Court File No.

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

BOOK OF AUTHORITIES OF THE APPLICANTS

April 13, 2014

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ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.

2007 CarswellSask 324, 2007 SKCA 72, [2007] 9 W.W.R. 79, [2007] S.J. No. 313, 299 Sask. R. 194, 33 C.B.R. (5th) 50, 408 W.A.C. 194

ICR Commercial Real Estate (Regina) Ltd. (Appellant) and Bricore Land Group Ltd., Bricore Investment Group Ltd., 624796 Saskatchewan Ltd. 603767 Saskatchewan Ltd.,(Respondents)

Klebuc C.J.S., Jackson, Smith JJ.A.

Heard: June 7, 2007
Judgment: June 13, 2007
Docket: 1443, 1452

Proceedings: affirming *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157 (Sask. Q.B.); additional reasons at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.); and reversing *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.)

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Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial

Related Abridgment Classifications

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

Headnote

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dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

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

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish "prima facie case" — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — "Sound reasons" test was better than "prima facie case" test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO's position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Debtors and creditors --- Receivers — Actions by and against receiver — Actions against receiver

Against chief restructuring officer — Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for acts of fraud, gross negligence or wilful misconduct, but order was ambiguous about acts of bad faith — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against CRO personally based on bad faith was dismissed — Supervising judge held that realtor was required to allege fraud, gross negligence or wilful misconduct, and failed to do so — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge did not err in refusing to lift stay to permit action against CRO personally — Supervising judge considered status of CRO as officer of court, noted ambiguity in order, and weighed evidence to certain extent.

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— CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

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Against chief restructuring officer — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

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s. 11(6) [en. 1997, c. 12, s. 124] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.11 [en. 2001, c. 9, s. 577] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

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Real Estate Act, S.S. 1995, c. R-1.3
Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules
R. 173 — referred to

Words and phrases considered:

Substantial indemnity costs

> [Jackson J.A. (Klebuc C.J.S. and Smith J.A. concurring):] . . . while [the judge, in awarding substantial indemnity costs,] 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.

APPEAL by creditor from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39 (Sask. Q.B.) dismissing application to lift stay against debtor under Companies Creditors' Arrangement Act, and from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264, 33 C.B.R. (5th) 46 (Sask. Q.B.) ordering costs against creditor.

***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:

> 7 ...
>
> (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 contending 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 Plate Glass* narrow its application.

27 In *Ramsay Plate Glass Co.*, 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 Plate 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 Plate 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 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*, *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 Plate 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 *Cooperative 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 Brothers Contracting Ltd., Re* [36] also supports a narrow reading of s. 11.3. After citing *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [37] and *Quintette Coal Ltd. v. Nippon Steel Corp.* [38] with respect to the intention of Parliament and the object and scheme of the *CCAA*, Bauman J. in *Smith Brothers* 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 evidence 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 Inc., Re*, [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*, 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 property 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.

Appeal allowed in part.

Footnotes

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 Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 121 (Sask. Q.B.).

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 Plate 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.W.T. S.C.) mentions *Ramsay Plate 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 [*Caterpillar Financial Services Ltd. v. 360networks corp.*] (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. 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 (1990), [1991] 2 W.W.R. 136 (B.C. C.A.).

38 (1990), 51 B.C.L.R. (2d) 105 (B.C. C.A.).

39 *Smith Brothers Contracting Ltd.*, *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 (Sask. C.A.), paraphrasing Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.) at 1046.

42 [1943] O.R. 683 (Ont. C.A.) 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 List]) at para 3.

53 [2006] O.J. No. 5029 (Ont. S.C.J.).

54 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, *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 Inc., Re*, *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 Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, *supra* note 15.

66 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 144 (Sask. Q.B.).

67 [2005] 8 W.W.R. 224 (B.C. C.A.) at para. 23.

68 2002 SKCA 84, [2002] 11 W.W.R. 246 (Sask. C.A.).

69 2006 SKCA 126, [2007] 2 W.W.R. 52 (Sask. C.A.).

End of Document

TAB 2

1991 CarswellBC 494
British Columbia Supreme Court

Alberta-Pacific Terminals Ltd., Re

1991 CarswellBC 494, [1991] B.C.W.L.D. 1413, [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99

Re COMPANY ACT, R.S.B.C. 1979, c. 59; Re BUSINESS CORPORATIONS ACT, S.A. 1981, c. B-15; Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36; Re ALBERTA-PACIFIC TERMINALS LTD., FRASER SURREY DOCKS LTD., PACIFIC TERMINALS LTD., JOHNSON MARINE TERMINALS LIMITED and JOHNSTON INTERNATIONAL SERVICES (HONG KONG) LTD.

Huddart J. [in Chambers]

Heard: April 18-19, 1991
Judgment: May 8, 1991
Docket: Doc. Vancouver A903661

Counsel: *M. Copping Hollis* and *G. Hughes*, for applicants Fraser River Harbour Commission.
R. Holmes and *G. Matei*, for petitioners.
J. Dixon and *A. Perry*, for Her Majesty the Queen in right of the Province of Alberta and Alberta Treasury Branch.
S. Jermyn, for Rico Equipment, an unsecured creditor.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

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

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Companies' Creditors Arrangement Act — Petitioners operating terminal for Harbour Commission — Order made under Companies' Creditors Arrangement Act staying all proceedings against petitioners and enjoining Commission from terminating operating agreement — Commission's application for order directing payment by petitioners of amounts falling due monthly under operating agreement dismissed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The harbour commission had an agreement (the "operating agreement") with FSDL under which FSDL operated a terminal for the commission. FSDL and its associated companies (collectively, the "petitioners") ran into financial difficulties and sought protection under the *Companies' Creditors Arrangement Act*. An order was made under the Act staying all proceedings against the petitioners, enjoining the commission from taking any steps to terminate the operating agreement (which was the primary asset of FSDL), and ordering that contracts that might give a benefit to any petitioner be maintained in full force and effect pending a further order. The commission applied for an order directing the payment by the practitioners of the amounts that fell due monthly under the operating agreement, and also asked the court to determine the nature of the relationship between the commission and the practitioners.

Held:

The application was dismissed.

This was not the appropriate time to consider the relationship between the parties.

The petitioners should not be ordered to pay moneys pursuant to the operating agreement pending the termination of the stay orders. There was no evidence of any hardship to the commission; the commission's only concern was that its position not be eroded relative to the position of other creditors. The petitioners did not appear to have the money to make the payments sought. The orders under the Act left to the management of the petitioners a considerable area of discretion in the application of its current cash flow. Given the terms of the operating agreement, the history of the relationship between the commission and the petitioners, the nature of the terminal operation, the nature of the line of credit facility, and the petitioners' cash flow statements, it was inappropriate for the court to intervene in the exercise of that discretion without some reason, such as perhaps evidence of hardship to the commission or of erosion of its property value.

Table of Authorities

Cases considered:

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

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1 —

s. 178 [am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26(1) and (2)]

Business Corporations Act, S.A. 1981, c. B-15.

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

Company Act, R.S.B.C. 1979, c. 59.

Harbour Commissions Act, R.S.C. 1985, c. H-1.

Application for order directing payment of moneys due under agreement in spite of stay under *Companies' Creditors Arrangement Act*.

***Huddart J.* [In Chambers]:**

1 This application is about the right of the Fraser River Harbour Commission to be paid moneys pursuant to its agreement with Fraser Surrey Docks Ltd. ("FSDL"), under which FSDL operates the deep-sea common user terminal of the Fraser port, while all proceedings against FSDL and its associated companies are stayed by orders made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

2 Under the terms of the operating agreement made January 1, 1989, FSDL is the terminal agent and wharfinger for the commission. The commission administers the Fraser port under the *Harbour Commissions Act*, R.S.C. 1985, c. H-1. The Johnston Group of companies has operated the terminal for more than 20 years, but since the 1989 agreement and related expansion, it has run into financial difficulties. The petitioners attribute these difficulties to a chemical spill in August 1989, and consequential claims for damages; a very high debt/equity ratio and the refusal of the Alberta treasury branch and government to convert their debt to equity; a fire on November 14, 1990; and finally, the commission's threat on November 16, 1990, to terminate the operating agreement.

3 To assist FSDL with the earlier of these difficulties, the commission had agreed on July 27, 1990, to defer payments due under the operating agreement for the months of June to September inclusive, the same to be paid on December 31, 1990. When FSDL defaulted on the regular payment for October due on November 15, 1990, the commission refused a request for a further deferral, advising that it would consider termination of the operating agreement if payment was not made within the 7 days of grace allowed under the contract.

4 FSDL considers that the commission has the right to terminate the operating agreement only upon its insolvency. When FSDL and its related companies admitted they were insolvent and sought the protection available to them under the *Companies' Creditors Arrangement Act* (the "CCAA") on November 22, 1990, FSDL owed the commission about $976,000. The commission claims that Johnston Marine Terminals Limited ("JMTL") then owed it $353,000. The total debt of the petitioners to the Alberta government and the Alberta treasury branches ("Alberta") was $13 million, some of it secured.

