria which the court must consider in determining whether to lift a stay, being whether the proposed cause of action is tenable, the balancing of interests as between the parties, the relative prejudice to the parties, and whether the proposed action would be oppressive or vexatious or an abuse of the court process, would all be met with respect to a trial of issues to resolve interpretation of the APAs with respect to the calculation of the working capital adjustments.

Ground J. went on to confirm that finding a tenable or reasonable cause of action is not the only factor to be considered:

> 30 Even if the Statement of Claim did disclose a tenable or reasonable cause of action, there are a number of other factors which this court must consider which militate against the lifting of the stay in the circumstances of this case. The institution of the Proposed Action, even if a tight timetable is imposed, would inevitably result in considerable delay and complication with respect to the full distribution of the estate to the detriment of many small trade creditors and individual creditors as well as to pension claimants. In addition, it would appear from the evidence before this court that Heico has been aware of most of the matters alleged in the Statement of Claim for approximately 2 years and there does not appear to be any valid reason given for the delay in commencing the application to lift the stay.

57 Turning back to the case before us, Koch J.'s reasons for refusing to lift the stay were:

> [16] . . .
>
> (a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. ....
> (b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).
> (c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re), supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. ...[54]

He went on to find that the proposed action against Bricore was not "tenable."

58 On an application made by a post-filing creditor, a supervising *CCAA* judge can refuse to lift the stay on the basis that the creditor's claim is outside the *CCAA* process and the action can be commenced after the *CCAA* order is lifted. (See *360networks*[55] and *Stelco*[56]). Koch J. did not exercise this option. He was no doubt motivated in part by the fact that by the time ICR's claim could be tried, after the stay is no longer in effect, there may be no funds for it to claim as Bricore has now liquidated all of its assets and there remains, for all intents and purposes, a pool of funds only. The funds are subject to a plan of distribution, approved by the creditors, and will be distributed over this year.

59 Instead of simply rejecting the claim, Koch J. appears to have weighed the evidence to a certain extent as a means of deciding the next step. He concluded that the claim was not frivolous within the meaning of a Queen's Bench Rule 173 striking motion, but it was nonetheless an untenable claim. The question becomes whether a supervising CCAA judge can weigh a post-filing claim in this manner.

60 Professor Sarra comments on the anomalous position of liquidating *CCAA* proceedings:

> One policy issue that has not to date been fully explored is whether the *CCAA* should be used to effect an organized liquidation that should properly occur under the *BIA* or receivership proceedings. Increasingly, there are liquidating *CCAA* proceedings, whereby the debtor corporation is for all intents and purposes liquidated, but not under the supervision of a trustee in bankruptcy or in compliance with all of the requirements of the *BIA*. While creditors still must vote in support of such plans in the requisite amounts, there may be some public policy concerns

> regarding the use of a restructuring statute, under the broad scope of judicial discretion, to effect liquidation. ...[57]

The issue of whether the *CCAA* should be used for a liquidating, as opposed to a restructuring purpose, is not before us. In the case at bar, when the Initial Order was granted, it was thought possible that Bricore could be restructured. It was only some months after the Initial Order that it became clear that all of the assets would have to be sold. Our task at this point is to address the position of an undetermined claim arising post-filing in such a context.

61 If a claim had some reasonable prospect of success and were otherwise meritorious in the *CCAA* context, it seems inappropriate to refuse simply to lift the stay on the basis that the claim is outside the *CCAA* process knowing that, by the time the matter is heard in the ordinary course, there will be no assets remaining. On the other hand, it also seems inappropriate to delay distribution of the assets under a plan of arrangement, or make some other accommodation, for an action that is likely to fail. I should make it clear that I am not addressing the issue of whether a meritorious claimant can share in a proposed plan of distribution as a result of the liquidation of the assets. The issue before this Court is whether a post-filing creditor should be permitted to commence action, in the context of what is now a liquidating *CCAA*, and avail itself of whatever pre-judgment remedies might be available to it as a result of its claim.

62 In the face of a liquidating plan of arrangement, given the broad jurisdiction conferred by the *CCAA* on the Court, it seems appropriate that the supervising judge establish some mechanism to weigh the post-filing claim to determine the next step. The next step might entail permitting the claimant to commence action and attempt to convince a chambers judge to grant it a pre-judgment remedy in relation to the funds. It is also possible that the supervising judge may delay distribution of the funds, or some portion thereof, with or without full security for costs, or on such other terms as seems fit. Mechanisms to test the claim could include referral to a special claims officer, examination of the pertinent principal parties, or a settlement conference, or, as in this case, a preliminary examination by the supervising *CCAA* judge in chambers based on affidavit evidence.

63 In the case at bar, having determined that it was appropriate to assess ICR's claim in some way, did Koch J. err either in his statement of the appropriate test or in its application?

64 Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in *Ivaco*,[58] but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.[59]

65 Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the *CCAA* proceeding.

66 Given the broad discretion granted to a supervisory judge under the *CCAA*, as well as the knowledge and experience he or she gains from the ongoing dealings with the parties under the

proceedings, it would be contrary to the purpose of the *CCAA* for the law under it to develop in a restrictive way. Having regard for this, there ought not to be rigid requirements imposed on how a supervising *CCAA* judge must exercise his or her discretion with respect to lifting the stay.

67 Nonetheless, a broad test articulated along the lines of that in *Ma, Re*[60] *may be of assistance. The test from Ma, Re* is:

> 3 ... As stated in *Re Francisco*, [1995] O.J. No. 917, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

While the *Ma, Re* test was developed for use under the *BIA*, a test based on sound reasons, consistent with the scheme of the *CCAA*, to relieve against the stay imposed by ss. 11(3) and (4) of the *CCAA*, may be a better way to express the task of the chambers judge faced with a liquidating *CCAA* than a test based simply on *prima facie* case. It must be kept firmly in mind that the Court is dealing with a claimant that did not avail itself of the remedy of withholding services under s. 11.3. It is also useful to remind oneself that, in a case such as this, the *CCAA* proceeding began as a restructuring exercise with the attendant possibility of creating s. 11.3 claimants. The threshold must be a significant one, but not insurmountable.

68 In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

(a) the balance of convenience;
(b) the relative prejudice to the parties;
(c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising *CCAA* judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

69 While Koch J. did not state the test as broadly as I have, I agree that ICR does not reach the necessary threshold. ICR did not structure its affairs or establish a claim with the specificity that justifies the development of a remedy to allow it to participate in the liquidation of the Bricore assets. There is also no aspect of the liquidation that requires the Court in this case to be concerned. In particular, the stay need not be lifted, and no other step need be taken in the context of the *CCAA* proceedings in light of these facts:

1. as of January 30, 2006, the Building was subject to an exclusive Selling Officer Agreement that provided CMN Calgary with the exclusive right to sell the prop-

erty and to earn a commission of 1.25% of the purchase price,[61] which is significantly less than that being claimed by ICR at a 5% commission;

2. the sale to the Proposed Purchaser was a sale of six of the seven Bricore properties;
3. the trial judge received a report dated September 25, 2006 from the CRO recommending approval of the sale, which is two days before the alleged contract with ICR was proposed;[62]
4. in the September 25 report, the CRO advised the Court that "the total aggregate purchase price for the Bricore Properties obtained by Bricore in the Accepted Offer to Purchase represented the greatest value which it would be possible to obtain for all of the Bricore Properties;"[63]
5. the September 27, 2006 letter from ICR to Bricore, states "we are aware that the properties are under contract to sell ..."; and,
6. there was no sale from Bricore to the City of Regina.

70 While ICR denies knowledge of the sale, it is important to come back to the September 27th letter from ICR to Mr. Ruf. It states:

> **We are aware that the properties are under contract to sell** and request that ICR be protected in the specific situations as outlined.[64] [Emphasis added]

The addition by the CRO of these words, "Date of closing of **a sale** or December 31, 2006 whichever is earlier," to that letter adds further support to the veracity of the CRO's report to the effect that the CRO entered into discussions with ICR to provide for the eventuality of a failed sale to the purchaser with whom Bricore already had a contractual relationship.

71 Finally, in assessing Koch J.'s decision, and in determining the deference that is owed to it, I am not unmindful that he issued some 20 orders in 2006, pertaining to the Bricore restructuring, at least five of which dealt substantively with the Building and its prospective sale to the Proposed Purchaser.

72 Thus, applying the standard of review previously articulated, I cannot say that Koch J. acted arbitrarily, on a wrong principle, or on an erroneous view of the facts, or that a failure of justice is likely to result from the exercise of his discretion in the manner he did.

VII. Issue #4. Did the supervising *CCAA* judge make a reviewable error in refusing leave to commence an action against the CRO?

73 In addition to the indemnification provided by para. 18 of the CRO Order quoted above, the Order goes on to indicate the only circumstances in which the CRO can be sued personally:

> 20. For greater clarity, the CRO [*sic*]:
>
> ...
>
> (c) the CRO shall incur no liability or obligation as a result of his appointment or as a result of the fulfillment of his powers and duties as CRO, except as a result of instances of fraud, gross negligence or wilful misconduct on his part; and

(d) no Proceeding shall be commenced against the CRO as a result of or relating in any way to his appointment or to the fulfillment of his powers and duties as CRO, without prior leave of the Court on at least seven days' notice to Bricore Group, the CRO and legal counsel to Bricore Group.

21. Subject to paragraph 20 hereof, nothing in this Order shall restrict an action against the CRO for acts of gross negligence, bad faith or wilful misconduct committed by him.

Setting aside the obvious ambiguity in this Order, it can be taken that to assert a claim against the CRO personally, ICR had to claim "fraud, gross negligence, wilful misconduct or bad faith." ICR claimed "bad faith."

74 Based on para. 20(d) of the Initial Order, there is no question that ICR was required to obtain prior leave of the court. The issue thus becomes whether the supervising *CCAA* judge erred in exercising his discretion in refusing to lift the stay.

75 Koch J.'s reasons for refusing to lift the stay are these:

> [18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.
>
> [19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.[65]

76 Again, Koch J. employed the same mechanism that he used to assess the claim against Bricore. He considered the status of the CRO as an officer of the court, noted the ambiguity in the Order and weighed the evidence to a certain extent. The question he was answering was the sufficiency of the claim to permit an action to be commenced against the Court's officer.

77 Again, applying the standard of review with respect to discretionary orders, there is no basis upon which the Court can intervene with Koch J.'s refusal to lift the stay so as to permit an action against the CRO in his personal capacity.

VIII. Issue #5. Did the supervising *CCAA* judge err in awarding costs on a substantial indemnity basis?

78 Koch J. awarded substantial indemnity costs for this reason:

> [6] In my view, allegations of misconduct against a court officer are rare and exceptional. Therefore costs on this motion should be imposed on a substantial indemnity scale, although not on the full solicitor and client basis sought. Bricore is entitled to costs on the motion of $2,000.00, and Maurice Duval is entitled to costs of $1,000.00, payable in each instance by the applicant, ICR Commercial Real Estate (Regina) Ltd.[66]

79 I note that Newbury J.A. in *New Skeena Forest Products Inc*., *Re*[67] dismissed a challenge to a costs award, holding that "these are the kinds of considerations which the [*CCAA*] Chambers judge ... was especially qualified to make." And, of course, all costs orders are discretionary orders.

80 Nonetheless in this case, it would appear that the supervising *CCAA* judge erred. There is no basis upon which to order substantial indemnity costs with respect to the application to lift the stay in relation to Bricore. Bad faith was not alleged on its part. With respect to the CRO, the only basis upon which the stay could be lifted was to make an allegation of "bad faith." In the absence of some other factor, ICR cannot be faulted for making the very allegation that it was required to make in order to bring its application within the ambit of the stay of proceedings that had been granted.

81 In addition, while Koch J. indicated he was not awarding solicitor-and- client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and- client costs is still a punitive order and, as there is no authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs. As such, the award does not seem to meet the test established in *Siemens v. Bawolin*[68] and *Hashemian v. Wilde*[69] wherein it is stated that solicitor-and-client costs are generally awarded where there has been reprehensible, scandalous or egregious conduct on the part of one of the parties in the context of the litigation.

82 If the parties are unable to agree with respect to costs in the Court of Queen's Bench and in this Court, they may speak to the Registrar to fix a time for a conference call hearing regarding costs.

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

2 Appeal Book, pp. 17a and 22a [Affidavit of Paul Mehlsen].

3 *Ibid*. at pp. 27a and 32a.

4 Order (Appointment of Chief Restructuring Officer, Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.

5 Order (Extension of Stay of Proceedings) made August 1, 2006.

6 Order (Extension of Stay of Proceedings) made August 18, 2006.

7 Order (Extension of Stay of Proceedings, Extension of Appointment of CRO and Increase in Maximum CRO Remuneration; Increase to Administrative Charge) made September 25, 2006.

8 Order (Approving Sale; Extending Stay of Proceedings; Extending Appointment of CRO) made October 10, 2006.

9 Appeal Book, p. 7a-8a.

10 *Ibid*. at p. 12a.

11 *Ibid.* at pp. 14a-15a.

12 *Ibid*. at p. 46a.

13 *Ibid*. at pp. 38a-39a.

14 *Ibid*. at p. 51a-52a.

15 *ICR v. Bricore*, [2007] S.J. No. 154, 2007 SKQB 121.

16 John D. Honsberger, *Debt Restructuring: Principles and Practice*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 9.61.

17 (1954) 34 C.B.R. 82 (Que. S.C.). There are no cases referring to Ramsay Glass on the point that Prof. Honsberger raises in his text. (*Ptarmigan Airways Ltd. v. Federated Mining Corp*., [1973] 3 W.W.R. 723 (N.T.S.C.) mentions *Ramsay Glass* but not in reference to the point made here.)

18 *Ibid*. at p. 83.

19 (2003), 45 C.B.R. (4th) 151 (B.C.S.C.), appeal dismissed (2007), 27 C.B.R. (5th) 115 (B.C.C.A.).

20 (2005), 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]).

21 (1992), 14 C.B.R. (3d) 303 (Ont. Ct. (Gen. Div.)).

22 *360networks, supra* note 19.

23 *Stelco, supra* note 20 at para. 11.

24 *Campeau, supra* note 21.

25 *360networks, supra* note 19.

26 *Stelco, supra* note 20.

27 *Campeau, supra* note 21.

28 R.S.C. 1985, c. B-3.

29 Lloyd W. Houlden & Geoffrey B. Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2006) at pp. 562 and 789.

30 *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12, s. 124.

31 *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, s. 577.

32 *Debt Restructuring Principles and Practice, supra* note 16 at p. 9-88.1.

33 Richard H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 3-17.

34 Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007).

35 *Ibid.* at pp. 110-11.

36 (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.). See also *Air Canada, Re*, (2004), 47 C.B.R. (4th) 182 (Ont. S.C.J. [Commercial List]), and *Mosaic Group Inc., Re*. (2004), 3 C.B.R. (5th) 40 (Ont. S.C.J.).

37 [1991] 2 W.W.R. 136 (B.C.C.A.).

38 (1990), 51 B.C.L.R. (2d) 105 (C.A.).

39 *Smith Bros., supra* note 36.

40 Order (Appointment of Chief Restructuring Officer; Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.

41 Bayda C.J.S., for the majority, in *Smart v. South Saskatchewan Hospital Centre* (1989), 75 Sask.R. 34 (C.A.), paraphrasing Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 at 1046.

42 [1943] O.R. 683 at 698.

43 *Rescue! The Companies' Creditors Arrangement Act, supra* note 34 at pp. 88-92.

44 *Supra* note 28.

45 Twelfth Report of the Standing Senate Committee on Banking, Trade and Commerce, February 1997, unnumbered p. 3 of the Chairman's Report, and p. 18.

46 *Ibid*. at pp. 17-18.

47 Canada Legislative Index, 2nd Session, 35th Parliament, Bill C-5, S.C. 1997, c. 12, pp. 1 & 2.

48 *Ibid.*

49 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts,* S.C. 2005, c. 47, s. 128.

50 Bill C-62, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada,* 2005, 1st Sess., 39th Parl., 2006-2007.

51 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para 15.

52 (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial]) at para 3.

53 [2006] O.J. No. 5029 (Ont. S.C.J.).

54 *ICR v. Bricore, supra* note 15.

55 *360networks, supra* note 19.

56 *Stelco, supra* note 20.

57 *Rescue! The Companies' Creditors Arrangements Act, supra* note 34 at p. 82.

58 *Ivaco, supra* note 53.

59 *Ma, Re* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*, supra note 29 at p. 403.

60 Ibid.

61 Order (Extension of Stay, DIP Financing, Sale Process & Shareholder Proceedings) of Koch J. in Chambers dated February 13, 2006.

62 Order made September 25, 2006, *supra* note 7.

63 Appeal Book, p. 37a, para. 3.

64 *Supra* note 11.

65 *ICR v. Bricore, supra* note 15.

66 *ICR v. Bricore,* [2007] S.J. No. 253, 2007 SKQB 144.

67 [2005] 8 W.W.R. 224 (B.C.C.A.) at para. 23.

68 2002 SKCA 84, [2002] 11 W.W.R. 246.

69 2006 SKCA 126, [2007] 2 W.W.R. 52.

TAB 18

Case Name:

Humber Valley Resort Corp. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended AND IN THE MATTER OF a Plan of Compromise of Arrangement of Humber Valley Resort Corporation, Newfoundland Travel and Tourism Corporation, Humber Valley Construction Limited and Humber Valley Interiors Limited AND IN THE MATTER OF an Application of Maxium Financial Services Inc. for an Order lifting the Stay of Proceedings provided in the Initial Order dated September 5, 2008, as amended by the Order dated October 14, 2008

[2008] N.J. No. 318

2008 NLTD 174

50 C.B.R. (5th) 137

280 Nfld. & P.E.I.R. 268

2008 CarswellNfld 291

172 A.C.W.S. (3d) 290

Docket: 2008 01T 3743

Newfoundland and Labrador Supreme Court - Trial Division
St. John's, Newfoundland and Labrador

R.M. Hall J.

Heard: October 31, 2008.
Judgment: November 4, 2008.

(21 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application by Maxium to have the Stay of Proceedings in bankruptcy proceeding lifted dismissed -- Maxium contended it was being severely prejudiced by the Stay of Proceedings on the basis that its security position was being eroded -- The prejudice to Maxium would not substantially outweigh the prejudice to the Resort.

Application by Maxium to have the Stay of Proceedings lifted. The applicant also sought an order requiring the Resort to deliver up possession to Maxium of various pieces of equipment leased under agreements made between the parties. The Resort was granted protection pursuant to the Companies' Creditors Arrangement Act. The Initial Order provided for a Stay of Proceedings. Maxium was entitled, save and except for the effect of the Stay of Proceedings granted to the Resort, to enforce its security for the leased equipment. Maxium contended it was being severely prejudiced by the Stay of Proceedings on the basis that its security position was being eroded. The Resort argued that a functioning golf course, and the use of the equipment, was key to a successful restructuring of its financial affairs.

HELD: Application dismissed. The prejudice to Maxium would not substantially outweigh the prejudice to the Resort. The court was not satisfied that Maxium had conducted sufficient investigations to market the equipment widely and therefore had not used best efforts in its own interest or in the interest of the Resort.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(4), s. 11(6), s. 68

Cases cited:

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007) 33 C.B.R. (5th) 50 (Sask. C.A.).

Canadian Airlines Corp. (Re) (2000) 19 C.B.R. (4th) 1 at paragraph 20 (Q.B.).

Statutes cited:

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

Counsel:

Geoffrey L. Spencer: Counsel for the Applicant.

John Stringer, Q.C., Stephen Kingston and Douglas B. Skinner: Counsel for the Respondents.

Dean A. Porter: Counsel for Home Construction Limited.

Neil L. Jacobs: Counsel for Her Majesty the Queen in right of Newfoundland and Labrador.

REASONS FOR JUDGMENT
ON APPLICATION OF MAXIUM FINANCIAL SERVICES INC.

FOR ORDER LIFTING STAY OF PROCEEDINGS

R.M. HALL J.:--

BACKGROUND

1 Humber Valley Corporation, Newfoundland Travel and Tourism Corporation, Humber Valley Construction Limited, and Humber Valley Interiors (collectively referred to as the "Resort") were granted protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "*CCAA*") by an Initial Order issued by this Court on September 5, 2008.

2 The Initial Order provided for a Stay of Proceedings with respect to the Resort from the date of the Initial Order up to and including October 6, 2008, and this Stay of Proceedings was extended to December 5, 2008, by an Order of the Court dated October 14, 2008. The extension of the Stay of Proceedings was subject to the right of creditors of the Resort to request a review and reconsideration of the extension.

3 The Applicant, Maxium Financial Services Inc. ("Maxium") seeks to have the Stay of Proceedings lifted as it pertains to Maxium and in particular seeks an order requiring the Resort to deliver up possession to Maxium of various pieces of equipment leased under certain capital leases made between Maxium and the Resort (the "Equipment").