5 The operating agreement is the primary asset of FSDL. Without it and the operating line of credit from the Alberta treasury branches, the petitioners would be unable to operate the terminal.

6 The ex parte order Mr. Justice Skipp made on November 22, 1990, stayed all proceedings against the petitioners until May 31, 1991, specifically enjoined the commission from taking any steps to terminate the operating agreement and the option to lease in favour of Pacific Terminals Ltd. ("Pacific") without further order, and ordered that contracts that might give a benefit to any petitioner "be maintained in full force and effect pending further order of this Court."

7 In December, the petitioners paid $28,544 to the commission, the amount attributable to the period in November following the CCAA order.

8 On December 18, Mr. Justice Spencer varied the order to provide for the continued provision by the Alberta treasury branches of the "existing $1.25 million operating credit facility" to the petitioners or any of them. Included in that order was a provision that "interest calculated on the daily outstanding principal amount under the Facility is to be paid monthly." The order was made with the consent of the petitioners, Alberta, and the commission. No similar provision was made with regard to the monthly payments required by the operating agreement.

9 FSDL did not make the payment due on January 15, or any subsequent payments. The payments due exceed $200,000 per month. FSDL claimed that it could not afford to make the payments, that the payments were prohibited under the order, and that, in any event, to make any payment on account of the operating agreement would be to favour an equity participant over general creditors.

10 The commission interpreted the order and its relationship with FSDL differently. It considered that the order required payments under the operating agreement to be continued. The matter came before Mr. Justice Arkell, who concluded on March 28:

> The present orders of the court require the Commission to continue and maintain the operating agreement for the benefit of the Petitioners, pending the reorganization plan, or further order of the court. The present court orders neither prohibit nor do they require the continuation of the monthly payments due under the operating agreement.
>
> The Commission is at liberty to apply to the court to vary the present court orders for a right of preference over other creditors and to receive continuing payments under the terms of the operating agreement. Alternatively, the Commission may apply to the Court for leave to commence an action against the Petitioners and sue for damages or ultimately for termination of the operating agreement.

Because he had reached this conclusion accepting the position of the commission that it was a "creditor" within the meaning of the CCAA, Mr. Justice Arkell did not find it necessary to resolve the dispute as to the nature of the relationship between the petitioners and the commission.

11 This application is a sequel to the application before Mr. Justice Arkell. It revisits the issue as to the nature of the relationship between the petitioners and the commission, and it asks this court to direct the payment by the petitioners of the amounts that fall due monthly under the operating agreement.

12 I find that I need consider only the second issue. The authorities cited by both counsel persuade me that the categorization of any commercial relationship will vary with the issue before the court. If and when a determination of the rights and obligations of the parties to the operating agreement is required, the court may be called upon to determine the nature of their relationship. If and when the court is called upon to fix the classes of creditors for the purpose of voting on a reorganization plan, the court may be required to determine whether or not the commission is a "creditor" within the meaning of the CCAA. Until some such occasion arises, I can see no reason for saying anything about their relationship.

13 It may be that the commission is anxious that the court determine the nature of its relationship with FSDL, JMTL, and Alberta-Pacific Terminals Ltd., before the fixing of the classes of creditors. If so, it did not say so.

14 There is no doubt that the commission is concerned at the hint in the petitioners' argument that they may be seeking the court's and the creditors' approval of a reorganization plan that will restructure their "revenue sharing arrangements" with the commission without the approval of the commission. A question about the judicial nature of the relationship might arise if the petitioners successfully exclude the commission from voting as a creditor, then seek to have it bound by any reorganization plan. From the information available to me on this application and from my understanding of the purpose and scheme of the CCAA, I consider such an idea so far-fetched as not to require further comment.

15 It may be that the commission considers the nature of the relationship material to the issue as to whether or not it should be paid the moneys that have fallen due since November 30 or that will fall due before May 31, or any later termination of the stay. I do not find it to be so because I have not had recourse to the arguments put forward by the petitioners based on joint venture, debt or equity contribution, or equitable subordination, in reaching the conclusion that I should not order the petitioners or any of them to pay moneys pursuant to the operating agreement pending the termination of the stay orders.

16 I have come to that conclusion having regard to the purpose and scheme of the CCAA, the terms of the operating agreement, and the financial circumstances of the petitioners as revealed in the monitor's report.

17 The purpose of the CCAA is to facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue in business, said Mr. Justice Gibbs in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.), at p. 88 [B.C.L.R.]. No creditor is exempted. But neither is anyone who is not a creditor included within its ambit.

18 At p. 90 of the *Chef Ready* case, Mr. Justice Gibbs said of the effect of the CCAA on the property interest acquired by a bank under s. 178 [*Bank Act*, R.S.C. 1985, c. B-1] security:

> But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the bank under ss. 178 and 179? It does not detract from the bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; ... it does not breach the 'complete code'. All that it does is postpone the exercise of the right to seize and sell. And here the bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise.

19 From a similar perspective, it can be said that all that the orders pursuant to the CCAA do with regard to the commission's rights under the operating agreement is to postpone the exercise of the right to terminate the agreement on insolvency or to sue for payments not made as they fall due. The commission had already allowed a 4-month postponement. So the petitioners argue. However, the commission seeks neither to sue nor to terminate the agreement. It does not wish to prevent FSDL from carrying on business. It recognizes the purpose of the stay of proceedings.

20 Rather, it says that the orders requiring it to continue to provide its land and facilities without current recompense and without any guarantee of future recompense make it unique among the creditors of the petitioners, unlike the Alberta treasury branches, who are to continue the line of credit facility, but who are to receive current interest on the credit advanced under it, and unlike those creditors who are paid for current supply of goods and services. In effect, it says that the monthly payments should be made in the ordinary course of business for the continued use of the land and facilities, because if they are not, the commission's position is eroding relative to other creditors. Its debt is growing each month, not only by accrual of interest, but by an additional $200,000, on average. It is providing the land and facilities from the use of which income is being derived without any compensation from that income. Thus it seeks an order for payment of the moneys as they accrue due to "preserve the status quo."

21 The petitioners say that to accede to the commission's request to be paid would be to give it a preference over general creditors to which it is not entitled, given the terms of the operating agreement and particularly the way in which the payments are structured. The commission disagrees, saying that the operating agreement is valid and enforceable, there being neither an agreement nor an order suspending or prohibiting payments under it, and that to require current payments to be made would not be to prefer one creditor over another with regard to debt accumulated before the stay orders.

22 In *Chef Ready*, supra, Mr. Justice Gibbs described the court's function on applications such as these at pp. 88 and 89, in these words:

> When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

23 The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo 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.

24 Obviously, the commission is one of the most important of those interests, because it holds and administers the public's interest in the land and facilities.

25 When I have regard to all of the materials put before me by the commission, I find no proof of hardship or even of need. For example, I see no suggestion that the commission is incurring expenses related to the Fraser Surrey dock that it must pay from other sources of revenue. Its only concern is that its position not be eroded relative to the position of other creditors. If the reorganization is successful, it is unlikely the commission will suffer any loss in the value of its position to which it has not agreed. If the reorganization turns out not to be possible, the commission's loss because of the stay may be substantial. Or it may not be. The owner of land and facilities is not in the same position as a creditor owed a fixed sum of money, easily valued.

26 When I have regard to the monitor's cash flow statements, I do not find the money to make the payments sought. The original ex parte order and the subsequent consent order left to management of the petitioners a considerable area of discretion in the application of its current cash flow. Given the terms of the operating agreement, the history of the relationship between the commission and the petitioners, the nature of the terminal operation, the nature of the line of credit facility, and those cash

flow statements, I have decided that it is inappropriate for the court to intervene in management's exercise of that discretion without some reason, perhaps evidence of hardship to the commission or of erosion of its property value.

27 I have reached that conclusion despite some considerable reservations about the way in which management has exercised that discretion, as revealed in the monitor's reports. Those reports suggest that payments have been made to other creditors from the petitioners' cash flows, contrary to this court's orders. I do not consider that I should discuss this matter further in these reasons. I advised counsel at the hearing of this application that such matters should be considered on another occasion on notice to all interested parties. On this hearing, only one unsecured creditor appeared. That creditor did not suggest that it had reason to remain after ascertaining the nature of the application and that its presentation would require the disclosure of information contained in the monitor's reports, sealed by order of Mr. Justice Spencer. It may be that unsecured creditors will wish to request further information if they receive notice of an application authorizing other payments.

Application dismissed.

TAB 3

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

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"

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

Related Abridgment Classifications

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

Headnote

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

Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

Table of Authorities

Cases considered by *Pepall J.*:

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

General Publishing Co., Re (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

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

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Statutes considered:

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

Bankruptcy Code, 11 U.S.C.
Chapter 15 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

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

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 23 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 137(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act.*

***Pepall J.*:**

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

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

3 No one appearing opposed the relief requested.

Backround Facts

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

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

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

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

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

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

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

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

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

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

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

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

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

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

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities

making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

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

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

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

Proposed Monitor

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

Proposed Order

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

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

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment

either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act* [3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re* [4] . Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

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

(b) Stay of Proceedings

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

(b) Partnerships and Foreign Subsidiaries

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

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

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re* [8] and *Global Light Telecommunications Inc., Re* [9]

(C) DIP Financing

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

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(4) In deciding whether to make an order, the court is to consider, among other things,

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

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

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

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

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

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

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

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

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

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

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage

the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

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

(d) Administration Charge

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

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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

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

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

(e) Critical Suppliers

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

and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

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

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

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

(f) Directors' and Officers' Charge

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

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

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company

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

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

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

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

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

(g) Key Employee Retention Plans

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

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the

Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re* [11] have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)* [12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

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

Annual Meeting

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

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

Other

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

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

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

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

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

Conclusion

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

Application granted.

Footnotes

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

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

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

4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

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

8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

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

10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

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

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

TAB 4

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

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

Headnote

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

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have

been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

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

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

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

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

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

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

Reasons for Decision

Introduction

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

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

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

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

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

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

Background Facts

(i) Financial Difficulties

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

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

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

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

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

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

(ii) Indebtedness under the Credit Facilities

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

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

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

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

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

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

(iii) LP Entities' Response to Financial Difficulties

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

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

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

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business

and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Monitor

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

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their

stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

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

(b) Limited Partnership

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

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

(c) Filing of the Secured Creditors' Plan

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

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

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

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

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

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

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

(D) DIP Financing

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

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

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

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

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

various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

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

(e) Critical Suppliers

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

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

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

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

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

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint

and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

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

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

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

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

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

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

(c) whether there is an unwarranted duplication of roles;

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

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

(f) the position of the Monitor.

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

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

(g) Directors and Officers

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

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

(h) Management Incentive Plan and Special Arrangements

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

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

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the

restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

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

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

(i) Confidential Information

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

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

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

Conclusion

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

Application granted.

Footnotes

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

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

3 Subject to certain assumptions and qualifications.

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

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

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

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

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

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

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

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

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

19 Supra, note 7 at para. 52.

End of Document

TAB 5

2007 CarswellOnt 7014
Ontario Superior Court of Justice

Collins & Aikman Automotive Canada Inc., Re

2007 CarswellOnt 7014, [2007] O.J. No. 4186, 161 A.C.W.S. (3d) 675, 37 C.B.R. (5th) 282, 63 C.C.P.B. 125

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 COLLINS & AIKMAN AUTOMOTIVE CANADA INC.

APPLICATION UNDER the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Spence J.

Heard: September 20, 26, 2007
Judgment: October 31, 2007
Docket: 07-CL-7105

Counsel: M.E. Bailey for Superintendent of Financial Services (Ontario)
K.T. Rosenberg, M.C. Starnino for United Steelworkers
C.E. Sinclair for National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW — Canada)
R.J. Chadwick for Ernst & Young Inc., as Monitor of Collins & Aikman Automotive Canada Inc.
A.J. Taylor, K.L. Mah for Collins & Aikman Automotive Canada Inc.
J.E. Dacks for JP Morgan Chase Bank NA
C.J. Hill for Chrysler LLC

Subject: Insolvency; Corporate and Commercial; Employment; Public

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Motions to amend initial order — Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") — Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors — Court issued initial order under CCAA — Para. 4 of initial order authorized company to retain further assistants if necessary — Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") — Para. 11 authorized company to terminate employees by agreement with other parties or, failing such agreement, to deal with consequences under CCAA — Para. 26 provided that monitor, by fulfilling obligations under initial order, would not be deemed to be employer of company's employees — Para. 29 immunized monitor from liability save for gross negligence or wilful misconduct — Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees — Superintendent and unions brought motions seeking various relief — Motions dismissed — Para. 4 did not provide that further hirings could breach collective agreements — If hirings did so, aggrieved parties could apparently seek relief under CCAA — Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order — Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime — If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might

found motion for relief — Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so — CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA — It was inappropriate for court to exercise its discretion under CCAA to delete "not required" provision, or to order company to make special payments — This would be contrary to reasonable expectations of company and DIP lender — DIP lender had changed its position on basis of existing court orders — Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations — There had been no objections regarding special payments at time of initial order — Union's position, that para. 11 of initial order should be made subject to applicable collective agreements and labour laws, was rejected — Para. 11 did not purport to abrogate collective agreement or labour laws — No reason was advanced why union could not withhold agreement to company's proposed exercise of para. 11, or pursue matter in court under CCAA — Para. 26 was not inconsistent with jurisdiction of board under Labour Relations Act ("LRA") to determine whether monitor was successor employer — Initial order did not purport to determine application of LRA — Application of para. 26 was limited to monitor's role under initial order — Court had jurisdiction to grant limitation of liability as set out in para. 29 — Wording in para. 29 was consistent with limitation of liability given to monitors under standard form model CCAA initial order.

Pensions --- Administration of pension plans — Valuation and funding of plans — Deficiency

Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") — Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors — Court issued initial order under CCAA — Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") — Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees — Superintendent and unions brought motions seeking various relief — Motions dismissed — Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order — Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime — If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might found motion for relief — Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so — CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA — It was inappropriate for court to exercise its discretion under CCAA to delete "not required" provision, or to order company to make special payments — This would be contrary to reasonable expectations of company and DIP lender — DIP lender had changed its position on basis of existing court orders — Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations — There had been no objections regarding special payments at time of initial order.

Annotation

When Air Canada filed for bankruptcy protection under the *Companies' Creditors Arrangement Act* (the "CCAA") in 2003, there existed virtually no judicial guidance as to how issues surrounding its underfunded pension plans would be treated under the CCAA. But the spate of employer insolvencies and pension plan deficits in the four years since (Slater Steel, Stelco, United Air Lines, Ivaco, General Chemical, etc.) has resulted in many of the issues at the intersection of insolvency law and pension law having been litigated and, for now at least, resolved. *Collins & Aikman* is the latest decision to answer one of the questions as to how to deal with pension issues in a CCAA restructuring.

The issue in *Collins & Aikman* was the validity of the employer decision to suspend special payments (i.e. contributions to pay down pension plan solvency deficits) on the basis of a provision in the initial CCAA court order stating that the company could, but need not, make pension plan contributions while under CCAA protection. The suspension of the special payments (but not current service contributions, which have continued to be remitted) was a condition of the interim financing designed to keep the insolvent company afloat during its restructuring, the terms of which financing were approved by the court. Neither the Ontario pension regulator nor the union opposed the financing, but they subsequently challenged the suspension of the special payment remittances to the pension plans.

The Ontario Superior Court held that the regulator and union could not have their cake and eat it too, i.e. they could not give the company the benefit of the interim financing while not allowing it to meet a key condition for that financing. Thus the validity of the "pension contribution suspension" provision in the initial CCAA order, which has become a relatively standard feature of such orders over the past few years, has been upheld, to the general relief of employers, financial institutions, and many other classes of CCAA stakeholders.

However, the decision is not necessarily a blanket endorsement of such provisions. To begin with, it is unclear whether the decision would automatically have been the same had the suspension of special payments not been a prerequisite to the court-approved financing. Second, the court held out the possibility of the regulator and/or the union being able to challenge the continued validity of the suspension at future stages in the CCAA process; whether such future challenges might be successful is, of course, another matter entirely. And finally, the union has appealed the Superior Court decision to the Ontario Court of Appeal, so this decision will not be the last judicial word on the issue.

Gary Nachshen

Table of Authorities

Cases considered by *Spence J.*:

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

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, 351 N.R. 326, *(*sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, *(*sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193 (S.C.C.) — considered

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia (2007), 2007 C.L.L.C. 220-035, 363 N.R. 226, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 65 B.C.L.R. (4th) 201, 283 D.L.R. (4th) 40, 137 C.L.R.B.R. (2d) 166, 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290 (S.C.C.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39 (Sask. Q.B.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Ivaco Inc., Re (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]) — considered

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Ivaco Inc., Re (2007), 2007 CarswellOnt 2855, 2007 CarswellOnt 2856, [2006] S.C.C.A. No. 490 (S.C.C.) — referred to

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

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

Richtree Inc., Re (2005), 2005 CarswellOnt 255, 13 C.B.R. (5th) 111, 10 B.L.R. (4th) 334, 7 C.B.R. (5th) 294, 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

Sulphur Corp. of Canada Ltd., Re (2002), 2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152, 35 C.B.R. (4th) 304 (Alta. Q.B.) — considered

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) — considered

United Air Lines Inc., Re (2005), *(*sub nom. *United Air Lines Inc. (Bankrupt), Re)* 2005 C.E.B. & P.G.R. 8145, 2005 CarswellOnt 1078, 45 C.C.P.B. 151, 9 C.B.R. (5th) 159 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Generally — referred to

Builders Lien Act, S.B.C. 1997, c. 45
Generally — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 2(d) — referred to

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

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 11(4) — considered

s. 11(6) — considered

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

s. 11.8(1) [en. 1997, c. 12, s. 124] — considered

s. 18.6 [en. 1997, c. 12, s. 125] — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A
Generally — referred to

s. 69 — considered

s. 69(1) — considered

s. 69(2) — considered

s. 69(12) — considered

s. 111 — referred to

s. 116 — considered

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

s. 55(2) — considered

s. 75 — considered

Regulations considered:

Pension Benefits Act, R.S.O. 1990, c. P.8
General, R.R.O. 1990, Reg. 909

Generally — referred to

s. 4(2) — considered

s. 5(1)(b) — considered

s. 5(1)(e) — considered

s. 31 — considered

MOTIONS by labour unions and Superintendent of Financial Services to amend intial order made with respect to insolvent company under *Companies' Creditors Arrangement Act*.