4 Maxium is in the business of providing lease financing and asset management services to, *inter alia*, customers in the golf course industry. It began its relationship with the Resort in 2003 when it leased various pieces of the Equipment to the Resort for the operation of a golf course on the Resort property at Humber Valley, Newfoundland. Security was given to Maxium by Humber Valley Resort Corporation by way of a Master Lease Agreement. The validity and enforceability of the Master Lease Agreement is not contested nor is it contested that payment thereunder is presently in arrears and Maxium is entitled, save and except for the effect of the Stay of Proceedings granted herein, to enforce its security.

5 The Equipment leased under the Master Lease Agreement is still in the possession of Humber Valley Resort Corporation. It is agreed that most of the Equipment has been winterized and stored and there are no concerns about its physical diminishment as a result thereof. Only a few pieces of the Equipment are currently being used to maintain the golf course and to prepare it for winterization. With the advent of snow conditions, that work will cease also and is expected to cease in a few weeks.

THE PRESENT APPLICATION

6 Maxium contends it is being severely prejudiced by the Stay of Proceedings on the basis that its security position is being eroded. In Affidavits filed with the Court, Maxium contends that the buying season for golf course equipment of the nature leased to the Resort is presently ongoing. It contends that 50% of Canadian golf courses shut down from December 1st to February 1st of each year. Those courses which close on December 1st, Maxium contends, will make their equipment purchase decisions in October and November. Maxium contends that in order to have an opportunity to sell the Equipment to another golf course prior to the commencement of the 2009 golf season (which Maxium says would commence in or around April 1, 2009), Maxium would have to proceed to market the Equipment by November at the latest. If Maxium is unable to market the Equipment during this short window of opportunity, it contends that the value of the Equipment will deteriorate with the loss increasing as the next golf season approaches.

7 Maxium produced a table showing its anticipated realizations on the sale of the golf Equipment at various times. It contends that if the Equipment was sold in November 2008 the realization would be $808,286. However, if the sale was held off and made during the period of December 2008 to April 2009, that realization would be reduced by $135,556 to a total of $672,730. A further delay of the sale to take place during the summer of 2009 would see that reduction in value being to the level $585,100. Maxium points out that even if it were to proceed to sell the Equipment immediately it is anticipated that it will incur deficiency with respect to the indebtedness owed to it by the Resort.

8 Maxium has noted that the Resort had previously indicated that it hoped to attract an operator for the golf course for the 2009 golf season and that such operator would hopefully negotiate lease terms with Maxium in order to secure the continued use of the Equipment. However, Maxium points out that it may not approve financing for such a prospective operator and that Maxium should not be forced to let the Equipment sit idle while it depreciates in value in the interim. It points out that the golf course is no longer in operation and the Equipment is, for the most part, not in use. It contends that the Equipment can be removed without detrimentally affecting the Resort. In the event that the Resort is able to attract a new operator for the golf course, Maxium contends that the new operator can obtain golf course equipment from other sources in time for the 2009 golf season.

THE RESPONSE OF THE RESORT

9 The Resort, on its part, contends that a functioning golf course is key to a successful restructuring of the Resort's financial affairs. Key to that operation of the golf course is the existence of the Equipment, leased by Maxium to the Resort, said Equipment being in place and ready for the use at the commencement of the golf season in the spring of 2009. Implicit in this argument is the suggestion that if the Equipment is not available, the purchase from new sources of new equipment will be more expensive, more time-consuming, and likely to delay the opening of the golf course and that collectively these complications will make the restructuring of the financial affairs of the Resort more difficult. In addition, the Resort argues that if the Stay of Proceedings is lifted as against Maxium, such action by the Court is likely to encourage a veritable stampede of applications by other creditors seeking to have their equipment repossessed. The Resort has not received applications from any other creditors seeking a lifting of the Stay of Proceedings. However, a review of the registered PPSA security against the Resort, tendered as an exhibit to the Maxium affidavits, indicates security issued by the Resort to numerous creditors governing various motor vehicles, heavy construction equipment and computer equipment. No evidence was presented by the Resort to show that the loss of this Equipment would prejudice the restructuring, albeit where construction for the completion of approximately 130 chalets will need to re-commence after the restructuring, the presence of the heavy equipment would seem to be logically required. Similarly, the loss of computer equipment might impact the restructuring through loss of the financial records and other records of the Resort.

LAW AND ARGUMENT

10 The Court has authority to lift a Stay of Proceedings granted under the *CCAA* by virtue of section 11(4) of the *CCAA*. That section provides:

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

11 It is to be noted that this power is discretionary but the *CCAA* does not set out any specific tests with respect to the lifting of a Stay or Proceedings. Section 11(6) of the *CCAA* does however provide a minimal amount of guidance. It states:

> 11(6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

12 The Saskatchewan Court of Appeal in *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 held that the test for lifting the Stay of Proceedings under the *CCAA* should be based on sound reasons consistent with the scheme of the *CCAA*:

> 68. In determining what constitutes "sound reasons", much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:
>
> (a) the balance of convenience;
> (b) the relative prejudice to the parties;
> (c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).
>
> The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising *CCAA* judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

13 In *Canadian Airlines Corp. (Re)* (2000) 19 C.B.R. (4th) 1 at paragraph 20 (Q.B.) the Court outlined various situations in which courts have lifted a Stay or Proceedings. At paragraph 20 the Court stated:

> 20. At pages 342 and 343 of this text, Canadian Commercial Reorganization:
>
> Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period

14 In *Canadian Airlines (supra)* the Court dismissed the application to lift the Stay of Proceedings on the basis that the value of the applicant's security was well in excess of what they were owed and that the applicants had not established that they would suffer any material prejudice in having to wait three weeks for the creditors' meeting to vote on the plan or arrangement.

15 In dealing with the issue of the balance of convenience, Maxium contends that if it is permitted to repossess its Equipment the Resort will not be inconvenienced as much as Maxium would be by the refusal to allow repossession. It emphasizes that the Equipment is not in use and is in storage and that the golf course is no longer in operation and that, if the Resort is successful in finding a new operator, that new operator will be able to acquire equipment on its own for the commencement of the golf season in 2009. On the other hand, Maxium will be severely prejudiced by leaving the Equipment idle with the Resort while its security erodes with the passage of time decreasing as much as 28% in value by summer 2009.

16 Maxium contends there would be no prejudice to the other creditors of the Resort, as the Resort would still be in a position to seek an operator of the golf course and that courts generally recognize that a reduction in the value of inventory during a stay period is an important decision and a factor to be considered by a court to lift a Stay for an inventory financier.

17 The Resort, on the other hand, urges that the Court should consider that it continues to work diligently and in good faith to restructure its affairs and that that restructuring ought to be allowed to proceed without interruption by reason of the repossession of the Maxium Equipment.

CONCLUSION

18 In considering the six tests set out by the Alberta Queens Bench in *Canadian Airlines (supra)*, the single most important test is whether Maxium would be severely prejudiced by the refusal to lift the Stay of Proceedings and that there would be no resulting prejudice to the Resort or to its creditors. It is interesting to note the strong language of this particular condition. Maxium is required to be "severally" prejudiced by the refusal to lift the Stay of Proceedings. On the other hand, there must be "no resulting prejudice" to the Resort or to the position of its creditors if the Stay is lifted. It is difficult to reconcile this extremely strong statement with the requirement set out by the Saskatchewan Court of Appeal in *ICR Commercial Real Estate (supra)* that the Court has to con-

sider a "balance of convenience". It is difficult to conceive how there can be any consideration of a balance of convenience where the *Canadian Airline (supra)* decision requires that there be no prejudice to the debtor company or to the position of its creditors. If there is no prejudice, what is there to be balanced against the impact upon Maxium if it is not to repossess? I am not satisfied that the tests which I should apply should be as stringent as that set out in condition number six, paragraph 20 of the *Canadian Airlines (supra)* decision. Rather, I am satisfied that there merely should be a balancing of the levels of prejudice to the creditor, Maxium, or to the Resort, depending upon whether the application to lift the Stay or Proceedings is allowed or not. This consideration needs to be made in light of the stated purpose of the *CCAA*, which is to allow a corporation sufficient time to restructure itself and that the Stay of Proceedings is not intended to maintain an absolute Stay of Proceedings at the positions existing before the Initial Order, insofar as they relate to either the Corporation or to creditors.

19 With these principles in mind, I conclude that Maxium has not demonstrated that the level of prejudice, which it might suffer, outweighs the difficulties that the removal and sale of its leased Equipment will cause to the Resort and to its restructuring efforts. Firstly, the stated debt owing to Maxium is overstated by the amount of the goods and services tax of over $100,000. Obviously, if the Equipment is repossessed, that goods and services tax is not payable. Therefore, the initial loss at least of Maxium is overstated. Additionally, Maxium has confined its research and opinion as to its prospective losses solely to the situation that would pertain if the Equipment was to be sold in Canada. Maxium deposes that it does not carry on business in the United States and has no knowledge of the United States market. That ignorance on its part, however, should not be a factor in causing this Court to accept that the only market for the Equipment is a Canadian market. It is logical that brokers would be available in the United States who could provide Maxium with evidence as to the market value of this Equipment in a U.S. market. With U.S. golf courses generally being open for a longer season, it is probable that there would be many more purchasers of this Equipment looking year-round for equipment to purchase. Additionally, the recent decline in value of the Canadian dollar versus the U.S. dollar would give a selling advantage to Maxium, if it were selling in to the United States.

20 Therefore, I am not satisfied that the prejudice to Maxium would substantially outweigh the prejudice to the Resort. In addition, I am not satisfied that Maxium has conducted sufficient investigations to market this Equipment widely and therefore has not used best efforts in its own interest or in the interest of the Resort.

21 **IT IS THEREFORE ORDERED** that the application of Maxium is dismissed. There shall be no order as to costs.

R.M. HALL J.

cp/e/qlkxl/qlcnt/qlaxw/qlbrl/qlced/qlana

TAB 19

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. 5379

61 C.B.R. (5th) 200

2009 CarswellOnt 7882

183 A.C.W.S. (3d) 634

2009 CanLII 70508

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

Heard: December 8, 2009.
Judgment: December 15, 2009.

(52 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Application by the CCAA applicants and the "CMI entities" for an order declaring that the relief sought by the "GS parties" was subject to the stay of proceedings granted on Oct. 6, 2009. Cross-motion by GS Parties for an order lifting the stay so they could pursue their motion challenging pre-filing conduct of the CMI entities, etc. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors supported the position of the CMI Entities. In essence, the GS Parties' motion sought to undo the transfer of the CW Investments Co. shares from 441 to CMI or to require CMI to perform and not disclaim the shareholders agreement as though the shares had not been transferred.

HELD: GS Parties' motions dismissed, save for a portion dealing with para. 59 of the initial order on consent; CMI Entities' motion granted with the exception of a strike portion, which was moot. The first issue was caught by the stay of proceedings and the second was properly addressed if and when CMI sought to disclaim the shareholders agreement. The substance of the GS Parties' motion was a "proceeding" subject to the stay under para. 15 of the initial order prohibiting the commencement of all proceedings against or in respect of the CMI Entitites, or affecting the CMI business or property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI business or the CMI property" which was stayed under para. 16 of the initial order. The substance and subject matter of the motion were certainly encompassed by the stay. The real question was whether the stay ought to be lifted in this case. If the stay were lifted, the prejudice to CMI would be great and the proceedings contemp lated by the GS Parties would be extraordinarily disruptive. The GS Parties were in no worse position than any other stakeholder who was precluded from relying on rights that arise upon an insolvency default. The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion. The onus to lift the stay was on the moving party. The stay was performing the essential function of keeping stakeholders at bay in order to give CMI Entities a reasonable opportunity to develop a restructuring plan.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 32, s. 11.02

Counsel:

Lyndon Barnes, Alex Cobb and Shawn Irving for the CMI Entities.

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors of Canwest.

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

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

K. McElcheran and G. Gray for GS Parties.

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian Media Guild.

Hilary Clarke for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;

(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;
(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its

352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them 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 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 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 the CMI Entities, the Monitor and/or the CMI CRA,

> or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities 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.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

> (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
> (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
> (c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
> (d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
> (e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary

issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Re Stelco Inc*[3] and the key element of the CCAA process: *Re Canadian Airlines Corp.*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*[5], the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "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. ... 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."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or
(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.
- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a

CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.

- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*[17]:

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd.*[19], one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> "The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an

> enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts."

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may -- on notice given in the prescribed form and manner to the other parties to the agreement and the monitor -- disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

S.E. PEPALL J.

* * * * *

Schedule A

[Editor's note: Schedule A was not attached to the copy received from the Court and therefore is not included in the judgment.]

1 (2000), 19 C.B.R. (4th) 1.

2 [1990] B.C.J. No. 2384 (C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1.

5 (1993), 17 C.B.R. (3d) 24.

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992) 14 C.B.R. (3d) 303.

9 R.S.O. 1990, c. C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 5 C.B.R. (5th) 92 at para. 37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1.

TAB 20

Case Name:

Timminco Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc., Applicants

[2012] O.J. No. 1949

2012 ONSC 2515

Court File Nos. CV-12-9539-00CL and CV-09-378701-00CP

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 26, 2012.
Judgment: April 27, 2012.

(25 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motion by plaintiff in class proceeding/creditor of company under CCAA protection to lift stay of proceedings allowed in part -- Stay lifted only to permit plaintiff to seek leave to appeal to Supreme Court of Canada procedural judgment about running of limitations period for class proceeding -- TO lift stay entirely would take focus of company's few remaining executives away from restructuring to deal with class proceeding, potentially causing prejudice to other stakeholders.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Motion by plaintiff in class proceeding/ creditor of company under CCAA protection to lift stay of proceedings allowed in part -- Stay lifted only to permit plaintiff to seek leave to appeal to Supreme Court of Canada procedural judgment about running of limitations period for class proceeding -- TO lift stay entirely would take focus of company's few remaining executives away from restructuring to deal with class proceeding, potentially causing prejudice to other stakeholders.

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Motion by plaintiff in class proceeding/creditor of company under CCAA protection to lift stay of pro-

ceedings allowed in part -- Stay lifted only to permit plaintiff to seek leave to appeal to Supreme Court of Canada procedural judgment about running of limitations period for class proceeding -- TO lift stay entirely would take focus of company's few remaining executives away from restructuring to deal with class proceeding, potentially causing prejudice to other stakeholders.

Motion by Penneyfeather for an order lifting a January 2012 stay of proceedings to permit Penneyfeather to continue a class proceeding against Timminco and others. Timminco was pursuing a restructuring process intended to maximize recovery for stakeholders. It continued to operate as a going concern with a greatly-reduced staff of 10 employees including the president and three executive officers. The class proceeding was commenced in May 2009. Settlement discussions had been terminated and there was a pending motion to strike portions of the statement of claim. Penneyfeather planned to seek leave to appeal to the Supreme Court of Canada an order declaring that the three-year limitation period provided in the Securities Act was not suspended by the operation of the Class Proceedings Act. Timminco consented to lift the stay to permit Penneyfeather to pursue this leave application only. Timminco submitted that key members of its executive team would have to expend considerable time dealing with Penneyfeather's class proceeding if the stay was lifted completely, thereby taking their focus away from the restructuring process.

HELD: Motion allowed in part. If forced to spend significant amounts of time dealing with Penneyfeather's class action in the coming months, the Timminco executive team would be unable to focus on the sales and restructuring process to the potential detriment of Timminco's other stakeholders. A delay in the sales process could have a negative impact on Timminco. It was premature to lift the stay other than with respect to the leave application.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.O. 1992, c. 6, s. 12, s. 28

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

Securities Act, R.S.O. 1990, c. S.5, s. 138.14

Counsel:

James C. Orr and N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in Class Proceeding, *Penneyfeather v. Timminco Limited et al*.

P. O'Kelly and A. Taylor, for the Applicants.

P. LeVay, for the Photon Defendants.

A. Lockhart, for Wacker Chemie AG.

K.D. Kraft, for Chubb Insurance Company of Canada.

D.J. Bell, for John P. Walsh.

A. Hatnay and James Harnum for Mercer Canada, Administrator of the Timminco Haley Plan.

S. Weisz, for FTI Consulting Canada Inc., Monitor.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- St. Clair Penneyfeather, the Plaintiff in the *Penneyfeather v. Timminco Limited, et al* action, Court File No. CV-09-378701-00CP (the "Class Action"), brought this motion for an order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and extended by court order dated January 27, 2012, and permitting Mr. Penneyfeather to continue the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Mr. Robert Dietrich, Mr. Rene Boisvert, Mr. Arthur R. Spector, Mr. Jack Messman, Mr. John C. Fox, Mr. Michael D. Winfield, Mr. Mickey M. Yaksich and Mr. John P. Walsh.

2 The Class Action was commenced on May 14, 2009 and has been case managed by Perell J. The following steps have taken place in the litigation:

(a) a carriage motion;
(b) a motion to substitute the Representative Plaintiff;
(c) a motion to force disclosure of insurance policies;
(d) a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;
(e) settlement discussions;
(f) when settlement discussions were terminated, Perell J. declined an expedited leave hearing and instead declared any limitation period to be stayed;
(g) a motion for particulars; and
(h) a motion served but not heard to strike portions of the Statement of Claim.

3 On February 16, 2012, the Court of Appeal for Ontario set aside the decision of Perell J. declaring that s. 28 of the *Class Proceedings Act* suspended the running of the three-year limitation period under s. 138.14 of the *Securities Act*.

4 The Plaintiffs' counsel received instructions to seek leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada. The leave materials were required to be served and filed by April 16, 2012.

5 On April 10, 2012, the following endorsement was released in respect of this motion:

> The portion of the motion dealing with lifting the stay for the Plaintiff to seek leave to appeal the recent decision of the Court of Appeal for Ontario to the Supreme Court of Canada on the limitation period issue was not opposed. This portion of the motion is granted and an order shall issue to give effect to the foregoing. The balance of the requested relief is under reserve.

6 Counsel to Mr. Penneyfeather submits that, apart from the leave to appeal issues, there are steps that may occur before Perell J. as a result of the Court of Appeal ruling. Counsel references that the Defendants may bring motions for partial judgment and the Plaintiff could seek to have the court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to s. 12 of the *Class Proceedings Act*.

7 Counsel to Mr. Penneyfeather submits that the three principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification. (See *Western Ca-*

nadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at paras. 27-29.), and under the *Securities Act*, the deterrent represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.

8 Counsel submits that, in this situation, there is only one result that will not do violence to a primary legislative purpose and that is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets. Counsel further submits that, as a practical result, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

9 Counsel to Mr. Penneyfeather takes the position that the requested outcome is consistent with the judicial principal that the CCAA is not meant as a refuge insulating insurers from providing appropriate indemnification. (See *Algoma Steel Corp. v. Royal Bank of Canada*, [1992] O.J. No. 889 at paras. 13-15 (C.A.) and *Re Carey Canada Inc*. [2006] O.J. No. 4905 at paras. 7, 16-17.)

10 In this case, counsel contends that, when examining the relative prejudice to the parties, the examination strongly favours lifting the stay in the manner proposed since the insurance proceeds are not available to other creditors and there would be no financial unfairness caused by lifting the stay.

11 The position put forward by Mr. Penneyfeather must be considered in the context of the CCAA proceedings. As stated in the affidavit of Ms. Konyukhova, the stay of proceedings was put in place in order to allow Timminco and Bécancour Silicon Inc. ("BSI" and, together with Timminco, the "Timminco Entities") to pursue a restructuring and sales process that is intended to maximize recovery for the stakeholders. The Timminco Entities continue to operate as a going concern, but with a substantially reduced management team. The Timminco Entities currently have only ten active employees, including Mr. Kalins, President, General Counsel and Corporate Secretary and three executive officers (the "Executive Team").

12 Counsel to the Timminco Entities submits that, if Mr. Penneyfeather is permitted to pursue further steps in the Class Action, key members of the Executive Team will be required to spend significant amounts of their time dealing with the Class Action in the coming months, which they contend is a key time in the CCAA proceedings. Counsel contends that the executive team is currently focussing on the CCAA proceedings and the sales process.

13 Counsel to the Timminco Entities points out that the Executive Team has been required to direct most of their time to restructuring efforts and the sales process. Currently, the "stalking horse" sales process will continue into June 2012 and I am satisfied that it will require intensive time commitments from management of the Timminco Entities.

14 It is reasonable to assume that, by late June 2012, all parties will have a much better idea as to when the sales process will be complete.

15 The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the Timminco Entities with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc*., [2005] O.J. No. 1171 (C.A.) at para. 36.

16 Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See *Canwest Global Communications Corp. (Re)*, [2011] O.J. No. 1590 (S.C.J.) at para. 27.

17 Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance of success, there may not be sound reasons for lifting the stay). See *Canwest Global Communications (Re)*, *supra*, at para. 27.