***Spence J.*:**

1 Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW — Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

2 On July 19, 2007, Collins & Aikman Automotive Canada Inc. ("Automotive") filed for protection from its creditors pursuant to the CCAA. The Applicant is insolvent. It was clear at the time of the CCAA filing that Automotive would not be able to reorganize and the Court was informed by counsel to Automotive and the Monitor that this proceeding is effectively a

liquidation. The Court is advised that the CCAA is being utilized by the Applicant to attempt to maximize the potential recovery for the benefit of all creditors by creating the opportunity to attempt to sell some or all of its remaining operating facilities on a going concern basis.

3 Chrysler LLC (previously known as DaimlerChrysler Company LLC) ("Chrysler") is Automotive's largest remaining customer. In order to provide Automotive with the stability to pursue the sale of its facilities, Automotive, Chrysler, the U.S. Debtors and JPMorgan Chase Bank, N.A. as Agent for the U.S. Debtors' pre-petition secured creditors negotiated a comprehensive funding agreement whereby Chrysler (the "DIP Lender") will fund the costs of this CCAA filing.

4 The relief sought by the moving parties concerns, *inter alia*, the pension plans of Automotive. The Superintendent advises that Automotive maintains seven pension plans which are registered in Ontario,

The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

> Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

The USW is concerned that, as presently worded, paragraph 4 of the Initial Order is open to an interpretation that permits the Applicant to employ individuals in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation. In particular, paragraph 4 could be taken to authorize the unilateral contracting out of union positions. Accordingly, the USW proposes that the following text should be appended at the end of paragraph 4: ", provided that such further retainers are not in breach of any of its collective agreements."

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:
>
> > (a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements...

8 The Superintendent objects to any provision that would be inconsistent with the Applicant being required to make any and all required employee contributions to its pension plans.

9 The USW objects to the foregoing provision of the Initial Order on the basis that Automotive appears to be interpreting that provision so as to amend the terms of their employment by staying Automotive's obligation to pay compensation accruing due to employees post filing, including, wages, benefits and special payments to the pension plan. Accordingly, the USW proposes that the words "but not required" be struck from paragraph 6.

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:
>
> . . . . .
>
> b. Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in any plan of arrangement or compromise filed by the Applicants under the CCAA (the "Plan");...
>
> d. Repudiate such of its arrangements or agreement of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; ...

The USW is concerned that these provisions are open to an interpretation that permits Automotive to repudiate its collective agreements with the USW's members. Accordingly, the USW proposes that the following text be added at paragraph 11, following the phrase "(as hereinafter defined)":

> and any and all applicable collective agreements (including, without limitation, all employee benefit, pension and related agreements, compensation policies, and arrangements), and labour laws....

11 The Superintendent seeks an order directing the Applicant to make all required employer contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Initial Order as is necessary to reflect this relief.

12 The CAW seeks an order compelling the Applicant to make the special payments due to the pension plans operated for the benefit of the CAW's members. The special payments that are referred to include the special payments that are provided for under s. 5(1)(b) and section 5(1)(e) of the Regulation under the PBA. These payments are required to be made to liquidate any unfunded liability in the plan by reason of a going concern deficiency and any insolvency deficiency based on actuarial valuation of the plan. The other special payments referred to are those dealt with in s. 31 of the Regulation. These payments are post wind-up special payments owing under s. 75 of the PBA to address a wind-up deficit. Section 31 states that annual special payments are to commence at the "effective date of wind up" and are equal to "the amount required in the year to fund the employer's liabilities under section 75 of the [PBA] in equal payments, payable annually in advance, over not more than five years".

13 As stated in *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.) at paragraph 25, in the context of going concern special payments, special payments "may fluctuate depending upon the investment results of the pension fund and the employer's ongoing contributions, together with estimated demands on the fund by the beneficiaries" and other factors. The true position of the plan cannot, in fact, be known until the crystallization of all benefits when benefits are settled after a wind-up at which time "it will be known what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim".

14 Accordingly, special payments are better understood as the payments which (in accordance with the PBA and Regulations and actuarial practice) have to be made to a pension plan now to meet the plan's benefit obligations which do not arise until some point in the future (either on retirement or termination for individual members or when benefits are settled in a plan wind up for the plan as a whole).

15 Likewise, post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date. Again, the actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are used to actually purchase annuities from an insurance company (at then prevailing annuity rates) to provide the monthly pension benefit to the member.

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately $345,000 as of June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position

of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

17 The factums of the USW and the CAW state that the most recently filed valuations for Automotive's various pension plans identify an aggregate wind-up deficiency of approximately $18.2 million.

Paragraph 26

18 Paragraph 26 provides as follows:

> THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof — or be deemed to have been or become an employer of any of the Applicant's employees.

The USW is concerned that this provision usurps the exclusive jurisdiction of the Labour Relations Board (the "Board" or the "OLRB") to determine, on a full factual record, whether someone is a successor employer. Accordingly, the USW proposes that the following text be deleted from paragraph 26: "or be deemed to have been or become an employer of any of the Applicant's employees"; and that the following words be added: ", provided that the foregoing is without prejudice to any rights pursuant to the *Labour Relations Act, 1995*, (Ontario)."

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

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

The USW is concerned that this provision provides the Monitor with a blanket immunity on a prospective basis, and that the court has no jurisdiction to provide this immunity and should not provide this immunity even if it did have such authority. Accordingly, the USW proposes that paragraph 29 be deleted and replaced with the following:

> THIS COURT ORDERS that nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any other applicable legislation.

The CRO Order

21 On September 11, 2007, Automotive returned a motion for an order approving its engagement of Axis Consulting Group Inc. ("Axis") and Allan Rutman ("Rutman") as Chief Restructuring Officer of Automotive (the "CRO Approval Motion")

22 On September 11, 2007, this court made an order approving Automotive and Axis' engagement (the "CRO Order"), subject to a reservation of rights by the USW to challenge paragraph 4 of the CRO Order.

23 Paragraph 4 of the CRO Order is similar to paragraph 29 of the Automotive Initial Order and the USW objects to it for the same reason. That paragraph provides as follows:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no

action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

24 The USW proposes that this paragraph be deleted and replaced with the following:

THIS COURT ORDERS that no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO.

Relevant Statutory and Regulatory Provisions

The Companies Creditors Arrangement Act

25 Section 11(1) of the CCAA provides as follows:

Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

26 Subsections 11(3) and (4) of the CCAA provide as follows:

(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.

Other than initial application court orders —

(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.

27 Section 11(6) of the CCAA provides as follows:

Burden of Proof on Application —

(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.

28 Section 11.3 of the CCAA provides as follows:

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.

The Pension Benefits Act

29 Section 55(2) of the PBA provides as follows:

An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times, ...

30 The General Regulation to the Act, R.R.O. 1990, Reg. 909, provides in part as follows:

4. (2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan...shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;

(b) all contributions required to pay the normal cost;

(c) all special payments determined in accordance with section 5; and

(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.

5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4 (2) (c) shall be not less than the sum of,

. . . . .

(b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

. . . . .

(e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments

over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

The Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A (the "LRA")

31 Section 69 of the LRA provides in part as follows:

69. (1) In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

. . . . .

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

32 Section 116 of the LRA provides as follows:

Board's orders not subject to review

116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Jurisdiction of the Court under the Companies' Creditors Arrangement Act

33 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306 (Ont. Gen. Div. [Commercial List]), Blair J. adopted, at paragraph 46, the following passage from the decision of Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31:

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 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, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

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 (citations omitted)

[emphasis added]

34 In *Sulphur Corp. of Canada Ltd., Re* (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.), Lovecchio J. considered the jurisdiction of the Court to make an order under s. 11 of the CCAA with provisions that conflicted with provisions of the *Builders Lien Act* of British Columbia (the "BLA"), a conflict which arose because of the grant under a CCAA order of a priority to the financing charge of a debtor in possession ("DIP financing") over all other creditors of the applicant company. Lovecchio J. decided that the Court has jurisdiction to grant a change under the CCAA to secure DIP financing which ranks in priority to a statutory lien under the BLA of British Columbia (paragraph 16).