18 Counsel to the Timminco Entities submits that the relative prejudice to the parties and the balance of convenience clearly favours keeping the stay in place, rather than to allow the Plaintiff to proceed with the SCC leave application. As noted above, leave has been granted to allow the Plaintiff to proceed with the SCC leave application. Counsel to the Timminco Entities further submits that, while the merits are vigorously disputed by the Defendants in the context of a Class Action, the Timminco Entities will not ask this court to make any determinations based on the merits of the Plaintiff's claim.

19 I can well recognize why Mr. Penneyfeather wishes to proceed. The objective of the Plaintiff in the Class Action is to access insurance proceeds that are not available to other creditors. However, the reality of the situation is that the operating side of Timminco is but a shadow of its former self. I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timeliness previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.

20 It is also significant to recognize the submission of counsel on behalf of Mr. Walsh. Counsel to Mr. Walsh takes the position that Mr. Penneyfeather has nothing more than an "equity claim" as defined in the CCAA and, as such, his claim (both against the company and its directors who, in turn, would have an equity claim based on indemnity rights) would be subordinated to any creditor claims. Counsel further submits that of all the potential claims to require adjudication, presumably, equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured claims have been paid in full.

21 In my view, it is not necessary for me to comment on this submission, other than to observe that to the extent that the claim of Mr. Penneyfeather is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be put on hold, for a period of time, so as to permit the Executive Team to concentrate on the sales process.

22 Having considered the relative prejudice to the parties and the balance of convenience, I have concluded that it is premature to lift the stay at this time, with respect to the Timminco Entities, other than with respect to the leave application to the Supreme Court of Canada. It also fol-

lows, in my view, that the stay should be left in place with respect to the claim as against the directors and officers. Certain members of this group are involved in the Executive Team and, for the reasons stated above, I am satisfied that it is not appropriate to lift the stay as against them.

23 With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

24 I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

25 In the result, the motion dealing with issues not covered by the April 10, 2012 endorsement is dismissed without prejudice to the rights of the Plaintiff to renew his request no sooner than 75 days after today's date.

G.B. MORAWETZ J.

TAB 21

Case Name:

Puratone Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of the Puratone Corporation, Pembina Valley Pigs Ltd. and Niverville Swine Breeders Ltd., (the "Applicants") Application Under: the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as Amended

[2013] M.J. No. 247

2013 MBQB 171

295 Man.R. (2d) 55

Docket: CI 12-01-79231

Manitoba Court of Queen's Bench
Winnipeg Centre

R.A. Dewar J.

Judgment: July 8, 2013.

(41 paras.)

Counsel:

David Jackson, for Puratone Corporation.

J.J. Burnell, for Bank of Montreal.

Jeffrey Lee and Sandra Zinchuk, for Farm Credit Canada.

Richard Schwartz and Jason Harvey, for ITB Claimants.

Ross McFadyen, for Deloitte Touche Inc.

David Kroft and Aaron Challis, for Directors and Officers.

1 **R.A. DEWAR J.**:-- On September 12, 2012, an Initial Order was pronounced by me in a proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C., 1985, c. C-36 (the "CCAA") filed on that date by three of the companies within the Puratone umbrella, namely The Puratone Corporation, Pembina Valley Pigs Ltd., and Niverville Swine Breeders Ltd. (hereinafter "Puratone").

2 The Puratone Group of companies ran a commercial hog production business. Their business included the breeding, farrowing, finishing and marketing of hogs. In order to carry on this business, Puratone needed grain to be used in feed for its hogs.

3 This motion involves 17 farming operators who claim priority to some of the proceeds of sale of the assets of the companies covered by the within CCAA proceedings. The lead farming operator, Interlake Turkey Breeders Ltd. claims to be a part of the steering committee for a group of farmers who supplied grain to the Puratone Group of Companies within two weeks of the filing of this CCAA proceeding. I will hereinafter refer to the group of farmers as "the ITB Claimants".

4 The Initial Order contained many of the usual provisions, including stay provisions as follows:

> **NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**
>
> 18. THIS COURT ORDERS that until and including October 12, 2012, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.
>
> **NO EXERCISE OF RIGHTS OR REMEDIES**
>
> 19. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the 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.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

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

5 Although the Initial Order included the stay provisions for only 30 days ending October 12, 2012, the stays have been extended as a result of a series of motions whilst Puratone has been undergoing its "restructuring". The restructuring referred to has essentially involved the sale of substantially all of its assets to Maple Leaf Foods Inc. on a going concern basis. That sale was approved by the court on November 8, 2012 and closed on December 17, 2012. As part of the order approving the sale, I ordered that the proceeds of sale should be paid to the Monitor to be held pending receipt of a Distribution Order. On March 12, 2013, I granted an order authorizing the distribution of most of the net proceeds from the sale of the assets. The creditors who received funds from the Distribution Order were as follows:

a)	Bank of Montréal	$17,726,173;
b)	Farm Credit Corporation	$15,817,303
c)	Manitoba Agricultural Services Corporation (MASC)	$ 1,041,524

6 The sworn pre-CCAA claim of Bank of Montréal before receiving this distribution was $43,322,558. The sworn pre-CCAA claim of the Farm Credit Corporation (FCC) before receiving this distribution was $41,025,891.76. The sworn pre-CCAA claim of MASC before receiving the distribution was $5,263,767.

7 There are therefore significant shortfalls being sustained by each of the major secured creditors.

8 The Monitor has retained a sum in an amount of $6,753,765 from the net proceeds. Of this amount, $1,573,765 has been withheld to deal with an issue that has arisen with the purchaser out of the sale and to that extent, as against Puratone and its creditors, the purchaser has the first claim against those funds. A further $5,000,000 was also recommended to be held back. These monies, in addition to whatever might be obtained from the relatively small number of assets yet to be liquidated, are intended to serve as a general holdback pending completion of the CCAA proceedings

including the continued realization of remaining assets, resolution of the dispute with the purchaser and potential legal actions.

9 One of the potential legal actions is a claim by the ITB Claimants ("the ITB Claim"). At the time of the application of the Monitor for a Distribution Order, a motion was brought by the ITB Claimants requesting that $903,250.50 be withheld from any distribution to the major secured creditors, and requesting leave to commence an action against Puratone and its directors and/or officers in order to make the said claim. On its initial return date, I adjourned the motion of the ITB Claimants while authorizing the distribution set out above, which contemplated the holdback that had been recommended by the Monitor. I set time frames for the parties to provide briefs and any further affidavit material. On April 10, 2013 the ITB Claimants filed a further notice of motion which amplified their requests. The matter came on for hearing on April 11, 2013 at which time, after hearing submissions, I reserved judgment.

10 The claim of the ITB claimants is that they supplied grain to Puratone on an individual contract basis on various dates between August 29 and September 11, 2012, a period within two weeks of the filing of the CCAA proceeding. It is alleged that the grain was used by Puratone to feed the hogs that were ultimately sold to Maple Leaf Foods Inc. as part of the going concern sale ultimately approved by the court. The ITB Claimants argue that at the time of the supply transactions, Puratone was gearing up for its CCAA application and must have then known that it would have been unable to pay for the grain once an Initial Order was pronounced. In essence, the claim of the ITB Claimants boils down to allegations that Puratone acquired the grain when it had no intention of paying for it. As a result, the ITB claimants argue that they have causes of action against Puratone entitling them to:

a) damages for fraudulent misrepresentation on the part of Puratone;
b) a claim [an order] under s. 234 of ***The Corporations Act***, C.C.S.M. c. C225, that Puratone's conduct was oppressive as regards the plaintiffs;
c) a declaration that an implied or constructive trust exists in favour of the plaintiffs, and that Puratone and its secured creditors were unjustly enriched by the feed supplied by the plaintiffs;
d) a declaration that the secured creditors claims are subordinate to those of the plaintiffs, and/or that in equity they subordinated their security to the ITB Claimants;
e) a declaration that Puratone and its directors and officers wrongfully and/or fraudulently caused Puratone to obtain feed from the plaintiffs which they knew would not be paid for;
f) a declaration that the secured creditors colluded with Puratone and/or its directors and officers to, in effect, wrongfully obtain feed which they knew would not be paid for; and
g) a declaration that the secured creditors indemnified, in fact or at law, Puratone and/or its directors and officers by supporting and participating in a process that was designed to ensure that the secured creditors received the benefit of the feed without having to pay for it.

ANALYSIS

11 A stay of proceedings is normally included in an Initial Order in order to permit an applicant to proceed with its restructuring (including, in some cases, its liquidation) without continually being harassed by creditors who are dissatisfied with the state of their outstanding accounts. The theory behind the stay order is that it will allow the applicant to devote its full time, efforts and resources to presenting and executing a restructuring plan which is in the best interests of the creditors generally, rather than fighting rearguard actions against individual creditors who are trying to collect their individual accounts.

12 A stay of proceedings however can be lifted in the appropriate case, but those cases will be the subject of judicial consideration which normally involves a balancing of stakeholder interests.

13 The CCAA does not set out a specific test identifying the circumstances in which the stay of proceedings should be lifted. Rather, it is in the discretion of the supervising CCAA judge whether a proposed action should be allowed to proceed. Apart from giving the judge the authority to grant the stay, the only guidelines expressed in the CCAA respecting such a stay order are found in section 11.02(3) which says:

> (3) The court shall not make the order unless
>
> (*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

14 In ***ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.***, 2007 SKCA 72, [2007] 9 W.W.R. 79, the Saskatchewan Court of the Appeal indicated that there must be "sound reasons", consistent with the scheme of the CCAA, to relieve against the stay. In the search for "sound reasons", the court suggested the following considerations:

> a) the balance of convenience;
> b) the relative prejudice to the parties; and
> c) the merits of the proposed action.

It also indicated that, "The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6)".

15 In my respectful view, these considerations are all to be viewed together and in the context of the nature and timing of the CCAA process before the court. The same request may very well receive a different reception in the case of an application for the lifting of a stay early in a CCAA proceeding that contemplates a true restructuring than in the case of an application brought late in a CCAA proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure as intended. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being left to sort through is who is entitled to the money. In my view, a court would be more receptive to lifting the stay in the latter case than in the former.

The stay respecting claims against Puratone

16 The motion of the ITB Claimants was opposed by Bank of Montréal and FCC. They essentially argued that the ITB Claimants had not demonstrated the existence of a cause of action with enough of a reasonable prospect of success to justify a delay in the distribution of the holdback monies to the secured creditors. In short they focused on the third of the considerations described in ***ICR***. They argued that the proposed claim of the ITB Claimants for a constructive trust respecting some of the assets of Puratone would fail for a number of reasons, namely:

a) The sale of grain by the ITB Claimants involved transactions that do not qualify for the application of the doctrines of unjust enrichment, or equitable subordination. These transactions were essentially commercial transactions as between buyer and seller. It was argued that an unpaid seller is simply a debtor of Puratone. Although Puratone has received a benefit, the normal buyer-seller relationship provides a juristic reason for the benefit, and therefore the doctrine of unjust enrichment does not apply. Furthermore the banks argued that the doctrine of equitable subordination has never been recognized in Canada.

b) The secured creditors are to be viewed as *bona fide* third parties with a commercial interest in the assets of Puratone and the ITB Claimants should not be entitled to jump the queue from the status of unsecured creditors and receive a priority ahead of secured creditors who hold valid and properly registered securities.

c) It is impossible to trace the grain into the hogs that were ultimately sold during the CCAA proceedings. Therefore, the ITB Claimants have no claim to the proceeds of sale of the hogs.

17 Counsel for the ITB Claimants has argued that this situation is a relatively new phenomenon. Historically, CCAA proceedings involved the restructuring of a company to permit it to carry on its business. CCAA proceedings in days gone by were not intended to be used where there were no future plans for the company. Counsel for the ITB Claimants argued that in this case, the plan was always to liquidate the assets in a controlled way in order to maximize the return to the secured creditors, but with the expectation that a shortfall would invariably occur to the secured creditors. He submitted that it must have been well known to Puratone as well as its secured creditors and directors and officers that at the time that the grain was supplied by the ITB claimants, Puratone was deeply underwater to its secured creditors. He argued that the evidence of knowledge of such insolvent condition can be inferred by the large shortfall suffered by Bank of Montréal and FCC notwithstanding a going concern sale which was negotiated during the CCAA proceedings only two months after the feed was supplied by the ITB Claimants. Counsel submits that CCAA applications of the scale of this proceeding are not prepared overnight, and that at the time of the supply of grain, Puratone would have been preparing its CCAA materials and would have known that the CCAA proceedings would only yield a sale which resulted in large secured creditor deficiencies. He argued that at the time of these contracts of supply, there was no likelihood that the ITB claimants would receive any of their money. He argued that by ordering the grain under these circumstances, essentially Puratone was perpetrating a fraud on the ITB claimants.

18 It was urged upon me by counsel for the two banks that the case authorities require a judge to scrutinize the claim which a creditor intends to advance before lifting the stay in a CCAA proceeding. It was argued that the authorities suggest that the test to be employed in lifting a CCAA

stay is more than the test used in striking out a statement of claim as disclosing no cause of action or being frivolous and vexatious, but does not require prospective plaintiffs to demonstrate a *prima facie* case. The terms "reasonable cause of action" or "tenable case" have sometimes been used.

19 In the ***ICR*** case, at paragraph 64 and 65, Jackson, JA wrote:

> [64] Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in *Ivaco*, but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.
>
> [65] Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the *CCAA* proceeding.
>
> (Emphasis added)

20 When I scrutinize the proposed claim of the ITB Claimants against Puratone, I conclude that its dismissal is not a foregone conclusion. The ITB Claimants raise a point which so far as I am aware has not been addressed by this court. Here, the court is faced with a CCAA proceeding which has had from the outset all of the earmarks of a liquidation proceeding. The affidavit of Raymond Hildebrand, sworn September 12, 2012 underlying the request for the Initial Order as well as the Pre-Filing Monitor's Report outlined the financial difficulties being experienced by Puratone, the reasons for those difficulties, as well as the efforts that had been made by Puratone and its restructuring professionals to deal with them. Some of the efforts had included a Sales and Solicitation Process ("SISP"), a process designed to find people who were willing to inject money into Puratone either through a going concern sale of assets or in equity injection. Those efforts failed.

21 In the Pre-Filing Report of Deloitte & Touche Inc., the then Proposed Monitor wrote:

> 46 The Proposed Monitor has been advised that the SISP, as originally proposed, failed to result in a successful investment or sale transaction. Accordingly, the SISP has been terminated and replaced with a short-term, expedited strategy to complete a sale of the business, or parts thereof, which will be undertaken by the Applicants with the assistance of the Proposed Monitor (the "Sales Process").

22 The Initial Order was granted based on information, *inter alia*, that the major secured creditors were Bank of Montréal and FCC. As indicated earlier, less than three months later, the parties were recommending a sale which would result in large secured creditor shortfalls. The ITB Claim-

ants argue that this result must have been contemplated by Puratone at the time that the ITB Claimants supplied their grain to Puratone. This raises the interesting question as to whether that expectation was in the mind of Puratone at the time that the grain was supplied, and if so, whether the ITB Claimants are entitled to any relief from Puratone other than a meaningless monetary judgment. It raises the issue whether a company with exposed secured creditors should be incurring credit at a time when it is preparing to make a CCAA application.

23 The ITB claimants request a constructive trust over the assets of Puratone that were sold during the CCAA proceeding which, if ordered, would erode the assets over which the banks claim security by the amount of the unpaid accounts of the ITB Claimants. A constructive trust has been recognized as a remedy against a debtor in the event that there has been a fraud. In Peter D. Maddaugh and John D. McCamus, The Law of Restitution, (looseleaf), Volume 1, at paragraph 5:200.30, the following is written:

> Chancery's willingness to impose a constructive trust in circumstances where a fraud has been perpetrated is by no means a modern development. No pre-existing fiduciary relationship need be established for this category of constructive trust and, indeed, a breach of trust or other fiduciary obligation is, in itself, simply one form of equitable fraud. As Lord Westbury explained in McCormick v. Grogan, L.R. 4 H.L. 82: "it is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud." And, in Westdeutsche Landesbank Girozentrale v. Islington L.B.C., [1994] 4 All E.R. 890, Lord Browne-Wilkinson recognized that "when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity". For example, one who acquires property by theft or fraudulent misrepresentation may be held a constructive trustee of the misappropriated property.

24 The question arises whether there is any practical reason for permitting the ITB Claimants to make their claim against Puratone at this time. Courts will generally not impose a constructive trust where the remedy jeopardizes the priority of innocent parties for value. In this regard, see ***Lac MineralsLtd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574, where LaForest J says:

> 197 ...In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, supra, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy....

The banks argue that there is no evidence that they are anything but innocent parties in these circumstances. Counsel for the two banks argue that there is no affidavit evidence adduced by the ITB Claimants that indicates that the banks were knowledgeable about any fraudulent intent on the part of Puratone, even if such existed. They argue that the court should not lift the stay simply on the

basis that the ITB Claimants make such an unsubstantiated allegation. Rather it is argued that the banks should, for the purpose of this motion, be assumed to have had no knowledge of any bad intent that is alleged to have been possessed on the part of Puratone, and that being the case, there is no prospect, let alone a reasonable prospect, that the ITB Claimants will be successful in obtaining a constructive trust at the end of the day.

25 The problem which I see with this submission is that evidence of the knowledge of the banks at the material times is a factual matter that is not readily apparent. Evidence such as that would normally only surface during the discovery process in civil litigation. The banks have chosen to file no affidavit material in this motion. It seems too high a threshold to require the ITB Claimants to demonstrate the knowledge of the banks at the material times on this motion. For current purposes, it is sufficient to conclude that given the size of the troubled loans, a reasonable inference is that the two banks who appeared to oppose the ITB Claimants motion would have been aware of the pending CCAA proceedings before they were filed, and at the time that the grain was being supplied, bank representatives would have had more than a cursory understanding of the business of Puratone and its financial difficulties. Whether the banks were aware that Puratone was purchasing grain on other than a COD basis after the decision had been made to apply for a CCAA order, and if so, whether the banks were in any position to do anything about it, is currently unknown. I do not say that the ITB Claimants will prevail in demonstrating the necessary knowledge in the fullness of time, but they have a claim which raises interesting issues, and they should be given the opportunity to pursue it sooner rather than later, especially when the existence of the claim will not jeopardize any restructuring.

26 What then of the other considerations enumerated by Jackson JA in the ***ICR*** case?

27 The merits of the claim against Puratone aside for the moment, the ITB Claim essentially translates into a priority claim between competing creditors. There is no restructuring plan which is being put at risk in this case. This proceeding is almost over. There are a few assets left to be liquidated, but that process will not be put at risk by the existence of the proposed claim by the ITB Claimants. Indeed, the Monitor confirms as such when in its latest report, it observed:

> 20. The Monitor understands that the general purpose of a stay of proceedings under the CCAA is to maintain the *status quo* for a period of time in order that a debtor company (and its directors and officers) can focus on restructuring efforts without undue interference.
> 21. Substantially all of the undertaking, property and assets of the Applicants have been sold and it is not anticipated that any formal restructuring will occur. In these circumstances, subject to the proviso which follows with respect to the role of the Monitor should litigation ensue, the Monitor is of the view that there would be no particular prejudice to the CCAA Proceedings if the stay of proceedings is lifted to enable ITB to initiate and proceed with an action against the Applicants and the directors and/or officers of the Applicants.

28 The proviso of the Monitor was simply that it not be required to retain any role in the litigation, if it was allowed to proceed.

29 Accordingly, the balance of convenience favours the ITB Claimants.

30 What then is the prejudice to be suffered if the claim were permitted to proceed at this time? The real prejudice in this case is that if the ITB Claimants are entitled to commence their action now against Puratone and the secured creditors, there could be a delay in the distribution of the holdback monies to the secured creditors. The banks would essentially be deprived of their use of the monies during the litigation and the return on the monies while sitting in the Monitor's trust account would not match what the banks might earn on those monies were they in hand.

31 On the other hand, if I do not permit the claim to be made at this time, the ITB Claimants would be forced to await the end of the CCAA proceeding before commencing their claim. By that time, there would be no money left in Puratone. It all will have been paid to the secured creditors, with at least the tacit acknowledgment by the court that those creditors were entitled to those monies ahead of anyone else. A result such as this is inconsistent with the notion that in a CCAA proceeding, creditors have resort to the supervising court to adjudicate on priority disputes.

32 Any prejudice created by the delay in distribution of funds can easily be alleviated by analogy to the Court Rules respecting prejudgment garnishment. In effect, that is the result which is being sought by the ITB Claimants. Although *Queen's Bench Rule* 46.14 (1) permits garnishment before judgment, Rule 46.14 (3) reads as follows:

> 46.14(3) An order under subrule (1) (Form 46D) may include,
>
> (a) a requirement that the plaintiff post security in a form and amount to be determined by the court; and
> (b) such other terms and conditions as may be just.

33 There is no doubt that the secured creditors are *prima facie* entitled to the proceeds of these proceedings. They have valid security agreements which have been properly registered. The ITB Claimants seek to challenge their priority not on the basis that the banks are not secured creditors, but on the basis of factual circumstances that would make it equitable to provide the ITB Claimants with a priority over the secured creditors. There are factual impediments to their claim for unjust enrichment and potentially legal impediments to their claim for equitable subordination and tracing. If I give them the right to make those claims, and those claims are not successful, the delays which those claims might cause to the timely receipt of monies by the secured creditors should not go unaddressed. This can be done by requiring the ITB Claimants to each file an undertaking whereby they would be liable to pay either or both of the banks damages arising from the delay in the payment of the holdback monies attributable to their claim. I am therefore ordering that out of the general holdback monies the amount of $903,250.50 be dedicated to the ITB Claim and not be paid out without further order of court, which presumably will occur either after the claim has been resolved or upon sufficient evidence being demonstrated that it has not been prosecuted in a timely way. Counsel may try and agree on the form of the undertaking as to damages, but may come back to me should agreement not be reached.

34 As regards Puratone, I therefore make the following orders:

> a) Out of the general holdback monies, the sum of $903,250.50 and any interest accrued thereon since March 12, 2013 shall be segregated in an interest bearing account designated as the ITB Claim Monies.

b) Leave is given to the ITB Claimants to commence the action against Puratone described at Schedule A of their notice of motion dated April 10, 2013, provided:

(1) they issue it within 40 days after the date of signing of the Order that evidences this decision, and
(2) Prior to the issuance of the Statement of Claim, each named plaintiff will file an undertaking as to damages for its pro rata share of any damages sustained by Bank of Montréal and/or FCC arising from any delay after July 31, 2013 in the distribution of its portion of the ITB Claim monies to Bank of Montréal and/or FCC caused by the issuance of the ITB Claim.

35 If a claimant does not file the requested undertaking as to damages, I will consider that such claimant has abandoned its claim and the ITB Claim Monies may be reduced by the amount of that claimant's claim.

The Proposed Claim against the directors and/or officers

36 The claim of the ITB Claimants against the directors and/or officers similarly finds its roots in the allegations of fraud made against Puratone. Counsel for the directors and officers relies upon the case of ***Peoples Department Stores Inc. (Trustee Of) v. Wise***, 2004 SCC 68, [2004] S.C.J. No. 64, drawing from it the principle that deference ought to be given to the decisions that directors make as they fulfil their functions. Notwithstanding that case, there is an argument to be made that where a company has committed a fraud, be it legal or equitable, knowledge on the part of directors of such conduct by officers or employees of the company may make the directors vicariously and/or personally liable.

37 Again, evidence of the actual knowledge of the directors and/or the officers is not readily apparent without the ability to inquire into the records of the company through the discovery process. For the same reasons that I expressed as regards the two banks, requiring the ITB Claimants to adduce evidence on this motion of the directors' and officers' knowledge is too high a threshold to impose. A reasonable inference is that at least some of the directors and officers would have known that a CCAA proceeding was being prepared within the two week period prior to the CCAA filing, and at least some of the directors and officers would have had intimate knowledge of the financial constraints of the company and the efforts which the company was employing to solve them during the two week period prior to the filing of the CCAA proceeding. That reasonable inference in my view is sufficient to conclude that the proposed claim against the directors and/or officers is not necessarily doomed to fail. This case, as with many, will depend on facts not currently available to the court.

38 Additionally, the balance of convenience favours the ITB Claimants, and I see no prejudice to the directors and officers facing the ITB claim sooner rather than later.

39 In my view there are sound reasons to justify lifting the stay to permit the ITB Claimants to issue the proposed claim against the officers and are directors, providing it is issued within 40 days after the date of signing of the Order that evidences this decision. It will however be necessary for the claimants to name the particular individuals who they propose to sue, recognizing that they may

expose themselves to costs, possibly on a solicitor and own client basis, for every person that they unsuccessfully sue.

GOING FORWARD

40 I have contemplated that the claim should be commenced by one statement of claim, naming at least Puratone and the named officers and directors. The normal Rules of the Court should be followed with the additional requirement that the action will be case managed. A case management conference before me shall be set up within 30 days of the close of pleadings, or earlier upon written request of any party.

41 If necessary, the costs of this motion shall be determined by me upon the resolution of the ITB Claims.

R.A. DEWAR J.

TAB 22

Case Name:

Growthworks Canadian Fund Ltd. (Re)

Re: IN THE MATTER OF a Proposed Plan of Compromise or Arrangement with respect to Growthworks Canadian Fund Ltd., Applicant

[2014] O.J. No. 1345

2014 ONSC 1856

Court File No. CV-13-10279-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: February 11, 2014.
Judgment: March 24, 2014.

(68 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Motion by Allen-Vanguard for an order that stay of proceedings under Initial Order did not apply to continuation of a 2008 action adjourned -- Motion by Fund for an order directing trial of two issues in respect of Allen-Vanguard's claim against it by way of a mini-trial adjourned -- Motions to be determined after pending motion for extending stay was heard.

Motions in a Companies' Creditors Arrangement Act proceeding to lift the stay and to determine proposed claims issues at a mini trial. The Fund, a labour-sponsored retail venture capital fund, was party to an action commenced in 2008. The Fund subsequently filed for CCAA protection. The 2008 action had not yet been set down for trial. The action was commenced as a result of a sale of shares in Med-Eng Systems to Allen-Vanguard Corporation, also a party to the 2008 action. A 2013 Initial Order under the CCAA granted the Fund a stay of proceedings. The stay had been extended and would have to be extended again shortly. Allen-Vanguard now moved for an order that the stay of proceedings under the Initial Order did not apply to the continuation of the 2008 action. The Fund sought an order directing the trial of two issues in respect of Allen-Vanguard's claim against it by way of a mini-trial.

HELD: Motions adjourned. In light of material events which had transpired in the Fund's CCAA proceeding since the hearing of these motions and in light of the material evidentiary gaps in the records filed on those motions, the court deferred its disposition of those motions until consideration of the forthcoming motion to extend the stay period. Given the proximity of the forthcoming stay extension motion, there was no point in considering, at this point of time, whether to lift the stay of proceedings in respect of the Fund's involvement in the 2008 proceedings. On the return of that stay extension motion, not only must the Fund file evidence to address the requirements for an extension specified in CCAA s. 11.02(3), but both it and Allen-Vanguard must also adduce evidence to address certain factors identified by the Court in Canwest Global Communications.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985,c., C-36 s. 20(1)(a)(iii)

Counsel:

K. McElcheran, for the Applicant, Growthworks Canadian Fund Ltd.

J. Dacks, for the Monitor, FTI Consulting Canada Inc.

R. Slaght and I. MacLeod, for Allen-Vanguard Corporation.

T. Conway and J. Leon, for the Offeree Shareholders in Ottawa Court File Nos. 08-CV-43188 and 08-CV-43544.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Lift stay and contingent claim process motions in a *CCAA* proceeding

1 Two events form the backdrop to these competing motions. First, the October, 2007 closing of the sale of shares in Med-Eng Systems Inc. to Allen-Vanguard Corporation ultimately spawned two 2008 lawsuits up in Ottawa: one initiated by the selling shareholders (the "Offeree Shareholders") (Action No. 08-CV-43188: the "Offeree's Action"), and one by the purchaser (08-CV-43544: the "AVC Action"), collectively the "Ottawa Proceedings". Some 5.5 years after their commencement, the Ottawa Proceedings have not yet gone to trial. Indeed, they have not been set down for trial.

2 Growthworks Canadian Fund Ltd. ("Growthworks" or the "Fund") was one of the selling shareholders of Med-Eng Systems and is a party to the Ottawa Proceedings, which brings me to the second event. On October 1, 2013, Newbould J. granted an initial order in Growthworks' application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Paragraph 14 of the Initial Order contained the standard Model Order stay provision which ordered that:'

> no proceeding ... in any court ... shall be ... continued against ... the Applicant ... or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceed-

> ings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

3 Against that background, the parties brought two competing motions in the *CCAA* proceeding. First, Allen-Vanguard Corporation ("AVC") moved for an order that the stay of proceedings under the Initial Order did not apply to the continuation of the Ottawa Proceedings or, alternatively, for an order that the stay of proceedings had no effect on the continuation of the Ottawa Proceedings "against or in respect of any other party named therein, except for Growthworks ... on such terms as are just".

4 On its part, Growthworks moved for orders directing the trial of two issues in respect of AVC's claim against it by way of a mini-trial, making the determination of those issues binding on AVC and the Offeree Shareholders for all purposes, and restraining AVC from taking any steps in the AVC Action that would affect Growthworks in any way. The two issues for which Growthworks seeks a determination at a mini-trial are the following:

> (i) Were the claims of AVC extinguished at law when it amalgamated with Allen-Vanguard Technologies Inc., formerly Med-Eng Systems Inc., on January 1, 2011? and,
> (ii) Assuming that AVC is capable of proving fraud on the part of the former management of Med-Eng, is AVC entitled under the August 3, 2007 Share Purchase Agreement to seek damages from Growthworks and the other Offeree Shareholders in excess of the "Indemnification Escrow Amount" for the alleged breaches and misrepresentations of Med-Eng?

I will refer to these two issues as the "Proposed Claims Issues".

5 At the hearing of the motion I informed counsel that I would contact RSJ Hackland in Ottawa to ascertain the state of the trial list there. I did so. On March 17, 2014, I received an email from Monitor's counsel advising that McEwen J. had extended the *CCAA* stay of proceedings until April 10, 2014 and informing me about the Sixth Report of the Monitor posted on its website. I have read that report and other court materials posted by the Monitor on the case website. On March 17, 2014, I received an email report from Master MacLeod regarding a case conference held that day in the Ottawa Proceedings, which I forwarded to counsel.

II. Growthworks Canadian Fund Ltd. and its initiation of *CCAA* proceedings

6 Formed in 1988, Growthworks is a labour-sponsored retail venture capital fund with an investment portfolio focused on small and medium-sized Canadian businesses. Growthworks filed for *CCAA* protection because it could not make a $20 million payment obligation to Roseway Capital S.a.r.l. due on September 30, 2013 under its May, 2010 Participation Agreement with Roseway. The Fund's debt to Roseway is its only outstanding secured debt. Growthworks informed the court that it lacked access to short-term financing and would have difficulty realizing upon assets in its portfolio because of their illiquidity consisting, as they did, of minority equity positions in private companies and restricted equity securities in a publicly traded company. Nevertheless, as of September 30, 2013, the total net asset value of the Fund was about $84.62 million, with assets of approximately $115 million.

7 Ian Ross, the Fund's Chair, in his September 30, 2013 affidavit sworn in support of the Initial Order, explained why Growthworks needed the benefit of a stay of proceedings:

> If the Fund is protected from the negative effects of a fire sale of its assets by a stay in these proceedings, and if it is able to continue to service its Venture Portfolio to preserve the value of its assets pending a restructuring, the Fund expects to be able to satisfy the obligations owing to Roseway in full through a combination of judicious dispositions, new debt financing and/or a merger or other transaction.
>
> The Fund has been in serious discussions with a possible merger partner and has received a letter agreement setting out a proposed transaction ... A stay of proceedings would permit the Fund time to continue discussions with the merger partner, with the goal of a successful merger transaction, while at the same time enabling it to explore other options without the threat of a forced sale of its interests and related losses.
>
> ...
>
> [T]he Fund seeks the protection of the Court pursuant to the [*CCAA*], including a stay of proceedings, to provide a safe context to restructure the Fund by refinancing, merger or judicious divestitures, and to resolve its legal and factual disputes with Roseway and the Manager, while at the same time ensuring the Fund has access to its critical documents and systems and the assistance of the Manager and GWC as needed to provide transitional services that enable the Fund to continue to operate and service its Venture Portfolio pending such a restructuring.

In his discussion about why the Fund required a stay of proceedings Ross did not refer to the Ottawa Proceedings.

8 Ross appended to his affidavit filed in support of the Initial Order the 2012 audited financial statements of the Fund (as of August 31, 2012). Those statements did not refer specifically to the Ottawa Proceedings. Note 10, dealing with "Contingencies", stated:

> In the normal course of operations, various claims and legal proceedings are initiated against the Fund. Legal proceedings are often subject to numerous uncertainties and it is not possible to predict the outcome of individual cases. In management's opinion, the Fund has made adequate provision or has adequate insurance to cover all claims and legal proceedings. Consequently, any settlements reached should not have a material effect on the Fund's net assets.

9 The stay of proceedings granted under the Initial Order ran until October 31, 2013. Growthworks moved to extend the stay period until January 15, 2014. In his October 25, 2013 affidavit in support of that extension Ross reported on the Fund's on-going efforts to finalize and execute a merger agreement with a potential merger partner by November 15, 2013. Ross stated: "[O]ne of the elements of that transaction will be the ability for the Fund to canvass the market to

seek competing bids ... in an attempt to identify a superior offer to any merger transaction". Ross made no mention of the Ottawa Proceedings in that affidavit.

10 In its First Report (October 8, 2013), the Monitor stated that "there are no known creditors of the Fund who have a claim of more than $1,000 ..." Neither the Monitor's First Report nor its Second Report (October 28) mentioned the Ottawa Proceedings.

11 On October 28, the day before the stay extension hearing, AVC delivered its motion materials seeking relief in respect of the Ottawa Proceedings. The hearing of that motion ultimately was adjourned to February 11, 2014. I will turn shortly to the subject-matter of the Ottawa Proceedings, but first it would be worthwhile to provide an overview of how the *CCAA* proceeding has unfolded since October 29, 2013, because that history provides a necessary part of the context for consideration of the competing motions.

12 First, by order made October 29, 2013, Mesbur J. extended the stay period until January 15, 2014.

13 Next, by order made November 18, 2013, Morawetz J. approved a sale and investor solicitation process ("SISP") for all of the Fund's property which used a Phase 1 Bid Deadline of December 13 and a final, Phase 2 Bid Deadline of roughly late January or early February, 2014. Running the second phase depended upon receipt of a qualified letter of intent in Phase 1 and a determination by the Fund's special committee of directors that there existed a reasonable prospect of obtaining a qualified bid.

14 In its Third Report (November 15) dealing with the SISP motion, the Monitor commented on the Ottawa Proceedings:

> The outcome of this dispute could potentially impact the timing of distributions from any proceeds realized in the SISP process to stakeholders other than Roseway. Accordingly, it is the view of the Fund and the Monitor that this limited issue should be resolved quickly.

15 By order made November 28, 2013, Mesbur J. authorized Growthworks to make distributions of collateral to Roseway under its security agreement and to repay Roseway from any proceeds of the SISP, subject to the payment of certain priority payables.

16 By order made January 9, 2014, McEwen J. extended the stay period to March 7, 2014 and approved a claims process (the "Claims Procedure Order"). According to the affidavit filed by Ross, the Fund proposed a claims process to identify and ultimately quantify and adjudicate claims against the Fund "to provide potential bidders with clarity, to the extent required for the form of transaction they may propose, regarding the claims against the Fund". In his affidavit Ross explained in some detail why the Fund thought clarity about claims was "important and likely essential for any proposed merger transaction":

> [A]ny potential merger partner (and possibly other bidders depending on the type of transaction proposed) will want to identify the claims against the Fund and either adjudicate and quantify such claims prior to closing or specifically identify the disputed and undisputed claims and address them in their bid.
>
> ...

> Accordingly, identifying the disputed and undisputed claims against the Fund may be required shortly after the Phase 2 Bid Deadline, depending on the form of transaction identified and the closing date of any such transaction.
>
> ...
>
> The timely identification of claims against the Fund is also important for the restructuring process generally and for the Fund's stakeholders, in particular, in order to permit distributions to be made (beyond distributions to Roseway Capital S.a.r.l. ... in relation to its agreed upon secured obligations) to the extent possible.

17 Ross identified two types of known claims against the Fund. First, Roseway and the Fund's manager were asserting contractual claims. Second, the Fund was named as defendant in two lawsuits -- the AVC Action in which $650 million was claimed, and a Nova Scotia proceeding in which AGTL Shareholders claimed $28 million in damages from the Fund.

18 The approved claims process set March 6, 2014 as the claims bar date. The process required the filing of proofs of claim with the Monitor, review by the Monitor, and a dispute resolution process before the Monitor with the Monitor able to seek directions from the court concerning an appropriate process to resolve the dispute. The AVC claim received separate treatment in the Claims Procedure Order, with the order deeming AVC to have submitted a proof of claim in the amount of $650 million (the "AVC Claim"), deeming the Monitor to have disallowed the claim, and deeming AVC to have submitted a dispute notice. The order stated that the procedure for determining the AVC Claim would not be determined until after the determination of the two present motions "or by further Order of the Court".

19 The AVC and Growthworks motions were heard on February 11, 2014.

20 Finally, by order made March 6, 2014, McEwen J. extended the stay period until April 10, 2014. On that motion the Fund reported that by the SISP's final deadline it had received two proposals, but neither was a qualifying bid that would pay in full and in cash the claims of Roseway. Growthworks did not receive an offer to complete a merger transaction, only a bid to purchase a portion of the Fund's assets and one to take over management of the portfolio. In his supporting affidavit Ross deposed that the Fund was recommending that it continue to manage and realize its assets to repay Roseway and to preserve value for other stakeholders. The Fund advised that it would discuss with Roseway "an appropriate cost reduction and asset management proposal" and it sought an extension of the stay period to allow the Fund to develop a management arrangement, identify exit opportunities to realize on the value of its investments, and assess and address tax implications for its shareholders.

21 In its Sixth Report (March 5) the Monitor provided additional details about the SISP process: it had seen overtures to 157 parties, the execution of confidentiality agreements by 55 parties, 36 of whom were deemed to be qualified bidders and who had received a confidential information memorandum, with 30 bidders gaining access to the electronic data room. In Phase 1 seven (7) letters of intent were received and six of the parties were invited to participate in Phase 2. By the Phase 2 deadline only two proposals had been received, neither of which constituted qualified bids, and neither of which was pursued. The Monitor made no suggestion that the existence of unresolved claims against the Fund, including the AVC Claim, had influenced the results of the SISP.

22 The Monitor also reported that since there was no deadline by which it was required to review and adjudicate received proofs of claim, it would:

> use its discretion to respond to and, if necessary, adjudicate disputed claims only when and if circumstances necessitate doing so. Other than in accordance with the Claims Procedure, the Monitor does not anticipate responding to or adjudicating disputed claims until such time as Roseway is paid in full and there are, or are likely to be, remaining funds for distribution to unsecured creditors of the Fund.

23 So, there sits the Fund's *CCAA* proceeding. Let me now turn to consider the dispute involving AVC.

III. The Med-Eng share sale

24 Growthworks, Schroder Venture Managers (Canada) Limited, Schroder Ventures Holding Limited, Richard L'Abbé and 1062455 Ontario Inc. (collectively the "Offeree Shareholders") owned approximately 80% of the shares of Med-Eng; Growthworks held about 12.4% of the Med-Eng shares.

25 By Share Purchase Agreement made as of August 3, 2007, the Offeree Shareholders sold their shares in Med-Eng to AVC for about $650 million. The transaction closed on September 17, 2007, with the Fund receiving about $72 million for its 12.4% shareholding. Shortly thereafter Med-Eng was amalgamated with Allen-Vanguard Holdings Ltd., which changed its name the following year to Allen-Vanguard Technologies Inc. ("AVTI"), which ultimately merged with AVC on January 1, 2011.

26 The SPA included an Escrow Agreement which provided that $40 million of the purchase price paid by AVC was to be held in escrow to indemnify AVC should certain types of claims arise (the "Indemnification Escrow Amount"). Section 4.1(a) of the Escrow Agreement stipulated that if AVC was entitled to indemnification in accordance with sections 7.02 or 7.04 of the SPA, it could draw upon the Indemnification Escrow Amount for such claims. Section 7.02 of the SPA specified the circumstances in which Med-Eng was required to indemnify AVC from claims incurred by the purchaser resulting from Med-Eng's breach of covenants, certain reps and warranties, or breach of a Teaming Agreement. Section 7.04 dealt with third party indemnification.

27 Section 7.02(2) placed a $40 million cap, or limit, on the amount for which AVC could seek indemnification under section 7.02:

> 7.02(2) Notwithstanding any of the other provisions of this Agreement, the Corporation will not be liable to any Purchaser Indemnitee in respect of:
>
> ...
>
> (b) any inaccuracy or misrepresentation in any representation or warranty set forth in Section 3.01 or any contravention of, non-compliance with or other breach, on or before the Closing Date, of the GD Teaming Agreement:

...

(ii) in excess of the Indemnification Escrow Amount;

other than, in all cases, any Claim attributable to fraud.

28 The Escrow Agreement provided that on December 21, 2008, the Indemnification Escrow Amount was to be reduced by the value of any claims made by AVC under SPA ss. 7.02 and 7.04 which remained pending as of that date, with the balance of the amount to be distributed to the Offeree Shareholders.