35 After noting that, apart from the circumstances of the case, the lien under the BLA would have priority, Lovecchio J. provided the following analysis under the headings set out below in the following excerpt which addresses the jurisdiction of the Court in helpful detail and is therefore set out fully here:

The Paramountcy Argument and the Jurisdiction of the Courts

¶ 23 Sections 11(3) and 11(4) of the CCAA read as follows:

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 a period as the Court deems necessary not exceeding 30 days, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

¶ 24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?

¶ 25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Re Hunters Trailer & Marine Ltd.* [See Note 3 below] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the CCAA and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

Note 3: (2002), 94 Alta. L.R. (3d) 389.

¶ 26 In discussing the objective of the CCAA, Wachowich C.J.Q.B. stated the following at para. 15:

The aim of the CCAA is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors...

At para 18:

I agree with the statement made by Mackenzie J.A. in United Used Auto & Truck Parts Ltd., Re (2000), 16 C.B.R. (4th) 141 (BCCA), at 146 that: ...the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

. . . . .

¶ 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.* [See Note 4 below] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

Note 4: [1999] A.J. No. 185 (C.A.), online: (AJ).

¶ 28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the CCAA. It is within this context that my initial Order and the June 19 Order were based.

¶ 29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re* [See Note 5 below] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. ...

Note 5: (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div.).

¶ 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* [See Note 6 below], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

Note 6: (1975), [1976] 2 S.C.R. 475..

¶ 31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the *Court of Queen's Bench Act* [See Note 7 below], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the *Mechanics' Liens Act* [See Note 8 below], also a provincial statute.

Note 7: R.S.M. 1970, c. C280.
Note 8: R.S.M. 1970, c. M80

¶ 32 ... In *Smoky*, Hunt J.A. used the words the exercise of discretion — a discretion she found to have been broad and one provided for in the statute.

¶ 33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CCAA, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

¶ 34 In *Re United Used Auto & Truck Parts Ltd.* [See Note 9 below], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

Note 9: (2000), 16 C.B.R. (4th) 141 (BCCA).

¶ 35 Parliament's way of ensuring that the CCAA would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

¶ 36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

¶ 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.

¶ 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* [See Note 10 below] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

Note 10: [1995] B.C.J. No. 1535 (C.A.)

36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), considered the jurisdiction of the Court under s. 11 of the CCAA in connection with an order given under that section removing directors from the board of the applicant company. Paragraphs 31ff of the decision dealt first with the jurisdiction of the Court and then with the exercise of its discretion. The following passages from that decision are relevant with respect to the jurisdiction of the Court:

> **Jurisdiction**
>
> [31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.
>
> [32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).
>
> [33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.
>
> . . . . .
>
> [35] ...[I]nherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc.* (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).
>
> [36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:
>
> > ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable

> entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the document], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end of the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

37 As to the exercise of the jurisdiction given by s. 11, the Court in *Stelco* said the following at paragraphs 43 and 44:

> [43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a)--(c) and 11(4)(a)--(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. ...
>
> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] 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". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

38 The Court in *Stelco* went on to determine that it was not for the Court under s. 11 to usurp the role of the directors and management in conducting the restructuring efforts and found that there was no authority in s. 11 of the CCAA for the Court to interfere with the composition of a board of directors.

In the course of that analysis the Court stated as follows at paragraph 48:

> [48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See Baxter Student *Housing Ltd. v. College Housing Cooperative Ltd.*, *supra*, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps best understood in the context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

40 On this basis, the limitation expressed by the Court in *Stelco* is not to be understood as restricting the jurisdiction of the Court to make orders which carry out that protective function.

41 Similarly, but in a quite different fact situation, Lax J. of this Court, in her decision in *Richtree Inc., Re* (2005), 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) dismissed a motion to exempt the applicant company from certain filing requirements with regulatory authorities: see paragraphs 13 to 18 of the decision. In paragraph 18 of the decision, Lax J. said that the order that was sought had nothing to do with the restructuring process of the applicant company.

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in *Sulphur Corp. of Canada Ltd., Re*, *supra*, at paragraph 37, "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

43 This analysis is developed further with regard to the special payments in the part of the text below that deals with the issue relating to paragraph 6 of the Initial Order.

The Context of the Initial Order and the CRO Order

44 On July 19, 2007, the Court issued the Initial Order authorizing, *inter alia*, Automotive to obtain and borrow under a credit facility (the "DIP Facility") from Chrysler as DIP Lender in order to finance certain expenditures contemplated by the cash flows that are approved by the DIP Lender and filed with the Court.

45 The Initial Order provided that the DIP Facility was to be on the terms and subject to the conditions set forth in the DIP Term Sheet and Commitment Letter between Automotive and the DIP Lender dated as of July 18, 2007 (the "Commitment Letter"), filed with the Court.

46 The Commitment Letter provides:

> The Borrower covenants as follows
>
> The Borrower shall not, without the Lender's prior written consent, make any material disbursement unless it is contemplated in the Initial cash flow, attached as Schedule "A" to this DIP Term Sheet and Commitment Letter (the "Initial Cash Flow") or any rolling cash flow approved by the Lender (collectively "Cash Flow Projections") and, for greater certainty, the Borrower shall not issue any cheques or make any disbursements until such point in time as the Lender has approved the same and confirmed sufficient funding of the same in accordance with the terms hereof[.]

47 The Initial Order also stated that rights of the DIP Lender under the Commitment Letter shall not be impaired in any way in Automotive's CCAA proceedings or by any provincial or federal statutes and that the DIP Lender shall not have any liability to any person whatsoever resulting from the breach by Automotive of any agreement caused by Automotive entering into the Commitment Letter.

48 The Initial Order provided that the DIP Lender was entitled to the benefit of the DIP Lender's Charge on all of the property of Automotive (except certain tax refunds).

49 The Affidavit of John Boken, dated July 19, 2007, sworn on behalf of Automotive and filed with the Court in connection with the application for the Initial Order (the "Boken Affidavit") stated the following at paragraph 46 with respect to the pension plans of Automotive:

> [Automotive] intends to continue to pay current service costs with respect to benefits accruing from the date of filing. The DIP Loan (as defined below), does not provide for the funding of any special payments.

50 In addition, the initial cash flow approved by Chrysler and filed with the Court on the application for the Initial Order clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

51 Automotive brought a motion to the Court on July 30, 2007 for, inter alia, an Order confirming the terms of the DIP Facility (the "DIP Approval Motion"). The DIP Approval Motion was made on notice to, among others, the USW and the Superintendent. The Boken Affidavit was again served in connection with the DIP Approval Motion. As noted above, the Boken Affidavit unequivocally indicated that special payments would not be made and were not permitted by the DIP Facility.

52 In addition, the Monitor filed its First Report with the Court at the return of the DIP Approval Motion and specifically noted that Automotive could not make any payments that were not in the cash flow forecast and that special pension payments were not provided for in the forecast. That point was reiterated in the notes to the cash flow forecast.

53 On July 30, 2007, the Court issued an Order confirming the terms of the DIP Facility (the "DIP Approval Order"). The DIP Approval Order provided:

> 3. THIS COURT ORDERS that the DIP Facility provided by DCC to the Applicant in the amount of Cdn.$13.6 million on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and DCC dated as of July 18, 2007, all as set forth in the Initial Order, is hereby confirmed and approved.

54 Based on the First Report of the Monitor and the submissions of all counsel Justice Stinson granted the requested relief and approved the DIP Loan "on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and the DIP Lender dated as of July 18, 2007, all as set forth in the Initial Order". As noted in Justice Stinson's endorsement in respect of the DIP Approval Order, Mr. Bailey on behalf of FSCO and Mr. Starnino on behalf of the USW requested that the Court "record their respective clients' reservation of rights in relation to the pension fund payments and other matters referenced in paragraphs 6(a), 11(b) and (d) of paragraph 26 of the [Initial] Order". Although the CAW did not attend the hearing on July 30, it did receive notice of Automotive's CCAA proceedings on July 23, 2007.

55 No party objected to the approval of the DIP Loan, or the terms and conditions set forth therein. No party appealed Justice Stinson's July 30 order approving the DIP Loan. The appeal period expired on August 20, 2007.

56 The DIP Approval Order was not opposed by the USW or the Superintendent, although they did appear at the DIP Approval Motion.

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

58 On August 23, 2007, the Court issued an Order (the "August 23 Order") approving the Amended DIP Term Sheet and Commitment letter dated August 21, 2007 (the "Amended Commitment Letter"). The Amended Commitment Letter provides that Automotive shall not, without the DIP Lender's prior written consent, make any material disbursement unless it

is contemplated in the cash flows approved by the DIP Lender. The Unions and the Superintendent did not oppose the August 23 Order, and they did not seek leave to appeal it.

59 The Boken Affidavit filed in support of the Initial Application indicated that:

(a) Automotive had no other realistic source of DIP funding to continue operations;

(b) the DIP Loan was the only basis on which funding was available to keep the potential for the preservation of some of the plants as going concerns; and

(c) the DIP Loan was being provided as a component of a complex multi-party agreement that represented a compromise of the rights of Chrysler, Automotive and the U.S. Debtors, which agreement was approved by the US Bankruptcy Court.