29 On September 10, 2008, about a year after the closing, AVC delivered a notice of claim under the SPA and Escrow Agreement alleging breaches of representations and warranties, and contending that the aggregate amount of its claims was $40 million. AVC did not break-down the dollar amount of its claim by category of alleged breach. On October 6, 2008, the Offeree Shareholders delivered a notice of objection.

30 Litigation then ensued.

IV. The Ottawa Proceedings

A. The Offeree's Action

31 First to file were the Offeree Shareholders who issued their Statement of Claim in the Offeree's Action on November 12, 2008 seeking a declaration that they were entitled on December 21, 2008 to the payment and distribution of the Indemnification Escrow Amount of $40 million. AVC and AVTI filed a statement of defence dated December 18, 2008.

B. The AVC Action

32 Instead of filing a counter-claim in the Offeree Action, AVC commenced its own action on December 18, 2008 seeking:

> Indemnification and/or damages for fraudulent and/or negligent misrepresentation and breach of contract in the amount of $40,000,000, which shall be distributed to Allen-Vanguard Corporation in accordance with the terms of the Escrow Agreement.

The Offeree Shareholders defended on February 10, 2009.

33 As originally framed, both actions put in play entitlement to the $40 million Indemnification Escrow Amount, and Growthworks was not exposed to any liability beyond foregoing its notional *pro rata* share of the funds held in escrow.

C. History of the Ottawa Proceedings: 2009 - 2013

34 On these motions the parties filed evidence describing the (slow) progress of the Ottawa Proceedings. The slow pace to date of the Ottawa Proceedings will inform, in part, my exercise of discretion under the *CCAA*, so let me highlight the key points.

35 The proceedings went into case management in September, 2009 at which time the court ordered productions to be completed by the end of that year. That did not occur. In February, 2010 Master MacLeod was continuing to order AVC to complete its productions.

36 He also ordered the parties to agree on dates in June, 2010 for the start of discoveries. That did not occur. The first discovery did not start until December, 2010. Most discoveries were com-

pleted by the summer of 2011, with a few further days of examination of AVC's representative in late 2012 and early 2013. To date the scorecard of examination dates has been: 21 days of examination of AVC's representative, 6 days of Schroder Venture, 1 day for Richard L'Abbé, 2 days for 1062455 Ontario, and one (1) day for Growthworks' representative, for a total of 31 days of examinations for discovery. As put by David Luxton, AVC's chair, in his affidavit in support of AVC's motion:

> The single day of discovery of Richard Charlebois (a retired employee of Growthworks Capital Ltd.) reflects the very limited involvement and role of Growthworks in the litigation.

37 I highlight these delays in productions and discoveries not to ascribe blame to one side or the other -- Master MacLeod has commented on the conduct of some parties during the course of his various decisions -- but to illustrate the on-going non-compliance with judicial case management timetables which, in turn, causes me to discount representations made on these motions about the feasibility of quickly moving the Ottawa Proceedings to trial. The track record of these proceedings cannot support such optimism.

38 On September 10, 2008, AVC defended a separate, earlier action brought by Paul Timmis, a former executive with Med-Eng, in respect of an escrow fund related to his compensation. Master MacLeod in Ottawa case managed both the Ottawa Proceedings and the Timmis action.

39 By case conference endorsement made April 16, 2012, Master MacLeod ordered that a 10-week trial of the Ottawa Proceedings commence September 3, 2013, and he issued detailed and comprehensive pre-trial management directions to ensure that the parties would meet that trial date. On December 4, 2012, Master MacLeod confirmed that the Offeree Action and AVC Action would be tried together, and his order contemplated the conduct of discoveries in the Timmis proceeding in January, 2013. (The materials did not explain why, given that the Timmis Action pre-dated the commencement of the Ottawa Proceedings, AVC only got around to conducting substantive examinations of Timmis after most of the discoveries had been completed in the Ottawa Proceedings.)

40 As a result of its examination for discovery of Timmis in late December, 2012 and early January, 2013, AVC sought to make radical changes to its Statement of Claim in the AVC Action. I say radical because AVC increased its claim for damages from the $40 million Indemnification Escrow Amount to $650 million, essentially asking for the return of the purchase price under the SPA. AVC alleged that the former management of Med-Eng had known, before the closing, that one of the company's largest customers intended to test a Med-Eng product against that of a competitor, yet deliberately withheld that information in order to ensure AVC completed the share purchase transaction. Although its initial claims had included one for indemnification based on fraudulent misrepresentation, AVC moved to add a second fraudulent misrepresentation claim.

41 On February 19, 2013, Master MacLeod granted AVC leave to issue its proposed amended statement of claim. The Offeree Shareholders appealed. By reasons dated May 22, 2013, RSJ Hackland dismissed their appeal. The amended statement of claim was issued on June 11, 2013. Inexorably the September 3, 2013 trial date went out the window, as Master MacLeod directed in his May 30, 2013 endorsement. As Master MacLeod pointed out, in an understated fashion: "I see no option but to adjourn the matter if it is the intention of the parties to try all of the issues".

42 It is worth considering parts of the analysis undertaken by RSJ Hackland in his reasons dismissing the appeal. He described the significance of the proposed amendments:

> The Master was well aware of the fact that the amendment if granted would expose the Med-Eng shareholders to potential liability for the full purchase price of the business and not simply for their respective interests in the $40 million holdback fund created on closing in order to secure any possible claims for misrepresentation and breach of warranty, as provided for in an escrow agreement. *The amendment in issue is indeed potentially "game changing"*, as the Master observed.[1]

He then commented on the essential nature of the amended claim:

> On the facts of this case, it is common ground that *all of the critical representations and warranties were given by Med-Eng management on behalf of the corporation being acquired and not by the vendors, the offeree shareholders ...*
>
> It would appear to be common ground in this case that *any liability on the part of the vendor shareholders could only be based on an obligation arising from the Share Purchase Agreement in the context of fraud*. As the Master accurately observed, the effect of this amendment to the pleading will be totally dependent on proving fraud ...[2]

RSJ Hackland agreed with the analysis conducted by Master MacLeod:

> I respectfully agree with the Master's analysis, which is captured in paragraph 22 of his careful reasons:
>
> > Since there is no fraud asserted against any defendant offeree shareholder, the defendants contend that this provision in article 7.02 (5) is a complete defence to a claim beyond the $40 million in the escrow fund. *They may be right.* Mr. Conway puts this argument persuasively and it is consistent with the intent of the agreement to limit the exposure of the vendors. Nevertheless I am not able to say with certainty that this is the only possible interpretation of the agreement. Mr. Lederman argues that no court can condone an interpretation which would unjustly enrich the former shareholders at the expense of the plaintiff if it was a victim of fraudulent misrepresentation. *There is sufficient ambiguity in these interrelated provisions that I am unable to find only one possible interpretation of the contract. I cannot say that on the face of the agreement the plaintiff could never succeed*.[3]
>
> ...
>
> Like the Master, *I cannot say that the proposed amendment was untenable in the sense that it could never succeed*. And I specifically do not accept the appellants' submission that it was an error of law for the Master to fail to articulate the spe-

> cific ambiguity in the Share Purchase Agreement on which the respondent's amendment could succeed.[4]

43 It is also worth noting several of the observations made by Master MacLeod in his May 30, 2013 endorsement adjourning the trial of the Ottawa Proceedings:

> [6] ... [T]he amendment effects a fundamental change to the exposure of the offeree shareholders and it also adds issues that were either not before the court previously or which now attract enhanced significance.
>
> [7] For example, it is now pleaded that the misrepresentations of Med-Eng and the completion of the purchase based on those misrepresentations caused Allen-Vanguard to spiral into insolvency ...
>
> [8] On the other hand there was some discussion at the hearing concerning the possibility of bifurcating the trial and [counsel for the Offeree Shareholders] wishes to bring a summary judgment motion. *I have ruled that it is not possible based on the wording of the SPA alone to determine that there are no circumstances that would permit recovery of more than $40 million from the offeree shareholders. RSJ Hackland has come to the same conclusion. In his decision he notes that it may be necessary to consider parol evidence.* Of course the admission of parol evidence requires that the court first find that the exceptions to the "parol evidence rule" apply and the nature and extent of the evidence that will then be admitted is itself open to argument. I am included to agree with the submissions of Mr. Slaght that it is quite unlikely that a judge will make that kind of decision on a summary judgment motion.
>
> [9] *On the other hand it might be possible to try that question. The question is whether or not the SPA caps the liability of the offeree shareholders even if there was fraud providing it is not fraud on the part of those shareholders. Counsel could agree to try that issue.*
>
> [10] There are other threshold questions. Allen Vanguard must prove that there were misrepresentations. They must prove that the misrepresentations were relied upon and that it was reasonable to do so in the face of Allen-Vanguard's own due diligence. In order to have any possibility of a claim above the amount in the escrow fund they must prove that the misrepresentations were fraudulent. Losing on any one of those issues is either fatal or would confine the remedy to the escrow fund.

44 Luxton, in his October 28, 2013 affidavit, clarified the nature of AVC's amended claim against Growthworks:

> Allen-Vanguard has not alleged that Growthworks made any fraudulent misrepresentations, but rather that it is liable (along with the other Offeree Shareholders) *under the terms of the Share Purchase Agreement* for the fraudulent misrep-

> resentations committed by [Med-Eng] and its former management ... (emphasis added)

45 The Offeree Shareholders filed an Amended Statement of Defence (June 28, 2013) and AVC delivered a Reply (August 22, 2013). Five weeks later Growthworks obtained the *CCAA* Initial Order.

46 On October 2, 2013, Master MacLeod set December 10 as the date for a privilege motion in the Ottawa Proceedings and advised that RSJ Hackland would hear a summary judgment motion by the Offeree Shareholders. Evidently the existence of the Initial Order was not disclosed at that case conference, and it appears that none of the counsel present at that case conference knew about it.

47 In subsequent correspondence with Master MacLeod, counsel for the Offeree Shareholders, including Growthworks, took the position that his clients would not be delivering any motion materials in light of the stay of proceedings in the Initial Order until issues with Growthworks were sorted out in the *CCAA* proceeding.

48 Paul Echenberg, the President of a firm advising the Offeree Shareholders in the Ottawa Proceedings, expressed the view in his November 24, 2013 affidavit that those proceedings were "nowhere ready for trial", an assessment that I accept as reasonably accurate. The evidence filed on these motions disclosed that production, discovery, refusals and privilege issues remain outstanding in the Ottawa Proceedings. That state of affairs was confirmed by the information provided by Master MacLeod in his March 17, 2014 email report to me, which I circulated to counsel:

> Ordinarily if such a trial is then adjourned because the timetable goes awry we will not provide a new fixed date until at least one of the parties is in a position to set the matter down. We have not reached that point. In fact there are motions contemplated which would make that unlikely and our current timetable has been put on hold due to the allegation in Toronto that everything about the Ottawa action is currently stayed.
>
> All that said, it remains theoretically possible in the view of the regional manager to accommodate a 10 week trial in 2014 particularly, if as I suspect, another long civil trial currently on the list has settled in whole or in part. *I would be very surprised however if either counsel for the offeree shareholders or counsel for Allen-Vanguard is prepared (or able) to set the Ottawa action down and certify that they are ready for trial at this time.* It would be possible to accommodate a trial of 10 weeks in early 2015 or in the fall of that year. (emphasis added)

My inquiries to RSJ Hackland about the availability of trial dates yielded similar information. Realistically, then, the Ottawa Proceedings will not proceed to trial until sometime in 2015 and continued litigation skirmishing between the parties might well push that date back further if past history is any indicator of future conduct.

V. Positions of the parties

49 Growthworks, supported by the other Offeree Shareholders, seeks the holding of a "mini-trial" on the two Proposed Claims Issues in the context of its *CCAA* proceeding. It offered some details on how such a "mini-trial" would operate. Growthworks would file affidavit evidence on the process of negotiating the SPA. Specifically, it would tender evidence from:

(i) Robert Chapman, a lawyer at McCarthy Tetrault involved in negotiating and drafting the SPA;
(ii) Cécile Ducharme, an advisor to Schroder Venture Managers (Canada) Ltd. who provided instructions to Chapman on behalf of some Offeree Shareholders during the negotations; and,
(iii) Paul Echenberg, who would discuss some of the positions taken by Offeree Shareholders during the SPA negotiations.[5]

In addition, the Fund would file documentary evidence on two issues: (i) the history of AVC's amalgamations; and, (ii) evidence that during its own 2009 - 2010 *CCAA* proceeding AVC did not suggest that it had a potential claim of $650 million against the Offeree Shareholders;

50 On its part, AVC opposed the continuation of the stay as against the Ottawa Proceedings arguing that that litigation would not affect the Fund's ability to continue its business or to restructure and that Growthworks would have "very limited involvement in the litigation with" AVC. That said, AVC did not back down from its pleaded position that the Fund's maximum exposure in the AVC Action would be joint and several liability for the full $650 million damage claim.

51 As to the "mini-trial" proposed by Growthworks, AVC argued that it (i) would not finally dispose of the dispute between the parties, (ii) would result in additional litigation costs, perhaps in the range of hundreds of thousands of dollars, (iii) could not be completed within one week, but would require three weeks, (iv) would require an examination of AVC's allegations of fraud in order to interpret provisions of the SPA, albeit AVC couched this part of its argument in terms of the "factual matrix" necessary for contractual interpretation, and (v) would unfairly restrict AVC's rights of appeal. AVC did not describe the type of evidence it might call on a "mini-trial", which I must confess was quite unhelpful given that the issue was four-square on the table in these motions. Instead, AVC proposed that the most efficient way of proceeding was to bifurcate the liability and damages issues in the Ottawa Proceedings and "secure an early trial date for the liability trial". Luxton deposed:

> The bottom line is that this case is ready to proceed to trial on all of the liability issues and there is no practical reason why it should not proceed.

I do not accept Luxton's assessment; it is belied by the evidence of the history of the Ottawa Proceedings to date.

VI. Analysis

A. What the parties really are seeking on their motions

A.1 AVC really is asking to lift the stay of proceedings in respect of the Ottawa Proceedings

52 AVC submitted that it was not moving to lift the *CCAA* stay of proceedings, but "rather to confirm that the stay imposed by the Initial Order will not be extended to apply to the Allen-Vanguard Proceedings". The simple response to that submission is that the Initial Order, by its

terms, applied to the Ottawa Proceedings, at least to the extent of the Fund's involvement in them. Paragraph 14 of the Initial Order could not be clearer:

> [A]ny and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

Growthworks is a party to the Offeree Action and the AVC Action. Both are proceedings "in respect of the Applicant or affecting the Business or the Property". Both therefore are stayed in respect of the participation of Growthworks in those proceedings. Master MacLeod accurately summarized the effect of the stay of proceedings in paragraphs 3 through 5 of his November 12, 2013 endorsement.

53 Although the stay does not extend, by its terms, to a person other than Growthworks -- and no request was made to extend the Initial Order to non-parties -- the practical consequence of the pleading of joint and several liability underpinning AVC's claim against Growthworks is that it is most difficult for the Ottawa Proceedings to move forward without the Fund's involvement, and AVC is not abandoning its joint and several liability claim against the Fund.

54 Accordingly, although AVC sought, as its primary relief, an order that the stay of proceedings in the Initial Order did not apply to the continuation of the Ottawa Proceedings, I regard its request as one, in substance, to lift the stay of proceedings in respect of Growthworks' involvement in the Ottawa Proceedings -- i.e. the Fund's potential liability in those proceedings.

55 AVC sought, by way of alternative relief, an order confirming that the stay had no effect on the Ottawa Proceedings in respect of any party other than Growthworks. The Initial Order did not purport to stay any proceeding except one "against or in respect of" the Fund or "affecting the Business or the Property". So, AVC's articulation of its alternative relief does nothing more than describe the actual scope of the stay in the Initial Order. Yet, based on the evidence filed by AVC, it really is not seeking the alternative relief because it wants to proceed to a full, traditional, expensive, conventional trial against all Offeree Shareholders, including Growthworks, and it wants any finding of liability and damages to bind Growthworks. As a practical matter, then, one must treat AVC's motion as a request to lift the stay of proceedings against Growthworks.

A.2 Growthworks really is asking for a two-stage claims process under the *CCAA*

56 Looked at one from one perspective, one could regard the Fund's request for a "mini-trial" within the *CCAA* proceeding as nothing more than an attempt to re-schedule its proposed summary judgment motion in the Ottawa Proceedings from a judge in Ottawa to a judge on the Toronto Region Commercial List. Indeed, Echenberg contended that the proposed mini-trial would deal with the same issues as those in the intended summary judgment motion which RSJ Hackland is scheduled to hear. If the request was based on nothing more than that, it would be a misuse of the *CCAA* process. But, the record disclosed that more was at play on the Fund's motion.

57 Growthworks did secure protection from this Court under the *CCAA* and this Court has made a Claims Procedure Order. That order referred the issue of the process to determine the AVC Claim to a later consideration by this Court. Section 20(1)(a)(iii) of the *CCAA* provides that the amount represented by a claim of any unsecured creditor is the amount "proof of which might be made under the *Bankruptcy and Insolvency Act*". Section 121(2) of the *BIA* requires that the determination whether any contingent claim is a provable claim and the valuation of such a claim must

be made in accordance with *BIA* s. 135. Section 135(1.1) of the *BIA* requires a trustee to determine whether any contingent claim is a provable claim and, if it is, to value it. *CCAA* s. 20(1)(a)(iii) modifies that process because it states that if the amount of a provable contingent claim "is not admitted by the company, the amount is to be determined by the court on *summary application* by the company or by the creditor".

58 Against that statutory background, I regard the motion brought by Growthworks, in essence, as one seeking to establish, under paragraph 46 of the Claims Procedure Order, a procedure for determining the Allen-Vanguard Claim.[6] Growthworks, in effect, proposes a two-stage claims process. First, the court would determine the two Proposed Claims Issues. Then, second ... well, the second stage is difficult to discern from the Fund's materials; it is somewhat shrouded in the mists of the future. But, as I understand the position of Growthworks, if a court determines the two Proposed Claims Issues, the parties would have a clearer picture of what issues remained in play regarding the Allen-Vanguard Claim against Growthworks and, presumably, in light of that clearer picture, could make a concrete proposal about the second step in the claims procedure.

59 In any event, in light of the deeming provisions in paragraphs 42 and 43 of the Claims Procedure Order, there now exists in the Growthworks *CCAA* proceeding a contingent claim advanced by AVC which "is not admitted by the company", so *CCAA* s. 20(1)(a)(iii) directs the court to determine the amount "on summary application". What that summary application process should look like is at the heart of the Fund's motion.

B. What to do

60 A stay of proceedings is a key element of any *CCAA* process. It affects the positions of a company's secured and unsecured creditors, as well as others who could potentially jeopardize the success of the restructuring plan and the continuance of the company. A stay affords a company breathing room in which to re-organize its affairs and compromise its obligations, or to divest assets to enable the business to operate under different ownership while generating funds to pay obligations or, in complex situations, to effect an orderly liquidation of the business enterprise. As stated by Farley J. in *Lehndorff General Partner Ltd. (Re)*:

> 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 .... 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.[7]

A party seeking to lift a stay bears a heavy onus of persuading a court to do so.[8]

61 Although many of AVC's submissions focused on opposing any extension of the stay of proceedings, the reality of this *CCAA* proceeding is that a stay remains in place until April 10, 2014. Growthworks will have to apply to this Court before that time for a further extension if it wishes to continue to benefit from the protection of the *CCAA*. Given the proximity of the forthcoming stay

extension motion, I see no point in considering, at this point of time, whether to lift the stay of proceedings in respect of the Fund's involvement in the Ottawa Proceedings.

62 Instead, I am seizing myself of the motion to extend the stay of proceedings which expires on April 10, 2014, and I will put over to that date my formal consideration of the two competing motions now before me.

63 On the return of that stay extension motion, not only must Growthworks file evidence to address the requirements for an extension specified in *CCAA* s. 11.02(3), but both it and AVC must also adduce evidence to address certain factors identified by this Court in *Canwest Global Communications*[9] relating to a request to lift a stay of proceedings.

64 The first factor involves whether the plan is likely to fail or, whether after the passage of almost half a year, the *CCAA* applicant, Growthworks, is no closer to a proposal than at the commencement of the stay period. The ground has shifted significantly since the argument of these motions on February 11, 2014. The SISP did not succeed. No merger transaction materialized. Growthworks remains in discussions with its only secured creditor, Roseway, about where to go from here. And although the Monitor ran a claims process, in its Sixth Report it stated that it did not "anticipate responding to or adjudicating disputed claims until such time as Roseway is paid in full and there are, or are likely to be, remaining funds for distribution to unsecured creditors of the Fund". In light of that state of affairs, Growthworks must explain certain matters to the Court:'

(i) Why does a need continue to exist to develop a *CCAA* claims process for the AVC Claim? Ross, in his November 20, 2013 affidavit, cast the need for some determination of the extent of AVC's Claim in terms of establishing the necessary groundwork for a possible merger transaction. In his view, if a court were to determine the issue of whether the Offeree Shareholders' exposure under the SPA was limited to the $40 million Indemnification Escrow Amount and AVC's Claim in excess of that amount was dismissed, then "the continuation of the [AVC] Action would not impede the completion of a merger transaction or the completion of any other restructuring transaction that may arise from the implementation of the SISP". In light of the failure of the SISP process, why does a continued, practical need exist for the determination of the AVC Claim in a summary fashion? Why is the determination of the AVC Claim in the *CCAA* proceeding needed to maintain the integrity of the *CCAA* process in light of the failure of the SISP?[10]

(ii) What tangible benefits, including dollars and cents benefits, would a *CCAA* claims process offer to the restructuring objectives underlying this particular *CCAA* proceeding at this point of time?

(iii) How would Growthworks' proposed two-stage claims process, involving an initial determination of the two Proposed Claims Issues, advance the ultimate determination of AVC's Claim and offer tangible dollars and cents benefits to the company in its efforts to re-organize?

(iv) On the latter point, the record was devoid of any evidence about the amount of litigation costs Growthworks has incurred and is incurring in the Ottawa Proceedings. That kind of evidence is most relevant to crafting a

> proportionate *CCAA* summary claims process. Proportionality is a hard-nosed, concrete concept, not an airy, theoretical one. Stripped down to its basics, proportionality requires parties to demonstrate, with respect to any proposed litigation step, what litigation bang will be achieved for the expenditure of each litigation buck. Translated to the present motions:
>
> (a) What has been the Fund's legal fees "burn rate" to date in the Ottawa Proceedings?
> (b) How much does the Fund expect it will have to spend on the proposed one-week "mini-trial"?
> (c) What litigation cost savings would result from proceeding with a "mini-trial" on the two Proposed Claims Issues in contrast to lifting the stay of proceedings and allowing the Ottawa Proceedings to continue in the fashion which they have to date?
>
> In other words, what would be the effect on the Fund's restructuring process of spending money on legal fees in a mini-trial type of summary claims process as compared to the Fund's litigation costs of continued Ottawa Proceedings?

I would appreciate the Monitor weighing in on these issues, especially given that it did not file a report on the initial return of the motions.

65 The second factor is how AVC, an unsecured contingent creditor, would be significantly prejudiced by a refusal to lift the stay and instead be required to prove its claim against Growthworks in a summary *CCAA* claims process. As mentioned, the record disclosed little prospect of the Ottawa Proceedings going to trial until sometime in 2015, if then. A 10-week trial of all issues sometime in 2015 hardly qualifies as a "summary application" of a claim for purposes of *CCAA* s. 20(1)(a)(iii). In my lexicon "summary application" equates to "quick and lean".[11] A one-week hearing using primarily written evidence, with only limited, focused *viva voce* cross-examination, strikes me not only as "quick and lean", but also reasonable should I direct a Stage One claims hearing on the two Proposed Claims Issues, a decision I have not yet made. In its motion materials AVC did not address the type of evidence it would file at such a summary hearing. That was not helpful. I expect it to do so on the return of the extension motion.

66 Indeed, I expect a higher degree of co-operation amongst counsel in these *CCAA* proceedings than that revealed in the record of the Ottawa Proceedings. On the return of the stay motion I expect all parties to have co-operated in order to place before me a clear picture of what a *motionless*, one-week hearing of the Proposed Claims Issues would look like, employing the assumption that (i) written openings would be filed in advance, (ii) all evidence-in-chief would be adduced by way of affidavit, (iii) *viva voce* cross-examinations would not exceed 3.5 days of hearing time, and (iv) closing arguments would be a combination of one day of oral arguments supplemented by written submissions. If, in the light of the additional evidence which I have directed be filed, I conclude that such a summary *CCAA* claims hearing should be held, I would be inclined to schedule it for early July, with reasons to be released just after Labour Day.

VII. Summary

67 By way of summary, in light of the material events which have transpired in the Fund's *CCAA* proceeding since the hearing of these motions last month and in light of the material evidentiary gaps in the records filed on those motions, I defer my disposition of those motions until consideration of the forthcoming motion to extend the stay period, of which I seize myself, and I direct the filing of the additional evidence described above.

68 I would conclude by observing that there is a certain "tail wagging the dog" aspect to these motions, if such a metaphor remains culturally acceptable. Growthworks was a 12.5% shareholder in Med-Eng, with its litigation exposure initially capped at foregoing 12.5% of $40 million, or $5 million. For business reasons which were accepted by this Court, Growthworks secured protection under the *CCAA*, a reality which all parties must accept. As I mused at the hearing, it is always open to the parties to find some way that the tail stops wagging the dog.

D.M. BROWN J.

1 2013 ONSC 2950, para. 2 (emphasis added).

2 *Ibid.*, paras. 4 and 5 (emphasis added).

3 *Ibid.*, para. 7 (emphasis added).

4 *Ibid.*, para. 9 (emphasis added).

5 I make no comment on the admissibility of any part of that proposed evidence.

6 I see no merit in the bifurcation argument advanced by AVC in paras. 66 *et seq.* of its February 5, 2014 Factum. The Fund's proposal for a "mini-trial" was made in the context of developing a summary claims process in a *CCAA* proceeding. If AVC does not wish to proceed with a claim against Growthworks in the *CCAA* proceeding, it can so advise the Monitor and be bound by the consequences of a final order in the *CCAA* proceeding. If it does wish to continue with a claim against Growthworks, then it must face the reality that a *CCAA* proceeding is underway.

7 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.), p. 32.

8 *Re Timminco*, 2012 ONSC 2515, para. 16.

9 2009 CarswellOnt 7882 (S.C.J.), para. 33.

10 *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.), para. 25.

11 As to the summary nature of *CCAA* claims procedures, see *Re Stelco Inc.*, 2006 CanLII 16526 (ON CA), para. 9.

TAB 23

Case Name:

Wabush Iron Co. Ltd. (Arrangement relatif à)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF: WABUSH IRON CO. LIMITED, Debtor/Respondent, and FTI CONSULTING CANADA INC., Monitor, and ROYAL BANK OF CANADA, Creditor/Petitioner

[2016] Q.J. No. 18011

2016 QCCS 6061

2017EXP-183

No.: 500-11-048114-157

Quebec Superior Court
District of Montreal

The Honourable Stephen W. Hamilton J.S.C.

Heard: November 10, 2016.
Judgment: December 7, 2016.

(48 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- The Newfoundland Court was in a better position to evaluate whether the evidence which was being sought was relevant to a live issue in the Newfoundland action, whether the request was reasonable and whether the notion of proportionality favoured the issuance of the order -- The prejudice to Wabush Iron was limited to matters of inconvenience and expense, which could properly be considered by the Newfoundland Court in deciding whether to issue the order -- Motion granted.

The Royal Bank of Canada (RBC), a creditor, made a motion to lift the stay of proceedings under the Companies' Creditors Arrangement Act (CCAA) Cliffs Mining Company (Cliffs) entered into a lease with RBC for equipment to be used by Cliffs in the operation of the Wabush mines. RBC obtained a judgment in Quebec against Cliffs and Wabush Iron and Wabush Mines. In 2015, Wabush Iron and a number of related parties filed for Court protection under the CCAA. RBC filed a proof

of claim against Wabush Iron in the CCAA proceedings. On August 15, 2016, RBC filed a motion to lift the stay of proceedings and permit it to add Wabush Iron as a defendant by counterclaim in a Newfoundland action. Meanwhile, on October 7, 2016, the monitor in the CCAA proceedings allowed in part RBC's claim against Wabush Iron in the amount of $5,224,485. As a result, RBC no longer sought to make Wabush Iron a party to the Newfoundland action. It amended its motion to limit the lifting of the stay of proceedings to compelling Wabush Iron, in the context of the Newfoundland action, to answer the written interrogatories and produce relevant documents. Wabush Iron and the monitor argued that the stay of proceedings under the Initial Order prevented RBC from compelling Wabush Iron to provide evidence.

HELD: Motion granted. The liability of Wabush Iron under the lease agreements had been definitively settled by the monitor accepting in part RBC's proof of claim. The evidence could be used against Cliffs, but the stay was not intended to protect third parties, even if the third party was a related party. If the interrogatories were served on Wabush Iron and it did not respond, the next step was for RBC to bring a motion in the context of the Newfoundland action to compel it to respond. If that happeneed, there was a judicial proceeding against Wabush Iron and the stay of proceedings clearly came into play. The Newfoundland Court was in a better position to evaluate whether the evidence which was being sought was relevant to a live issue in the Newfoundland action, whether the request was reasonable and whether the notion of proportionality favoured the issuance of the order. The prejudice to Wabush Iron was limited to matters of inconvenience and expense, which could properly be considered by the Newfoundland Court in deciding whether to issue the order.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s. 11.02(1), s. 11.02(2)

Counsel:

Peter Kalichman, IRVING MITCHELL KALICHMAN, For the Debtor/Respondent.

Sylvain Vauclair, WOODS, s.e.n.c.r.l., For the Monitor.

Joe J. Thorne, STEWART McKELVEY LAWYERS, For the Creditor/Petitioner.

JUDGMENT ON ROYAL BANK OF CANADA'S AMENDED MOTION TO LIFT STAY OF PROCEEDINGS WITH RESPECT TO WABUSH IRON CO. LIMITED (#405)

INTRODUCTION

1 A creditor makes a motion to lift the stay of proceedings under the *Companies' Creditors Arrangement Act*[1] for the limited purpose of compelling the production of evidence by the debtor.

CONTEXT

2 Cliffs Mining Company was the managing agent for Wabush Mines, an unincorporated joint venture of Stelco Inc., Dofasco Inc. and Wabush Iron Co. Limited.[2]

3 In 1996, Cliffs entered into a lease with Royal Bank of Canada for equipment to be used by Cliffs in the operation of the Wabush mine in Labrador,[3] and another lease for equipment to be used in Quebec.

4 Disputes arose between RBC and Cliffs in 2003 with respect to the exercise of the option to purchase under the leases. Cliffs, as managing agent for Wabush Mines, instituted an action against RBC in the Supreme Court of Newfoundland and Labrador on October 9, 2003 to compel RBC to accept a certain payment in exchange for ownership of the Labrador equipment.[4] RBC instituted an action against Cliffs, Stelco, Dofasco, Wabush Iron and Wabush Mines in Quebec Superior Court in 2004 claiming the higher contractual value of the Quebec equipment.[5]

5 The Quebec Court of Appeal maintained RBC's Quebec action in 2010.[6]

6 On February 13, 2014, RBC filed a counterclaim against Cliffs in the Newfoundland action claiming the higher contractual value of the equipment.[7] In its defence, Cliffs disclaimed any personal liability for the acts or omissions of Wabush Mines, and pleaded that any relief sought by RBC must be against the members of Wabush Mines.[8]

7 On January 19, 2015, RBC applied for leave to amend its counterclaim to add Stelco, Dofasco and Wabush Iron as defendants by counterclaim.[9] On May 15, 2015, RBC issued interrogatories to Cliffs, Stelco, Dofasco and Wabush Iron.[10]

8 On May 20, 2015, Wabush Iron and a number of related parties filed for Court protection under the CCAA. The Initial Order issued by this Court included a stay of proceedings, which has been renewed from time to time and is still in force today.

9 Dofasco and Cliffs provided answers to the May 2015 interrogatories[11] but Wabush Iron refused to answer without first having the stay of proceedings lifted. Further interrogatories were issued to Cliffs on June 21, 2016, to which Cliffs provided answers.[12]

10 On December 18, 2015, RBC filed a proof of claim against Wabush Iron in the CCAA proceedings.

11 On August 15, 2016, RBC filed a motion before this Court to lift the stay of proceedings and permit it to add Wabush Iron as a defendant by counterclaim in the Newfoundland action.

12 On October 6, 2016, RBC issued written interrogatories to Wabush Iron in relation to the Newfoundland action.[13] These are narrower than the May 2015 interrogatories, as a result of the answers obtained from other parties. The interrogatories focus on whether Dofasco, Stelco and Wabush Iron authorized Cliffs to exercise the option to purchase the equipment in 2003. Wabush Iron refused to answer the October 2016 interrogatories without first having the stay of proceedings lifted.

13 Meanwhile, on October 7, 2016, the monitor in the CCAA proceedings allowed in part RBC's claim against Wabush Iron in the amount of $5,224,485.26. RBC did not appeal from that decision.

14 As a result, RBC no longer seeks to make Wabush Iron a party to the Newfoundland action. It amended its motion to limit the lifting of the stay of proceedings to compelling Wabush Iron, in the context of the Newfoundland action, to:

a) answer the written interrogatories;

b) produce relevant documents; and

c) make available a representative for discovery.

15 Wabush Iron and the monitor contest the motion.

ISSUES

16 The motion raises the following issues:

1. Does the stay of proceedings under the Initial Order prevent RBC from compelling Wabush Iron to provide evidence?

2. If so, should the Court lift the stay of proceedings?

ANALYSIS

1. Scope of the stay of proceedings

17 Section 11.02(1) and (2) CCAA provide as follows:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(Emphasis added)

18 Pursuant to Section 11.02(1) CCAA, the Initial Order included the following paragraphs:

> **7. ORDERS** that, until and including June 19, 2015, or such later date as the 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 Wabush CCAA Parties or affecting the business operations and activities of the Wabush CCAA Parties (the "**Business**") or the Property (as defined below), including as provided in paragraph 11 hereinbelow except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Wabush CCAA Parties or affecting the Business or the Property of the Wabush CCAA Parties are hereby stayed and suspended pending further order of this Court, the whole subject to subsection 11.1 CCAA.
>
> **15. ORDERS** that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Wabush CCAA Parties is a party as a result of the insolvency of the Wabush CCAA Parties and/or these CCAA proceedings, any events of default or non-performance by the Wabush CCAA Parties or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Wabush CCAA Parties, or affecting the Business, the Property or any part thereof are hereby stayed and suspended except with leave of this Court.

(Emphasis added)

19 The stay period has been extended on several occasions pursuant to Section 11.02(2) CCAA and now expires on January 31, 2017.

20 The language of Section 11.02(1) and (2) CCAA and of paragraphs 7 and 15 of the Initial Order (as extended) is very broad. The notion of "proceedings" clearly includes judicial proceedings such as an action by an unsecured creditor against the debtor to collect a debt, or a proceeding by a secured creditor to enforce its rights against the debtor's property. The Courts have interpreted "proceedings" broadly to also cover extra-judicial proceedings which could prejudice an eventual arrangement, and as including a mere procedural step that is part of a larger action or special proceeding.[14]

21 In the present case, Wabush Iron is merely being asked to provide evidence. That evidence will not be used against Wabush Iron. The liability of Wabush Iron under the lease agreements has been definitively settled by the monitor accepting in part RBC's proof of claim and RBC not appealing from that partial acceptance. The evidence may be used against Cliffs, but the stay is not intended to protect third parties, even if the third party is a related party.

22 However, even if the Court concludes that the production of evidence would not prejudice an eventual arrangement, such that the stay of proceedings does not apply to prevent RBC from

serving interrogatories on Wabush Iron and obtaining relevant documents and from requiring that a representative of Wabush Iron produce evidence on discovery, that does not put an end to the inquiry.

23 If the interrogatories are served on Wabush Iron and it does not respond, the next step is for RBC to bring a motion in the context of the Newfoundland action to compel it to respond. Given the position taken by Wabush Iron on this motion, that outcome appears likely.

24 If that happens, there is a judicial proceeding against Wabush Iron and the stay of proceedings clearly comes into play.

25 As a result, the Court will treat this as a matter to which the stay of proceedings applies.

2. Lifting the stay of proceedings

26 The Court has discretion to lift the stay. Section 11.02(1) and (2) CCAA include the limitation "until otherwise ordered by the court", and paragraphs 7 and 15 of the Initial Order includes the limitation "except with leave of this Court".

27 RBC asks the Court not only to lift the stay but also to order Wabush Iron to answer the interrogatories, produce documents and make available a representative to be examined on discovery. The Court expresses some doubt as to whether it has jurisdiction to render such orders in a Newfoundland action. In any event, the Court is of the view that it should not do so. The Court does not have sufficient knowledge of the Newfoundland action to assess whether such orders are appropriate. At most, the Court will lift the stay of proceedings and allow RBC to make a motion to the Newfoundland Court asking the Newfoundland Court to issue those orders.

28 The Courts have highlighted that the stay should be given a broad interpretation in order to achieve its goals.[15] Similarly, the stay should only be lifted in circumstances where to do so is consistent with the goals of the stay.

29 The purpose of the stay of proceedings is to promote the reorganization and restructuring of the debtor by maintaining the *status quo*, giving the debtor some breathing room, protecting the debtor from the claims of the creditors and preserving the debtor's assets for the benefit of all of the creditors and other stakeholders. It prevents an aggressive creditor from obtaining an advantage over other creditors during the restructuring process, and allows for all claims to be determined in summary fashion through the claims procedure under the CCAA.

30 Various cases set out the test for lifting the stay. The Court adopts the following statements from the decision of Justice Pepall in *Canwest*:

> [32] As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land*

Group Ltd., [2007] S.J. No. 313. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

[33] Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*, [2000] A.J. No. 1692, and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.[16]

(Emphasis added)

31 In the circumstances of this case, the Court should consider the balance of convenience or the relative prejudice to the parties. The merits of the action may also be relevant.[17]

32 The balance of convenience involves weighing the importance of the evidence sought to the petitioner's case versus the expense and inconvenience to the third party in obtaining the evidence.

33 The Court notes that the balance of convenience test that it would undertake in the CCAA context includes many of the factors that the Newfoundland Court would apply in deciding whether

to order a party to respond to interrogatories under Rule 31 of the *Rules of the Supreme Court, 1986*,[18] which provides in part:

> **31.01.** (1) A party may serve upon an adverse party written interrogatories in Form 31.01A to be answered by the adverse party, or if the adverse party is a body corporate, partnership or association, by an officer or agent thereof, and subject to rule 31.03, the adverse party, officer or agent shall answer each interrogatory to the best of his or her personal knowledge or from information available to him or her through any person.
>
> (2) A party may serve upon any person who is not a party, interrogatories to be answered by that person, or if that person is a body corporate, partnership or association, by an officer or agent thereof, and subject to rule 31.03, the person shall answer each interrogatory to the best of his or her personal knowledge and, if necessary, by adding any explanatory information, provided the party shall serve a copy of the interrogatories and answers upon any adverse party forthwith upon receipt of the same.
>
> **31.02.** (1) Interrogatories shall relate to the same matters as may be dealt with by an examination for discovery under rule 30.08.
>
> (2) Unless the Court otherwise orders to protect a party or person interrogated from annoyance, expense, embarrassment or oppression, the number of interrogatories or sets of interrogatories to be served is not limited.
>
> (3) Unless the Court otherwise orders, the interrogatories may be served at any time after the pleadings are closed within the meaning of rule 14.22.
>
> (4) Where interrogatories are to be served on two or more persons or are required to be answered by an officer or agent of a person, a note at the end of the interrogatories shall state which of the interrogatories each person is required to answer.
>
> **31.03.** (1) Unless the Court otherwise orders, interrogatories shall be answered separately and fully under oath as in Form 31.03A, and the answer shall be served on the party giving the interrogatories within ten days of their receipt.
>
> (2) An objection to answering any interrogatory may only be taken on the ground of privilege or that it is not relevant to the subject matter involved in the proceeding, but not that it is outside of the scope of the pleadings, and the objection shall be made in the affidavit in answer.
>
> **31.04.** If a person on whom interrogatories have been served fails to answer any one or more of them or answers insufficiently, the Court may, upon such terms as are just, make an order requiring that person to answer or to answer further, either by affidavit or oral examination, or to answer any other interrogatory.

[...]

(Emphasis added)

34 In relation to Rule 31 and the authorities submitted jointly by the parties, the Court notes the following:

* The Rules are to be interpreted liberally to effect full disclosure;[19]

* The non-party's obligation is limited to answering each interrogatory to the best of his or her personal knowledge (Rule 31.01(2)). The non-party is not required to inform himself or herself by consulting others;[20]

* The person can object to answering on the ground that "it is not relevant to the subject matter involved in the proceedings" (Rule 31.03(2)). The interrogatories must in some manner be connected with or of assistance to the interrogating party in relation to a live issue in dispute, and will be considered unnecessary if the matter has been conceded or has not been raised as an issue in the pleadings.[21] Further, the interrogatories will be refused if the issue is "much too remote to have any bearing on the outcome of the case";[22]

* The Court has an overriding discretion to place limits on the interrogatories to protect the person interrogated from "annoyance, expense, embarrassment or oppression" (Rule 31.02(2)).[23] The Court can also refuse interrogatories if they are "scandalous", "not *bona fide*", "vexatious" or "prolix" or if they place a "disproportionate burden" on the person;[24] and

* If the person fails to answer, the Court may, "upon such terms as are just", order the person to answer (Rule 31.04).