60 By Order of Justice Pepall dated September 11, 2007, Axis Consulting Group and Allan Rutman was appointed Chief Restructuring Officer ("CRO") of Automotive (the "CRO Order"). Paragraph 4 of that CRO Order states:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except for any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection therewith. This last limitation on liability will be effective up until and including Sept. 20, 2007 and thereafter as ordered by the judge hearing the motion on Sept. 20, 2007.

61 The last sentence in paragraph 4 of the CRO Order was added by Justice Pepall in response to submissions by counsel that the issue of protections for the CRO were to be further addressed on this motion by the USW.

The Issues

Paragraph 4

62 The USW states its concern that the provision in paragraph 4 that allows the Applicant to retain further Assistants could be interpreted to allow hiring "in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation" (USW Factum, paragraph 43). How in particular that might come about is not explained. It is not suggested that the Applicant has acted or intends to act in such a manner.

63 Paragraph 4 does not provide that such hirings may be made in the manner that is the cause of concern. No basis was submitted for considering that such a result is implicit in paragraph 4.

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making further hirings. It is conceivable in principle that hirings might be made in a way that would raise issues of the kind raised in *Richtree Inc., Re, supra*. In such circumstances, having regard to the approach taken by the Court in *Richtree*, the aggrieved parties would apparently be able to seeks appropriate relief from the Court as part of administrative or supervisory jurisdiction in respect of orders made by the Court under the CCAA. That would be an appropriate context in which to address the question of whether there is a conflict between the Collective Agreement and/or the LRA on the one hand and the CCAA and/or the Initial Order on the other. In the present circumstances, it is unnecessary to address the matter and there is no fact situation before the Court to allow it to be addressed properly.

Paragraph 6

65 The objection taken to the phrase "but not required" in paragraph 6 is that Automotive regards the phrase as staying its obligations to pay various kinds of post-filing employee compensation, including in particular special payments to the pension plan.

66 Under the DIP Approval Order, the Court approved the DIP Facility on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter dated July 18, 2007. As noted, the Commitment Letter precludes Automotive from making distributions not contemplated in approved cash flows and the cash flow filed with the Court stated that special payments under the pension plans would not be made. These features link the DIP Approval Order to the paragraph 6 provision in the Initial Order that the specified kinds of payments are not required to be made. That is to say, the Initial Order and the DIP App4***o***roval Order are an integrated arrangement. The rationale given for this arrangement in the records is that Automotive will not be in a position to carry on business and will not have available funds without the DIP Facility and the terms on which the DIP Lender is prepared to commit to the DIP Facility are as stated.

67 Automotive states in its factum that it has continued to pay all wages and vacation pay during the course of this CCAA proceeding and intends to continue such payments and that the DIP Loan will, subject to certain conditions, provide advances to facilitate payment of statutory severance obligations.

68 The Initial Cash Flow provides for certain operating disbursements in respect of "Payroll, Payroll Taxes, Benefits, Severance, Other". The associated note states:

> The Forecast [Initial Cash Flow] assumes that payments are made for medical and health benefits and current service pension payments will be made while a plant is operating and then cease on the end of production date. The Forecast does not provide for the payment of any special pension payments as it is assumed these will be stayed in a CCAA filing.

69 The Court has approved the DIP Facility and, subject to this motion, the Initial Order. It is obvious that the DIP Facility and the Initial Order are integrally related. In consequence, if Automotive were to fail to use the funds available under the DIP Facility for the purposes that have been indicated for those funds in these CCAA proceedings, that would be a matter that might properly found a motion to the Court for relief. So the phrase "but not required" in paragraph 6 does not given Automotive a carte blanche to withhold contemplated payments, contrary to a suggestion that was made against the paragraph in the course of the hearing.

70 On the other hand, it is clear that the effect of the terms of the DIP Approval and paragraph 6 of the Initial Order is that Automotive, under the Order, is "not required" to make the special payments under its Pension Plans that would otherwise be required.

71 The requirement for the making of such special payments is a statutory requirement. The special payments are provided for in the pension benefits regime under the PBA and the related regulations, as set out in the relevant provisions excerpted above.

Jurisdiction under the CCAA re the Special Payments

72 The USW and the CAW submitted that the obligation under the pension benefits statutory regime to make special payments is an obligation under their respective collective agreements with Automotive. Those agreements require Automotive to maintain pension plans for members having certain specific features, principally relating to the amount of the pension to be earned and paid for the period of employment served by the employee. It was not shown that any provisions in the collective agreements do expressly require Automotive to comply with the statutory regime as to special payments. Rather, the submission seemed to be that because Automotive has an obligation under the Collective Agreement to maintain the pension plan and also has a statutory obligation in respect of pension plans it maintains to make certain special payments, that the contractual obligation impliedly includes the statutory obligations and therefore, any relief from the statutory obligation also constitutes relief from the contractual obligation under the Collective Agreement. Whenever it is argued, as here, that a term should be implied in a contract, the necessary question is why that is so and in this case, no answer is evident from the submissions. The implication was perhaps that it is self-evident but that may be debatable. The pension plan provisions in the collective agreements are addressed to the pension benefits that the plan is required to make available to the members and not to how that is to be done. On this basis, it would seem to be a stretch to say that just because a pension plan is required to conform to the statutory regime, the company sponsoring the plan has impliedly agreed with the bargaining agent to do so. This would

suggest that all that the company has agreed to do in the Collective Agreement is to maintain a plan that provides for the benefits contracted for in the collective bargain.

73 However, that analysis may be unduly technical for purposes of the issues on this motion. The commitment of Automotive in its collective agreement to maintain pension plans would given rise to a reasonable expectation that it would keep those plans in good standing in accordance with applicable regulatory requirements designed to ensure that the plans will be able to meet their payment obligations. Moreover, at least one of the pension plans contains a provision which requires the making of all payments required by the applicable statutes. So the better approach is probably to regard the maintenance of the special payments as effectively contemplated by the collective agreements.

74 Even so, this consideration would be relevant to the issue of the jurisdiction of the Court to make the impugned order only if this relationship to the collective agreements gives rise to jurisdictional considerations that are different from those that arise by reasons of the payments being required pursuant to the PBA.

75 As observed by the Supreme Court of Canada in its decision in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (S.C.C.) at paragraph 86, collective bargaining is a fundamental aspect of Canadian society, which has emerged as the most significant collective activity through which the freedom of association protected by s. 2(d) of the Charter is expressed in the labour context. Recognizing that workers have the right to bargain collectively reaffirms the values of dignity, personal autonomy, equality and democracy.

76 This fundamental process of collective bargaining is entrenched in the laws of Ontario by the LRA, which provides a comprehensive scheme for employment relations. Among other things, that statute directs that:

> (a) there shall only be one collective agreement in force between a trade union and an employer;
>
> (b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;
>
> (c) the collective agreement is binding upon the employer and the employees;
>
> (d) the collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or the statute without the consent of the Labour Board on the joint application of the parties;
>
> (e) a provision of a collective agreement may only be revised on the mutual consent of the parties;
>
> (f) no employer and no person acting on behalf of an employer shall interfere with the representation of employees by a trade union; and,
>
> (g) no employer shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

77 Based on these elements of the LRA, it appears that the employees cannot legally terminate their employment under their collective agreement before "it ceases to operate in accordance with its provisions or the LRA without consent of the O.L.R.B. on the joint application of the parties". The USW submits that therefore, the employees cannot legally terminate their services. However, whether this is so would depend first on whether the making of the Initial Order or its terms would allow the Collective Agreement to be terminated. No submissions were made that assist on this point.

78 Secondly, since the LRA provides that the Collective Agreement could be terminated with the consent of the Board, there is a question whether that consent could be obtained — a matter that was not canvassed in the submissions.

79 The above considerations relating to the LRA do not suggest that the relationship of the PBA requirements for special payments to the collective agreements should be considered to give those requirements any jurisdictional status for the issues in this case that would go beyond the implications that arise from the fact of those requirements being imposed pursuant to statute.

80 This result is not altered by the Court's recognition that collective bargaining is a fundamental aspect of Canadian society involving the exercise of the freedom of association protected by s. 2(d) of the *Charter*. It was not suggested that the Initial Order constitutes a breach of the *Charter* rights of the employees.

81 The Moving Parties rely upon the decision of Farley J. in *United Air Lines, Inc., Re* (2005), 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) as authority for the proposition that a CCAA debtor must in all circumstances continue to make special payments post-filing. *United Air Lines* involved a motion brought by UAL for an order authorizing it to cease making contributions to its Canadian pension plans. UAL applied for protection from its creditors pursuant to section 18.6 of the CCAA, whereby it sought recognition of a Chapter 11 proceeding in the United States. UAL had filed for bankruptcy protection in the United States in December 2002 and filed under section 18.6 of the CCAA in 2003. The motion was not brought until February 2005.