35 In the CCAA context, the additional but overriding consideration is the impact of the proceedings on the CCAA process, and whether they put that process at risk. That notion is interpreted broadly, as whether the proceedings would seriously impair the ability of the debtor to continue in business or the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.[25]

36 RBC argues that its claim against Cliffs and the remaining members of Wabush Mines has significant merit. It says that Wabush Iron's evidence is fundamental to this claim and that it has exhausted all other avenues with parties and non-parties to obtain the evidence. It adds that it has narrowed its request as much as possible.

37 RBC argues that if the stay is not lifted, it will be denied this evidence and its case against Cliffs and the remaining members of Wabush Mines will be prejudiced.

38 Wabush Iron argues that the evidence is not necessary and that RBC is testing an assertion that is not being made. It also argues that RBC has not exhausted all other avenues to obtain the evidence. The specific questions set out in the October 2016 interrogatories have not been put to Cliffs, Dofasco or Stelco.

39 Moreover, Wabush Iron argues that lifting the stay of proceedings would place an extremely onerous and costly burden on it. It explains that there are currently no Wabush Iron directors, officers, employees or representatives with first-hand knowledge of the events, and that previous attempts to contact former Wabush Iron representatives in the context of this case have been unsuccessful. It estimates that the total cost for the documentary search could be in the tens of thousands of dollars, that it could take weeks if not months, and that it likely will not turn up any relevant evidence.

40 RBC argues that this inconvenience to Wabush Iron and the time and cost involved is limited. It adds that Wabush Mines has been aware of this litigation and the Quebec action for years and has had ample opportunity to gather evidence. It argues that any inconvenience to Wabush Iron is outweighed by the prejudice that RBC would suffer if the motion is dismissed and it is denied access to the evidence.

41 The Court is of the view that the Newfoundland Court is in a better position to evaluate whether the evidence which is being sought is relevant to a live issue in the Newfoundland action, whether there are other avenues to obtain the evidence, whether the request is reasonable and whether the notion of proportionality favours the issuance of the order or not.

42 However, this Court is in the best position to undertake the analysis of the potential impact of this order on the CCAA process. Accordingly, the Court will limit its analysis to the question of whether the order which is being sought puts the restructuring process at risk. If it does, the Court will refuse the order. If it does not, the Court will lift the stay, and will leave it to the Newfoundland Court to assess whether it should order Wabush Iron to answer the interrogatories, produce documents and produce a representative to be examined out of court, by balancing the potential harm to RBC of not having the evidence against the potential inconvenience and expense that searching for the information and disclosing it would cause to Wabush Iron.

43 Wabush Iron does not argue that this motion puts the CCAA process at risk, but suggests that the expense is an unnecessary burden on Wabush Iron and will reduce the amounts to be distributed to its creditors.

44 This is not like *Hawkair*, where the union brought an application for certification against the debtor. In that case, Justice Burnyeat held:

> [34] I am satisfied that the filing of the Certification Application has and will seriously impair the ability of the Company to focus and concentrate on its efforts to bring forward a plan of reorganization. While I am not satisfied that the Certification Application will seriously impair the ability of the Company to carry on business, it is clear that the management of the Company does not have the financial or personnel resources to deal with the Certification Application on its own. In a small company such as this, I am satisfied that there are insufficient resources to carry through with the submissions and negotiations which will be required if a collective agreement is to be reached on the assumption that Certification will be granted. I am satisfied that the Company will be better able to handle such an application once the reorganization has taken place as the Company will then know with certainty the economic status of the Company. I am also satisfied that one of the purposes of the stay of proceedings provided under s. 11 of the Act is to allow time and energy to be directed towards the preparation

> and presentation of a plan of reorganization in a timely manner. There have already been a number of delays and extensions of deadlines to present a Plan. If the Company is required to follow through with the Application for Certification and, if there is certification, the negotiations for a contract, the purpose of providing a Plan of Reorganization on a timely basis will be thwarted. The Plan is now scheduled to be before all parties by June 9, 2006. If the Union is in a position to proceed with the Certification Application, no certainty will be available regarding the status of the employees until late in the year at the earliest. That can hardly be described as a Plan which is presented to all parties on a timely basis.[26]

45 The Court is of the view that the prejudice to Wabush Iron is limited to matters of inconvenience and expense, which can properly be considered by the Newfoundland Court in deciding whether to issue the order.

FOR THESE REASONS, THE COURT:

46 **GRANTS** Royal Bank of Canada's Amended Motion to Lift the Stay of Proceedings with respect to Wabush Iron Co. Limited (#405);

47 **LIFTS** the stay of proceedings in respect of Wabush Iron Co. Limited to permit Royal Bank of Canada to apply in the proceedings in Newfoundland and Labrador bearing Court File No. 2003 01T 3807 for an order compelling Wabush Iron Co. Limited to:

a. answer the interrogatories served on October 6, 2016 and produce documents relevant to such answers; and

b. make available a representative with knowledge of the matters raised in the interrogatories or who would inform himself or herself to that effect for discovery in the Newfoundland action;

48 **THE WHOLE, with costs.**

THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

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

2 Exhibit A to the affidavit of Gary Ivany sworn on October 15, 2014, which is itself Exhibit A to the Ivany affidavit sworn on July 14, 2016 filed in support of RBC's motion.

3 Exhibit C to the October 15, 2014 Ivany affidavit.

4 Court file 2003 01T No. 3807.

5 Court file 200-17-005035-043.

6 2010 QCCA 1126.

7 Exhibit 1 to Clifford T. Smith's affidavit sworn November 4, 2016.

8 Exhibit 2 to Smith's affidavit.

9 Exhibit 1 in support of the motion.

10 Exhibit 5 to Smith's affidavit.

11 Exhibits 6 and 7 to Smith's affidavit.

12 Exhibit 8 to Smith's affidavit.

13 Exhibit 5 in support of the motion.

14 *Nortel Networks Corp. (Re)*, 2010 ONSC 1304, par. 36-39, appeal dismissed, 2010 ONCA 464; *Hawkair Aviation Services Ltd. (Re)*, 2006 BCSC 669, par. 27; *Toronto Stock Exchange Inc.* v. *United Keno Hill Mines Ltd.*, [2000] O.J. No. 1814, par. 11.

15 *Canwest Global Communications Corp. (Re)*, 2009 CanLII 70508, par. 28; *Hawkair*, *supra* note 14, par. 14-18.

16 Canwest, *supra* note 15 par. 32-33. See also *Homburg Invest Inc. (Arrangement relatif à)*, [2012] Q.J. No. 242, EYB 2012-201097 (C.S.), par. 21.

17 *ICR Commercial Real Estate (Regina) Ltd.* v. *Bricore Land Group Ltd.*, 2007 SKCA 72, par. 68; *Sino-Forest Corp. (Re)*, 2012 ONSC 6275, par. 16.

18 SNL 1986, c. 42, Schedule D.

19 *Szeto* v. *Field*, 2009 NLTD 8, p. 8-9.

20 Derek Green and Christopher P. Curran, Q.C., "Rules of Court. Annotated (Selected Pre-Trial and Post-Trail Procedures)" in The Law Society of Newfoundland and Labrador, *Bar Admission Course. Practice and Procedure*, 2007, p. 31-8.

21 Green and Curran, *supra* note 20, p. 31-8.

22 *Joyce* v. *Western Toyota Limited*, 2008 NLTD 137, par. 23.

23 Green and Curran, *supra* note 20, p. 31-5.

24 *Attorney-General of Newfoundland* v. *Churchill Falls (Labrador) Corp. Co.* (1982), 34 Nfld & P.E.I.R. 507 (TD), par. 5, 19-20, 38; Green and Curran, *supra* note 20, p. 31-9.

25 *Hawkair*, *supra* note 14, par. 19-20.

26 *Supra* note 14, par. 34.

TAB 24

Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé

2019 QCCA 358

Excerpts from QCA Reasons with unofficial English translations

1) Pg. 169

A. Manquement des appelantes au devoir de renseignement

[476] On peut, en guise de préambule, souligner l'intensité particulièrement élevée du devoir de renseignement qui incombait ici aux appelantes. Celles-ci ont en effet, pendant toute la période litigieuse, mis en marché auprès du grand public un produit sans utilité particulière, la cigarette, produit destiné à être inhalé (donc introduit dans le corps des usagers), qui présente un danger potentiellement mortel mais pernicieux, car il se développe sur la durée, une durée que favorise justement son caractère toxicomanogène.

[477] Les appelantes ont-elles manqué à cette obligation de renseignement? On ne peut répondre à cette question que par l'affirmative. Car non seulement ont-elles intentionnellement dissimulé au public et aux usagers les effets pathologiques et toxicomanogènes des cigarettes qu'elles mettaient en marché, mais elles ont collectivement mis au point et pratiqué, parallèlement, un programme de désinformation visant à miner toute information contraire à leurs intérêts : elles ont entretenu de fausses controverses scientifiques, détourné les débats, menti au public (et même aux autorités publiques), enveloppant le tout de stratégies publicitaires trompeuses contraires à leurs propres codes de conduite (et contraires, à compter de 1980, à la *L.p.c.*).

[478] La situation, on en conviendra, sort de l'ordinaire. …

Translation:

A. Appellants' Breach of Duty to Inform

[476] One could, by way of preamble, underline the particularly heightened intensity of the duty to inform applicable here to the appellants. The appellants have in fact, during the entire litigation period, sold to the general public a product without a particular use, the cigarette, a product to be inhaled (thereby introduced to the body of its users) that presents a harmful and potentially fatal danger, as it develops over time, which duration promotes its addictive character.

[477] Did the appellants fail in this duty to inform? One cannot answer this question but in the affirmative. Not only did they intentionally hide from the public and users the pathological and addictive features of cigarettes that they sold, but they collectively formed and put into practice, in parallel fashion, a program of misinformation designed to undermine all information contrary to their interests: they have maintained false scientific controversies, diverted debates, lied to the public (and even to public authorities), enveloping this in misleading publicity strategies that violated their own codes of conduct (and, since 1980, violated the *Consumer Protection Act*).

[478] The situation, one will agree, is out of the ordinary. …

2) Pg. 176

[496] Car la preuve, là-dessus, est plus que prépondérante : les appelantes ont, pendant toute la durée de la période en question, manqué à leur devoir de renseignement, devoir qui, vu le danger présenté par la cigarette, produit toxique et toxicomanogène, était d'une intensité élevée. Leur manquement est double : d'une part, elles n'ont pas fourni de renseignements au public ou aux usagers ou n'ont fourni que des renseignements inadéquats; d'autre part, elles ont activement désinformé le public et les usagers en s'attaquant de diverses manières à la crédibilité des avertissements, conseils et explications donnés et diffusés par d'autres (gouvernements, corps médicaux, groupes anti-tabac, etc.) à propos des méfaits de la cigarette et en usant de stratagèmes publicitaires trompeurs.

Translation:

[496] The above evidence is more than abundant: the appellants have, during the entire period in question, failed in their duty to inform, a duty which, given the danger presented by the cigarette, a toxic and addictive product, was heightened. Their failure is two-fold: first, they did not provide information to the public or users or did not provide adequate information; in addition, they actively misinformed the public and users in attacking in different ways the credibility of warnings, advice and explanations given and disseminated by others (governments, medical groups, anti-smoking groups etc.) with regard to the harms of the cigarette and by using misleading publicity strategies.

3) Pg. 178

[501] Quoi qu'il en soit, les appelantes (ou les sociétés auxquelles elles ont succédé) maintiennent par la suite le silence, mais se dotent en 1964 d'un Cigarette Advertising Code. Ce n'est pas la première fois que ces concurrentes agissent de manière coordonnée afin de défendre leurs intérêts communs et d'éviter une ingérence gouvernementale. Ainsi qu'on l'a vu, leur « entente cordiale » s'amorce dès 1953, alors qu'elles conviennent d'une stratégie à laquelle elles resteront fidèles pendant des décennies, et certainement pendant la période visée par les recours des intimés, stratégie qui guidera les interventions de toutes sortes qu'elles feront ou ne feront pas ainsi que, de façon générale, leurs démarches publiques et publicitaires de même que l'orientation de leurs relations avec le gouvernement.

Translation:

[501] In any event, the appellants (or the companies which they succeeded) then maintained silence but in 1964, created a Cigarette Advertising Code. This is not the first time that these competitors reacted in a coordinated manner in order to defend their common interests and avoid government intervention. We have seen their "cordial agreement" since 1953 while they developed a strategy to which they remained loyal for decades, and certainly during the period at issue in this case, a strategy that dictated acts of all types that they either did or did not put into effect as well as, in general, their public and advertising actions as well as the direction of their relations with the government.

4) Pg. 199

[563] Entre 1950 et 1998, les appelantes ont donc, tant par ce qu'elles ont caché (jusqu'en 1994) que ce qu'elles ont fallacieusement véhiculé et propagé, délibérément enfreint le devoir de renseignement qui leur incombait à titre de fabricant de cigarettes, quel que soit l'angle sous lequel on le considère...

[564] Plus même, on peut parler d'un comportement de mauvaise foi, résultant d'une dissimulation délibérée des effets de la cigarette sur la santé des usagers, puis d'une négation, d'une minimisation et d'une banalisation systématiques de ceux-ci fondées notamment sur l'idée savamment mais artificiellement entretenue d'une controverse scientifique et sur la prétendue faiblesse des rapports entre cigarette et maladies ou dépendance, le tout enrobé d'une stratégie publicitaire trompeuse.

Translation:

[563] Therefore, between 1950 and 1998, the appellants, in light of what they hid (until 1994) and what they falsely conveyed and promoted, deliberately breached the duty to inform which applied to them as cigarette manufacturers, regardless of the angle of consideration…

[564] In addition, one can speak of bad faith conduct arising from a deliberate concealment of the effects of cigarettes on the health of its users, and a negation, minimization and systematic trivialization of these effects grounded in the cleverly but artificially maintained idea of a scientific controversy and the alleged weakness of the links between the cigarette and illnesses or dependence, all coated in a misleading advertising strategy.

5) Pg. 317

[903] Comme l'a conclu le juge, les pratiques publicitaires des appelantes constituaient des représentations fausses ou trompeuses. …

[904] Le juge n'a pas erré en concluant à l'existence de pratiques interdites jusqu'à la fin de la période visée. …

Translation:

[903] As the trial judge concluded, the appellants' advertising practices constituted false and misleading representations. …

[904] The trial judge did not err in concluding that prohibited practices existed until the end of the period at issue.

TAB 25

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF Section 11 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 Canwest Global Communications Corp. and other applicants
AND IN THE MATTER OF a plan of compromise or arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest Canada Inc.

[2010] O.J. No. 3075

2010 ONSC 3530

85 C.C.P.B. 127

2010 CarswellOnt 5225

191 A.C.W.S. (3d) 69

Court File No. CV-09-8396-00CL, CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

July 19, 2010.

(44 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application by a creditor of companies subject to protection under the Companies' Creditors Arrangement Act for an order that the stays imposed as a result of the protection did not apply to its action, or for an order to lift the stays, dismissed -- Stays applied to the action -- With one minor exception the Court would not lift the stays to allow the action to proceed.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application by a creditor of companies subject to protection under the Companies' Creditors Arrangement Act for

an order that the stays imposed as a result of the protection did not apply to its action, or for an order to lift the stays, dismissed -- Stays applied to the action -- With one minor exception the Court would not lift the stays to allow the action to proceed.

Civil litigation -- Civil procedure -- Disposition without trial -- Stay of action -- Removal of stay -- Application by a creditor of companies subject to protection under the Companies' Creditors Arrangement Act for an order that the stays imposed as a result of the protection did not apply to its action, or for an order to lift the stays, dismissed -- Stays applied to the action -- With one minor exception the Court would not lift the stays to allow the action to proceed.

Application by Gluskin Sheff and Associates for an order that stays in favour of the Canwest companies did not apply to its action, or for an order to lift the stays. The Canwest companies were granted protection under the Companies' Creditors Arrangement Act pursuant to two orders. As a result of these orders the companies were protected by broad stays of proceedings which precluded actions against them. In spite of the stays Gluskin, an investment management firm, issued a Statement of Claim for payment for services in the amount of $849,648 rendered pursuant to an Investment Management Agreement or for damages on a quantum meruit basis. The action was commenced against two of the companies in their capacities as administrators of certain registered pension plans.

HELD: Application dismissed. The stays, which were extremely broad, applied to this action. A stay that was imposed under the Act was to be interpreted broadly and in accordance with the objective of providing debtors with the best possible chance of affecting a successful restructuring and ensuring that the creditors were treated fairly. The stays would not be lifted. There was no statutory test under the Act that governed the lifting of a stay. The stay provisions in orders under the Act were discretionary and were to be applied as to support the legislative purpose of the Act. Consideration of the balance of convenience, the relative prejudice to the parties and the merits of the action did not favour Gluskin. The objectives of the Act would not be met by lifting the stays. Allowing the action to proceed would be prejudicial to the restructuring and unfair to others. An exception was made for the action to proceed with respect to $30,000 claimed for post-filing services rendered by Gluskin pursuant to the Act.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.2

Ontario Rules of Civil Procedure, Rule 9.01(1)

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22(b)

Counsel:

Lyndon Barnes, Alex Cobb and T. Klinck for the Applicant CMI Entities and LP Entities.

D.V. MacDonald for the Administrative Agent of the Senior Secured Lenders Syndicate.

L. Willis for the Ad Hoc Committee of CMI Entities Senior Subordinated Noteholders.

Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

J. Moher for CIBC Asset-Based Lending Inc.

H. Daley for Gluskin Sheff & Associates.

REASONS FOR DECISION

S.E. PEPALL J.:--

Introduction

1 On October 6, 2009 and January 8, 2010, initial Companies' Creditors Arrangement Act[1] orders were granted to the CMI Entities including Canwest Media Inc. ("CMI") and the LP Entities including Canwest Publishing Inc. ("CPI") (the "Applicants") respectively. The CMI Entities, which hold interests in television stations and channels, and the LP Entities, which hold interests in newspaper publishing and digital and online media operations, are being restructured separately. As a result of the initial CCAA orders, the Applicants are protected by broad stays of proceedings which preclude the taking or maintaining of proceedings against or in respect of them or affecting their business or property. Notice of the orders was widely disseminated. In spite of the stays, on January 20, 2010, Gluskin Sheff and Associates Inc. ("GSA"), an investment management firm, issued a statement of claim for payment for services rendered pursuant to an Investment Management Agreement ("IMA") or for damages on a quantum meruit basis against CMI and CPI in their capacities as administrators of certain registered pension plans.

2 By notice of motion dated April 20, 2010 and made returnable June 16, 2010, GSA seeks a declaration that the stays of proceedings in my October 6, 2009 and January 8, 2010 initial orders do not apply to its action. Alternatively, it asks for leave to lift the stays.

Facts

(a) The Pension Plans

3 Canwest Media Works Inc., now known as CMI, and Canwest Media Works Publications Inc., now known as CPI, (the "Canwest Parties") are the sponsors and administrators of numerous defined benefit and defined contribution pension plans. In accordance with applicable pension benefit standards legislation, a pension trust fund was established for each pension plan.

4 As administrator, the relevant CMI or CPI Entity is required to oversee all pension plan and fund administration matters. The administrator is responsible for investing the assets of the pension fund in a reasonable and prudent manner and in the manner prescribed by the applicable statute and regulations.

5 The Canwest Parties appointed RBC Dexia Investor Services Trust (the "Custodian") as the custodian of each pension fund. The Canwest Parties and the Custodian entered into a Master Trust Agreement dated August 10, 2007 to establish a trust for the purposes of co-mingling a portion of the assets of all of the plans under a consolidated investment structure. That Agreement provides that the Custodian holds title to all assets comprising the Master Trust fund but does so only in accordance with the instructions of CMI or CPI or investment managers appointed by them. Compensation of the Custodian constituted a charge upon the Master Trust Fund and was to be paid out of the Fund unless paid by the Canwest Parties.

6 As sponsor, the Applicants are responsible for funding the various plans in accordance with their terms and the relevant legislation. Fifteen of the seventeen plans in issue are defined benefit plans. The sponsor is ultimately responsible for ensuring that the defined benefit plans are fully funded.