82 UAL was a large U.S. corporation that was attempting to restructure. It had an international workforce, including a small Canadian workforce. In its motion, it was seeking authority to cease making all contributions to its Canadian pension plans even though it continued to meet its pension funding commitments in all countries other than the United States and Canada. UAL's U.S. employees and retirees had the benefit of the protections provided by the Pension Benefits Guarantee Corporation, while the Canadian employees, as the beneficiaries of a federally regulated scheme, did not. UAL had not presented any evidence of its inability to make the pension payments.

83 After reviewing all of the facts, Farley J. summarized as follows at paragraph 7:

> As discussed above, the relative size of the Canadian problems *vis-a-vis* the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring — given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

84 *United Air Lines* does not appear to stand for the proposition that all pension contributions, including special payments, must in all cases be paid by a CCAA debtor absent an agreement with its unions and FSCO. On the contrary, Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

85 Based on the decision of the Court of appeal for Quebec in *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.), there is a reason to consider that the "not required" clause does not purport to abrogate the pension plan obligations. It authorizes the company not to make payments on account of its obligations during the currency of the Initial Order. Unpaid obligations would constitute debts of the company to be dealt with at the termination of its protection under the CCAA: see *Mine Jeffrey* paragraphs 60 to 62.

86 It was submitted that the text of the *Mine Jeffrey* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Mine Jeffrey* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to

be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

87 Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.

88 Reference was made to s. 11.3(a) of the CCAA, which provides that no order made under s. 11 is to have the effect of prohibiting a person from requiring payment for services provided after the order is made. The Applicant is paying the wages and the current service obligations under the pension plans of the employees who continue to be employed. The special payments do not relate exclusively to the continuing employees. It is not shown (and does not seem to be submitted) that the amounts that might be required under the special payments arise from or are in connection with the current service obligations to the plan (assuming those obligations are paid in due course). The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

89 Accordingly, this point does not alter the conclusion that the Court has the jurisdiction to approve the "not required" clause, notwithstanding its effect in respect of the special payments.

Exercise of the Statutory Discretion under the CCAA

90 There is a separate question raised whether it is a proper exercise of the discretion of the court for it to approve the provision in question. That question must be addressed in the context discussed above.

91 The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own. In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately $5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional $12 million. Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.

92 Two other important considerations are evident in the present case. First, for the reasons given above, the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.

93 Secondly, the moving parties each had a full opportunity to object to the approval of the DIP Facility and none of them did so, even though it was clear from the terms of the DIP Facility and the terms of the Initial Order that they are an integrated arrangement. Instead of objecting to the DIP Facility, they have allowed it to be approved and have objected only to the related provisions of the Initial Order. In proceeding this way, it appears they have avoided facing the question whether if they opposed the DIP Approval Order for the reasons they now advance in respect of the special payments, the DIP Lender might have resisted their demands at the first moment, to the detriment of the continuing employment of members, and they now seek to raise the issue now that the DIP lender is in place and has been advancing funds, in circumstances where the only practical consequence could be to raise the question which would have appropriately been raised at the earlier stage.

94 Chrysler submitted that this conduct is a collateral attack on the DIP Approval Order and should not be countenanced by the Court.

95 The Initial Order was approved on July 19, 2007 with a provision in paragraph 3 providing for a further hearing on July 30, 2007 (the "Comeback Date") at which time the Initial Order could be supplemented or otherwise varied. On July 30, 2007 the Court ordered the approval of the DIP Facility. It ordered an extension of the Stay Period to August 24, 2007.

96 The Court did not make any order to supplement or vary the Initial Order in any other respects. Neither did it make any order to the contrary. Nor does it appear from the recitals in the DIP Approval Order that the Court was asked on that motion to deal with the Initial Order in other respects. Stinson J., in his endorsement of July 30, 2007 approving the issuance of the DIP Approval Order, recorded the requests on behalf of the Superintendent and the USW that he record their respective clients' reservation of rights in relation to the pension fund payment and other matters referenced in paragraphs 6(a), 11(b) and (d) and paragraph 26 of the Initial Order. Since this reservation was recorded at the same time as the DIP Approval Order was granted and without any order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

97 It is important that, in the Initial Order at paragraph 34, the DIP Facility was ordered to be on the terms and conditions in the DIP Term Sheet and Commitment Letter dated as of July 18, 2007 which was approved in that paragraph subject to a further hearing on the Comeback Date. Covenant No. 1 in the DIP Term Sheet and Commitment Letter provides that the Borrower shall not without the Lender's prior written consent make any material disbursement unless it is contemplated in the initial cash flow or any subsequent cash flow approved by the Lender.

98 As noted earlier, on the motion to approve the Initial Order the Court had affidavit information from Automotive that the DIP Loan does not provide for the funding of any special payments, along with a copy of the cash flow which states that no provision is made for the payment of any special pension payments.

99 So, based on the above analysis, the Court, in the Initial Order, by reason of paragraph 34 (as to which no reservation of a right to object has been made or is now asserted), has ordered that the DIP Loan is not to be applied to special payments except with the consent of the DIP Lender.

100 The Superintendent seeks an order requiring the Applicant to pay the Special Payments. For the reasons given above, such an order would constitute a collateral attack on DIP Approval because the evidence is that the Applicant has no funds available to it other than the DIP Loan. Consequently, the order the Superintendent requests would effectively order the Applicant to use the DIP Loan for a purpose which, pursuant to paragraph 34 of the Initial Order, is not permitted.

101 Chrysler's agreement to act as DIP lender is based on the fact that the Applicant's supply is required to maintain Chrysler's own just-in-time vehicle manufacturing operations. The Superintendent submits that if Chrysler has concluded that it requires the output derived from the labour of the employees, then it is only fair and equitable that Chrysler bears the cost, in terms of remuneration to the employees including special payments to the Pension Plans, of that labour.

102 In the decision in *Ivaco Inc., Re* (2005), 47 C.C.P.B. 62 (Ont. S.C.J. [Commercial List]) at paragraph 4 (affirmed (2006), 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490 (S.C.C.)) at the first instance, Farley J. characterized the nature of special payments, stating that "notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a 'fresh' obligation".

103 The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period.

104 The Superintendent objects that the approach that has been taken by the Applicant in the present case has been done without the requisite negotiation with the Superintendent and the pension plan stakeholders. In the decision in *United Airlines Inc.*, *supra*, Farley J. cited the example of a case where the company obtained specific relief from the requirement to make special payments although current service costs were made. The Court, however, concluded that such an arrangement "is not a 'given right' of the company" and is to be achieved "on a consensual basis after negotiation" with the pension plan stakeholders.

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been, each side could have assessed its own interests *vis-à-vis* the position of the other and the extent to which it would take the risk of insisting on its position or instead seek a compromise. Instead, what has happened is that the DIP Facility has proceeded without objection and the DIP Lender has changed its position on the basis of the Court orders given to date and now, after it has done so, an effort is made to put it in a position where it has no choice but to increase its funding or risk the loss of the continuing operations. This might yield a negotiation but it would be a lopsided one by reason of the DIP Lender already having provided funding in accordance with the Court orders.

106 The USW contends that its submissions in respect of paragraph 6 of the Initial Order are not in conflict with paragraph 34 because they do not seek an order that the DIP Lender provide the funds that Automotive would require to make the special payments or that Automotive make the payments, but only that it not be ordered that Automotive is not required to make those payments.

107 Since the material before the Court is to the effect that Automotive had and has no funds and has no expectation of having funds available which could be used to make the special payments, other than the monies available under the DIP Facility, if the Court were now to countenance and make the amendment to paragraph 6 which the moving party seeks, the necessary practical consequence of that amendment would be to allow pressure to be put on the DIP Lender to increase its funding commitment to Automotive and consent to Automotive making the special payments, because Automotive would otherwise be potentially vulnerable to proceedings to force it to meet its payment obligations and there would inevitably be concerns about the consequences that could flow from default on its part. That situation would be contrary to the expectations which both Automotive and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order. It might well be different if the moving party had instead sought an order that the "not required" clause in paragraph 6 should be subject to a proviso that it would not apply to the extent that payment of such amounts could be funded out of monies other than from the DIP Facility. There is no alternative request for such a proviso, perhaps because no one expects it would be of any use.

108 So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

109 Moreover, the failure of the moving parties to reserve in respect of and then dispute paragraph 34 of the Initial Order has the following unsatisfactory effect. If the moving parties had duly disputed paragraph 34 there would have been an opportunity for the Court to consider what would have been the two opposing positions on whether the DIP terms proposed by the DIP Lender should be accepted. If that question had properly been put in issue, then there would also have been an opportunity for each side to consider whether it would seek to press its position or would compromise for the sake of the respective potential benefits to each side. No such opportunity would exists with the request that is now before the Court. So the request should not be granted.

110 For the reasons given above, there is no fair way at the present time to put the parties on a level playing field for negotiation about the special payments. For the reasons mentioned at other points above, it is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible. With these considerations in mind, it is appropriate to take into account that the period of the application of the Initial Order was extended by Court order and will expire on the date set by the last such Order unless further extended. If a motion is made for a further extension of the Initial Order beyond its present expiry date, there would seem to

be no basis in the above reasons to object to the legitimacy of interested parties raising an objection to paragraph 6 at that time, provided they are also prepared to object to paragraph 34.