(b) The Investment Management Agreement

7 In March, 2006, GSA entered into the Investment Management Agreement ("IMA") with Canwest Media Works Inc. "on behalf of certain pension funds listed in schedule I" and Canwest Mediaworks Publications Inc. "on behalf of certain pension funds listed in schedule II." Both companies are referred to as the Corporations and are described in the IMA as administrators of the registered pension plans listed on the aforesaid schedules. The Investment Management Agreement states that:

- The Corporations are retaining GSA to serve as investment counsel and portfolio manager in respect of the management of a portion of the plans' assets.
- The Corporations appoint GSA as investment counsel and portfolio manager for the CanWest Income Trust Account. The Account consisted of the assets of the Plans which were credited to the Account from time to time, the securities in which such assets were invested and all dividends, interest and other income earned thereon and the proceeds of disposition thereof. The Account was registered in the name of CanWest Pension Pooled Fund.
- Certain individuals are authorized by the Corporations to provide GSA with instructions.
- On seven days' notice, the Corporations may withdraw cash or other assets from the Account, subject to any fees owing to GSA in respect of the Account.
- The Corporations have executed an Agreement with RBC Dexia Investor Service Trust ("the Custodian"). The assets of the Account are held by the Custodian. The Corporations shall instruct the Custodian to accept instructions from GSA in relation to the investment of the Account.
- GSA shall provide the Corporations with quarterly financial statements, written investment management reports and compliance reports for the Account.
- GSA shall manage and invest the assets of the Account in a diversified portfolio of *income trusts*. (Emphasis added.)
- Unless instructed otherwise by the Corporations, GSA has the right to vote in respect of any securities held in the Account.
- Management fees are calculated and paid monthly based upon the asset value of the Account net of fees. The management fee per annum is 0.5% of the assets held in the Account.
- All maintenance and operating fees charged by brokers, custodians, banks or trust companies shall be borne by the Account.
- GSA is also entitled to an annual performance fee. It is to be paid as soon as practicable following the end of the fiscal year of the Account which is

June 30.[2] The fee is equal to 25% of the net appreciation of the assets in the Account in excess of a specified hurdle.

- The IMA may be terminated by either party on 30 days' written notice.

(c) Services Provided by GSA

8 Commencing in March, 2006, GSA provided investment services and continued to do so both before and after the October, 2009 CMI Entities initial order. Its last invoice was dated January 7, 2010. As such, no services were rendered after the LP Entities initial order. Although not specified in the IMA, GSA's fees were always paid from the Account.

9 From April 19, 2006 up to and including January 7, 2010, GSA invoiced "Canwest Media" on a quarterly basis for the monthly management fees. Invoices were not issued to the Custodian for payment directly from the Account. Similarly, invoices for the performance fee were not issued to the Custodian for payment directly from the Account. Rather, the relevant Canwest representative would direct the Custodian to pay the management fees and the performance fees out of the Account and also directed the proportionate share of the fee that was to be charged to each plan. In contrast, and as specifically authorized by the IMA, without any prior approval by the CMI or LP Entities, brokerage fees were paid directly from the Account as were maintenance and operating fees.

10 On October 31, 2006, the Federal Government announced its intention to introduce legislation that would make income trusts less attractive. The number of available income trust securities shrank and became highly concentrated in specific economic sectors. To manage risk, GSA began to include other income oriented securities in the Account. GSA maintains that the Canwest Parties were aware of the mix of securities and took no objection. The Canwest Parties disagree with the characterization of the communications that passed between the parties.

11 The IMA was with Canwest Mediaworks Inc., a predecessor company to CMI, and with Canwest Mediaworks Publications Inc., a predecessor company to CPI. GSA states that Canwest Mediaworks Inc. was not the entity named in the initial CCAA order (although not stated, presumably GSA is referring to the October, 2009 order) but does not identify when it learnt that the party named in the IMA had been succeeded by an Applicant in the CCAA proceeding. GSA states that it had not been advised of this corporate reorganization at the time.

(d) The Dispute Between the Parties

12 On July 7, 2009, GSA issued an invoice to "Canwest Media" for its performance fee of $740,247.41 and a quarterly management fee of $30,913.28 for the quarter ended June, 2009. GSA states that the Account's performance outperformed the benchmark and that the incremental benefit to the plans was $3.5 million. The Canwest Parties advised that a performance fee was not warranted as the performance assessment was based on a portfolio that did not correspond to the approved mandate found in the IMA and the IMA did not provide for non-income trust investments. The parties had further discussions.

13 On October 8, 2009, GSA issued an invoice for management fees of $33,276.15 for the quarter ended September 30, 2009.

14 The management fees portion of the July 7, 2009 invoice was paid on October 28, 2009. The Canwest Parties directed the Custodian to pay the fees out of the account and to charge a propor-

tionate share of the fees to each plan. GSA was told that there were no issues with the management fees invoiced for the quarter ended September 30, 2009. GSA continued to render services.

15 In December, the Canwest Parties requested a withdrawal of certain of the funds in the Account. While GSA objected, the withdrawal occurred. On December 22, 2009, GSA received a cheque for the management fees invoiced for the period ended September 30, 2009, but it was countermanded and the Canwest Parties continued to complain of GSA's failure to comply with the terms of the IMA. Consistent with their advice of December 23, 2009, they also terminated GSA's appointment effective immediately. They refused to pay any additional performance or management fees and wanted reimbursement of the fees paid for the period the Account was not compliant with the IMA. The basis for their actions was that the IMA had been breached by purchasing securities that were not income trusts.

16 The Canwest Parties then instructed GSA to redeem all the assets in the Account which it did.

17 As mentioned, the initial order in the CMI Entities' CCAA proceedings was granted on October 6, 2009. On October 14, 2009, I granted a Claims Procedure Order. Pursuant to that order, the CMI Entities called for claims against the CMI Entities and proof of claim forms were given to CMI Entitities' known creditors. GSA was not given, nor did it request, a proof of claim package. The Canwest Parties did not consider GSA to be a known creditor because they did not consider that GSA had an outstanding claim against it. GSA did not submit a proof of claim before the claims bar date or at all. The same was true with respect to the LP Entities. There the Claims Procedure Order was granted on April 12, 2010, but no proof of claim was ever filed by GSA.

(e) The Action

18 After some further discussions, GSA issued a Statement of Claim for payment of $849,648.51 representing its performance and management fees or in the alternative, damages on a quantum meruit basis. Of this sum, $777,259.78 represents a performance fee for the performance year ended June 30, 2009; $34,939.97 is for management fees for the period July to September, 2009 and which were invoiced on October 8, 2009; and $37,448.76 is for management fees for the period October 1, 2009 to December 23, 2009.

19 In the Statement of Claim, GSA denies that adding non-income trust securities to the Account amounted to a breach of fiduciary duty or entitled the Canwest Parties to terminate the IMA other than on 30 days' notice. It states that the Canwest Parties were aware of the changes made to the Account and raised no objection. Furthermore, members of the pension plans benefited from the management of the Account. GSA states that the Canwest Parties have acted in bad faith trying to take advantage of an inconsequential discrepancy between the IMA and the intent of the parties.

20 GSA states that the action will not consume the Canwest Parties' attention and resources so as to hinder the restructuring. The events are mostly decided; the amount in issue is not material and would be paid by the plans; and the relationship was handled by one senior employee. Additionally, examinations for discovery are now time limited.

21 The Canwest Parties take a different view. They state that allowing the action to continue would be disruptive. The purpose of the claims procedure was to ensure to the fullest extent possible that all claims be established and resolved before CCAA emergence, not afterwards. Much progress has been made in this regard. It would be both time consuming and distracting to have to deal

with the issues raised in the Statement of Claim post-emergence particularly as the two enterprises being restructured will have gone their separate ways and will sponsor their own pension plans. Having the GSA dispute resolved outside the claims procedure would be contrary to the overall objectives of the restructurings and would mean that the GSA claim would be evaluated and possibly remedied on an entirely different basis than the claims of other creditors. Allowing the GSA action to proceed would be both prejudicial to the restructurings and unfair to other creditors.

Issues

22 The issues to consider are whether the stays are applicable and if so, whether they should be lifted.

Positions of the Parties

23 GSA takes the position that the stay is inapplicable because it is not within the stay language of the orders and its action is not against the Canwest Parties but rather against certain pension plans and their members and the assets of those plans. This is in accordance with the IMA and consistent with the Canwest Parties' acknowledgement that they were acting as plan administrators. The Canwest Parties are named solely in a representative capacity as administrator of those plans and no damages are being sought from them. Rather, fees are claimed from the assets of the plans. Naming the Canwest Parties and not the beneficiaries of the plans is authorized by Rule 9.01(1) of the Rules of Civil Procedure. Plan administrators hold the plans' assets in trust for the benefit of plan members and not for their own account or benefit and are authorized by the applicable legislation to engage agents to invest the plans' assets and to pay the agents from the plans' assets. GSA particularly relies on the Court of Appeal decision in *Morneau Sobeco Limited Partnership v. Aon Consulting Inc.*[3].

24 Alternatively, GSA asks that the stay be lifted. It submits that GSA is not a creditor within the CCAA proceedings and the action, if successful, will not impose any financial or other obligations on the Canwest Parties. By analogy, the circumstances are similar to insured claims where stays have been lifted as judgment would only be enforceable against insurance proceeds and not against the debtor's assets. There is no evidence or reasonable basis to suggest that permitting the action to proceed will impair the restructurings. Lastly, GSA notes that services were provided after the October, 2009 CMI Entities' initial order.

25 The Canwest Parties state that the IMA was a contract with the Canwest Parties who were the administrators of the plans and who were alone responsible for GSA's fees. GSA had no contractual right to require that its fees be paid out of the trust funds relating to the plans and it invoiced the Canwest Parties for them. The Canwest Parties particularly rely on *General Motors v. Canada*[4] in support of its position. As to GSA's alternative request, they state that GSA is a sophisticated investment manager that is now attempting to manoeuver a better outcome for itself than it would have had under the claims processes established in the CCAA proceedings. These restructurings are now at a very advanced stage and it would be unfair to creditors and prejudicial to the two restructurings to allow GSA to pursue the action in court when other similarly situated contractual counterparties have participated in the claims processes established by the court.

26 The Ad Hoc Committee and CIBC Asset-Based Lending Inc. support the position of the Canwest Parties. The Monitor takes no position on whether the stay applies but is opposed to any lifting of the stay.

Discussion

27 In my view, the stays apply to the action brought by GSA.

28 Firstly, the wording of the stay provisions in the two orders[5] is extremely broad and encompasses GSA's action. The CMI Entities' Initial Order states:

> [40] THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

The LP Entities' Initial Order states:

> [41] THIS COURT ORDERS that until and including February 5, 2010, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property, except with the written consent of the applicable LP Entity, the Monitor and the LP CRA (in respect of proceedings affecting the LP Entities, the LP Property or the LP Business), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property are hereby stayed and suspended pending further Order of this Court. In the case of the LP CRA, no Proceeding shall be commenced against the LP CRA or its directors and officers without prior leave of this Court on seven (7) days notice to CRS Inc.

29 An action is therefore captured by the stays if it is against or in respect of an Applicant or affects the Business or Property of an Applicant. The two orders define CMI and LP Business and Property broadly. In my view, GSA's action would fall into each of these four categories.

30 Secondly, a stay imposed in a CCAA proceeding is to be interpreted broadly and in accordance with the objective of providing debtors with the best possible chance of affecting a successful restructuring and ensuring that creditors are treated fairly. As noted by Farley J. in *Re Lehndorff General Partner Ltd.*[6],the power to grant a stay extends to affect not only creditors but to non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. As he also noted in that decision, a key purpose of the stay is to prevent manoeuvring for position among creditors. Furthermore, the possibility that a creditor or

stakeholder might be prejudiced does not affect the court's exercise of authority to grant a stay as the prejudice is offset by the benefits of facilitating the reorganization.[7]

31 Thirdly, while capacity may be a factor to consider when faced with a request to lift a stay, it would undermine the objective of a stay if one could dissect the various capacities in which a debtor company serves. In this regard, Gillese J.A.'s comments in *Morneau Sobeco Partnership v. Aon Consulting Inc.* were obiter and the case dealt with a release and not a stay of proceedings. The Canwest Parties are the defendants in the action and the statement of claim is replete with allegations against them including that they acted in bad faith. Part of the purpose of a stay is to enable the debtor company to devote its time and attention to restructuring not to responding to allegations in pleadings.

32 Fourthly, even if one does dissect the capacities of the Canwest Parties, they were administrators who were responsible for investing and overseeing the investment of the pension funds. They were not the trustee[8]; RBC Dexia was. Furthermore, the Canwest Parties as administrators had the ability to engage investment advisors in the discharge of their responsibilities. Consistent with this fact, GSA was providing services to the Canwest Parties and invoices were sent to "Canwest Media".

33 I also accept the argument of the Canwest Parties that the *General Motors Canada Limited v. Canada* decision addressed this precise issue albeit in a different context. In that case, the issue was whether General Motors Canada Limited ("GMCL") was entitled to claim an input tax credit to offset goods and services tax payable on investment management fees relating to the administration and investment of its registered pension plans, or whether the input tax credit "belonged" to the pension funds from which GMCL recovered the fees. The Canada Revenue Agency asserted that the services were in essence provided to the pension funds. Both the Tax Court of Canada and the Federal Court of Appeal rejected this argument. The factual background in the GMCL case and the case before me are very similar. In the *GMCL* case, the Tax Court noted:

> "The roles and respective duties of GMCL, as administrator, and Royal Trust, as the trustee, were entirely separate. While GMCL may have exercised some fiduciary duties as the plan's administrator, that does not mean that GMCL was a trustee of the trust. The only trustee of these pension plans can be Royal Trust, the Custodial Trustee, which, according to the definition of "trustee" and the evidence, holds legal title. Consequently, it was GMCL that contracted for and acquired the services of the Investment Managers. ...
>
> No evidence whatsoever was adduced to suggest that the Plan Trusts were a party to the Investment Management and Fee Agreements that made GMCL liable to pay, or that GMCL entered into an Investment Management Agreement as an agent on behalf of the Plan Trusts. The Fee Agreements, pursuant to which consideration was calculated with respect to the Investment Management Agreements, were solely between GMCL and the respective Investment Managers. The Investment Managers issued invoices, pursuant to the Agreements, solely to GMCL. GMCL approved the amounts invoiced in accordance with the Fee Agreements and then instructed the Trust to pay the Investment Managers

> from the funds it had placed in the pension plans. This in no way converts or transfers the liability for payment of the invoices to the trustee.
>
> Contractually, GMCL is the only party that carried the liability to pay this consideration to the Investment Managers. The Investment Management and Fee Agreements are definitive on this point. The Investment Managers invoiced only GMCL. Generally, liability crystallizes upon the issuance of an invoice. If GMCL did not pay the invoice, the Managers could sue only GMCL, not the Plan Trust. Only GMCL is liable to pay these invoices. Since the trust was never vested with responsibility for managing the assets, it had no requirement for the services of Investment Managers. The Managers can look only to GMCL for payment."[9] [Emphasis added]

34 The Court accordingly held that GMCL itself was entitled to claim the input tax credits in respect of the GST relating to the investment management fees paid to the managers of the assets of GMCL's registered pension plans. This was in spite of the fact that GMCL entered into the investment management agreement in its capacity as administrator of its registered pension plans.

35 It seems to me that this decision is similar to the case before me. The Custodian, RBC Dexia, is the trustee who held legal title to the assets in the fund. The Canwest Parties contracted for and acquired the services of GSA. Although by statute, the fees could be paid from the Account, the plan trusts were not liable for payment; the Canwest Parties were. The Canwest Parties approved the payments to GSA and then authorized the Custodian to pay them out of the Account. The Custodian had no responsibility or requirement for investment management services; the Canwest Parties did. The Canwest Parties were described as contracting on behalf of the plans but this simply reflects their role as administrator. Again, as stated in the *GMCL v. Canada* decision,

> "It follows from these comments that, although GMCL re-supplied the investment services to the trusts, and despite a reimbursement to GMCL by the Trust in the event that GMCL paid these fees directly, GMCL was still the person liable for the payment of the supply of these services by the Investment Managers, pursuant to the terms of the Agreements between GMCL and the Managers. The origin of the payment is irrelevant."[10]

36 GSA's action is not only against or in respect of the Canwest Parties, it also affects their Business as that term is defined in the initial orders thereby attracting the application of the stays. The effective administration of the plans and the relationship between the Canwest Parties and their employees are important aspects of the Business of the Canwest Parties. It should also be observed that by statute, if there are unfunded liabilities in the defined benefit plans, the Canwest Parties are required to make special payments to ensure that the plans are funded.

37 Lastly, the action can also be said to affect the Property of the Canwest Parties as that term is defined in the initial orders. Nowhere does it say in the IMA that GSA is to be paid by the fund or by the Trustee. Unlike the Trustee in the Master Trust Agreement, GSA has no security interest over the fund. In addition, the Account has been collapsed. Recovery of any judgment against the Canwest Parties clearly affects their Property. Even if GSA could execute against the defined benefit plans, the Canwest Parties would still be responsible for any deficiency arising in the plans. As such the Canwest Parties' Property may also be affected by GSA's action.

38 For all of these reasons, it appears abundantly clear that the statement of claim of GSA is encompassed by the stays of proceedings.

39 The second issue to consider is whether the stay should be lifted to permit the action to proceed.

40 There is no statutory test under the CCAA that governs the lifting of a stay. The stay provisions in the CCAA orders are discretionary and should be applied so as to support the CCAA's legislative purpose: *Re Canwest Global Communications Corp.*[11]

41 In that case, I described in some detail the legal issues applicable to the granting and lifting of a stay. I wrote:

> According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[12], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*.[13] That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[14]
>
> Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[15] and Professor McLaren has added three more since then. They are:
>
> 1. When the plan is likely to fail.
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
> 4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
> 7. There is a real risk that a creditor's loan will become unsecured during the stay period.
> 8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
> 9. It is in the interests of justice to do so.[16]

42 None of those situations is present here and in my view, a consideration of the balance of convenience, the relative prejudice to the parties and the merits of the action do not favour GSA's position. The objectives of the CCAA would not be met by lifting the stay. Indeed the converse is true. I accept the Canwest Parties' position that allowing the action to proceed would be prejudicial to the restructuring and unfair to others. GSA elected to commence this action in the face of the court ordered stays and opted not to file a proof of claim in either CCAA proceeding. It seems to me that this is the exact type of maneuvering that the CCAA is designed to avoid. The whole purpose of the claims procedures is to elicit and deal with claims against the Canwest Parties so that their businesses may emerge unencumbered by prior claims. It is also unfair to other creditors to permit this action to proceed. Those creditors did submit claims and their claims were subject to compromise in the plans advanced in the two separate CCAA restructurings.

43 I do not accept that this case is analogous to an insured claim. As already outlined, it cannot be assumed that a judgment would or should be enforceable against the funds and in any event, the Canwest Parties would ultimately be responsible for addressing any shortfalls in the defined benefit plans.[17] The CMI Entities have not yet emerged from CCAA protection and this action would be time consuming and a distraction. The absence of good faith and due diligence on the part of the Canwest Parties has not been established. Lastly, I note that the Monitor is opposed to the lifting of the stay. In all of these circumstances, with one modest exception which I will address, the stay should not be lifted.

44 The performance fee and the management fees are pre-filing debt with respect to the LP Entities and subject to compromise. The same is true for the CMI Entities with the exception of that portion of the October 1, 2009, to December 23, 2009 management fee attributable to them which is arguably recoverable for post-filing services rendered pursuant to section 11.2 of the CCAA. I am lifting the stay for the limited purpose of permitting a claim by GSA for that amount which I estimate would be less than $30,000. This does not preclude a claim for set-off by the CMI Entities. With that limited exception, GSA's motion is dismissed.

S.E. PEPALL J.

1 R.S.C. 1985, c. C-36 as amended.

2 As noted in the affidavit of GSA's Deputy Chief Executive Officer, Jeremy Freedman, the performance of the Account over the year is determined at the end of the performance year which is June 30.

3 (2008), 65 C.C.P.B. 293 (C.A.).

4 [2009] F.C.J. No. 447 (F.C.A.), aff'g [2008] T.C.J. No. 80 (T.C.C.).

5 The power for the court to stay proceedings is found in section 11.2 of the CCAA. The stays in both orders were extended from time to time by the court.

6 (1993), 17 C.B.R. (3d) 24 at p. 33.

7 Ibid, at p. 32.

8 Pursuant to section 22(b) of at least the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8, they would not qualify to be trustees.

9 *Ibid*, at paras. 53-54.

10 Ibid, at para. 57.

11 [2009] O.J. No. 5379 at paras. 27 and 28.

12 Aurora: Canada Law Book, looseleaf, at para. 3.3400.

13 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

14 Ibid, at para. 68.

15 (2000), 19 C.B.R. (4th) 1.

16 Ibid, at paras. 32 and 33.

17 In their factum, the Canwest Parties state: "the Statement of Claim in the Action does not say that relief is sought only against the Plans and in fact scrupulously avoids specifying from whom damages are sought." That said, in argument, counsel for GSA acknowledged that GSA would restrict its recovery to the funds.

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 **JTI-MACDONALD CORP.**

Court File No. CV-19-615862-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office - Civil
8th Floor, 720 Bay Street
Toronto, Ontario M7A 2S9
Fax: (416) 326-4181

Jacqueline L. Wall, LSO No. 38511D
Tel: (416) 325-8435
Email: jacqueline.wall@ontario.com

Shahana Kar, LSO No. 33311O
Tel: (416) 314-2080
Email: shahana.kar@ontario.com

Counsel to the Moving Party,
Her Majesty the Queen in right of Ontario