Paragraph 11

111 The objection taken by the USW is that the provisions of s. 11 are open to an interpretation that would permit Automotive to repudiate its collective agreements with the USW's members.

112 Paragraph 11 is stated to be subject to covenants in the Definitive Documents as defined in the Initial Order. (They appear to be certain security documents.) The provision does not state that the right to terminate is subject only to such covenants. No mention is made in paragraph 11 of other obligations to which the Applicant may or may not be subject.

113 The USW seeks to have the rights provided for in clauses (b) and (d) of paragraph 11 made subject to all applicable collective agreements and labour laws. Those rights can only be exercised by agreement with the affected employees or other counterparty or under a plan filed under the CCAA, failing which the matters are to be left to be dealt with in any plan of arrangement filed by the Applicant under the CCAA. Nothing in the provision purports to abrogate any applicable collective agreement or labour laws. No reason was advanced why the authorized bargaining agent could not withhold agreement to any proposed exercise of clause (b) or (d) and if Automotive then sought to deal further with the matter pursuant to the CCAA there is no apparent reason why the matter could not be pursued against Automotive in court under the CCAA.

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

115 The USW and the CAW object to the part of paragraph 26 which provides that the monitor, by fulfilling its obligations under the Initial Order, shall not be deemed to have taken control of the business or be deemed to have "been or become an employer of any of the Applicant's employees." [The word "employees" does not appear in the text of the Order in certain of the materials, but it is obviously intended.]

116 The USW objects to the provision on the basis that the determination of whether the monitor is an employer is within the exclusive jurisdiction of the O.L.R.B. by reason of s. 69, s. 111 and s. 116 of the LRA. Section 69(2) of that Act provides that a person to whom an employer sells its business becomes the employer (the "successor employer") for the purposes specified in that section until the Board declares otherwise.

117 The Initial Order does not expressly purport to determine the application of s. 69(2) of the LRA, since it does not refer to that Act. The application of paragraph 26 is stated to be limited to the monitor in its limited role under the Initial Order, which leaves the Applicant in possession and control of the business and, therefore, as the employer . This consideration has been regarded as determinative in finding such a provision to be acceptable: see the *Mine Jeffrey* decision at paragraph [76].

118 The discussion in *Mine Jeffrey ic., Re* about a provision of this kind did not address statutory provisions such as s. 69(2) of the LRA.

119 As worded, it is not apparent that paragraph 26 warrants the concern expressed by the USW. It seems reasonable to assume that if the monitor were to take action of a kind that would suggest that the monitor has started to act *de facto* as the employer, in breach of paragraph 26, a motion might be brought before the Court under the CCAA and/or to the Ontario Labour Relations Board and the matter would then be considered in the context of an actual fact situation rather than in the present abstract and ill-defined circumstances. No order to give effect to the objection of the USW and the CAW in respect of this feature of paragraph 26 is appropriate at the present time.

Paragraph 29

120 The USW objects that the immunity, or limitation of liability, provided to the monitor in the first sentence of paragraph 29 is not within the jurisdiction of the Court under the CCAA, or if it is, the granting of this immunity is not a proper exercise of the discretion of the Court. The impugned provision limits liability to gross negligence and willful misconduct.

121 There was no reservation of rights in the endorsement of Stinson J. of July 30, 2007 with respect to this paragraph.

122 The USW cites no authority that has been decided with respect to the CCAA in support of its contention that the limitation of liability is beyond the jurisdiction of the Court under the CCAA. In view of the stay jurisdiction of s. 11 of the CCAA and taking into account the "on such terms" jurisdiction under that section, it might seem that the better view is that the Court does have the jurisdiction to make such an order and that the only issue is whether the grant of limited liability of the kind specified is a proper exercise of the discretion of the Court.

123 The USW submits that other court decisions show that the Court does not have the jurisdiction to grant a limitation of liability to the monitor of the kind set out in paragraph 29.

124 In *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123 (S.C.C.) ("*T.C.T. Logistics*"), the Supreme Court of Canada held that the "boiler plate" immunization of the receiver, though not uncommon in receivership orders, was invalid in the absence of "explicit statutory language" to authorize such an extreme measure:

> Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.
>
> . . . . .
>
> As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:
>
> > ...explicit statutory language is required to divest persons of rights they otherwise enjoy at law... [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

125 The USW also relies on s. 11.8(1) of the CCAA. Indeed, subsection 11.8(1) explicitly exempts a monitor from liability in respect of claims against the company which arise "before or upon the monitor's appointment":

> Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

126 The decision in *TCT Logistics Inc.* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *TCT Logistics Inc.* decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

127 Section 11.8(1) deals with the situation where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees and it provides a blanket immunity against claims which arose before or upon the monitor's appointment. It is understandable that in the situation addressed in the section that the immunity would be limited to such claims and that it would be a blanket immunity in respect of such claims. The existence of s. 11.8(1) does not given rise to any implication as to what kind of limitation of liability would be reasonable in respect of a monitor with the limited powers given in the present case.

128 The specific wording in paragraph 29 of the Initial Order is consistent with the standard limitation of liability protections granted to monitors under the standard-form model CCAA Initial Order, which was authorized and approved by the Commercial List Users' Committee on September 12, 2006.

129 That is, of course, not determinative but it suggest that the clause has received serious favourable consideration from members of the bar in a context unrelated to particular party interests.

130 The monitor submitted in its factum a list of twelve recent CCAA proceedings in which orders have been granted with similar provisions to the limitation of liability in this case. This would seem to suggest that in those cases the clause limiting liability was not disputed or, if it was, the Court found the clause to be acceptable.

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

132 The USW advances the submissions made with respect to jurisdiction as regards the monitor based on *TCT Logistics Inc.* against the clause limiting the liability of the CRO.

133 Automotive does not have D&O insurance in place. The protection set out in paragraph 4 of the CRO Order can reasonably be regarded as a fundamental condition of Axis Consulting Group Inc. and Mr. Rutman's agreement to accept and continue as CRO. Automotive would probably be severely restricted in its ability to appoint a capable and experienced Chief Restructuring Officer without the ability to offer a limitation on potential liability.

134 The USW's claim that the Court does not have authority to grant this protection to the CRO is contrary to established practice. These protections are consistent with limitations of liability granted to Chief Restructuring Officers in other CCAA proceedings, and are consistent with the protections granted to Monitors under the standard-form CCAA Initial Order. The same or similar language was used in paragraph 19 of the Order of July 29, 2004 in the Stelco Inc. CCAA proceedings and in paragraph 3 of the Order of November 28, 2003 in the Ivaco Inc. CCAA proceeding, both granted by Farley J.

135 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 154 (Sask. Q.B.) the Saskatchewan Court of Queen's Bench upheld a similar limitation of liability for the Chief Restructuring Officer of Bricore. In dismissing a motion to lift the stay against the Chief Restructuring Officer, Koch J. stated:

> The [CCAA] 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.

136 The Saskatchewan Court of Appeal upheld the decision [2007 CarswellSask 324 (Sask. C.A.)].

137 The terms of the limitation of liability given to the CRO are similar to the limitation in the indemnity ordered in paragraph 21 of the Initial Order to be given by the Applicant to the directors and officers of the Applicant. The moving parties have not requested any amendment of that paragraph.

138 It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.

139 Paragraph 4 of the CRO Order appears satisfactory for the above reasons.

Conclusion

140 For the reasons given above, the motions are dismissed.

141 Counsel may make written submissions as to costs if necessary.

Motions dismissed.

TAB 6

2012 ONSC 1299
Ontario Superior Court of Justice [Commercial List]

First Leaside Wealth Management Inc., Re

2012 CarswellOnt 2559, 2012 ONSC 1299, 213 A.C.W.S. (3d) 266

In the Matter of a Plan of Compromise or Arrangement of First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2019418 Ontario Inc., FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc., Applicants

D.M. Brown J.

Heard: February 23, 2012
Judgment: February 26, 2012
Docket: CV-12-9617-00CL

Counsel: J. Birch, D. Ward, for Applicants
P. Huff, C. Burr, for Proposed Monitor, Grant Thornton Limited
D. Bish, for Independent Directors
B. Empey, for Investment Industry Regulatory Organization of Canada
J. Grout, for Ontario Securities Commission
R. Oliver, for Kenaidan Contracting Limited
J. Dietrich — Proposed Representative Counsel, for the investors
E. Garbe, for Structform International Limited
N. Richter, for Gilbert Steel Limited
M. Sanford, for Janick Electrick Limited
M. Konyukhova, for Midland Loan Services Inc.
C. Prophet, for Canadian Imperial Bank of Commerce

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Qualifying company

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Applicants qualified for CCAA protection — Applicants were "companies" within meaning of CCAA — Total claims against applicants, as affiliated group of companies, was greater than $5 million — Some applicants were "debtor companies" in sense that they were insolvent — It was necessary and appropriate to extend CCAA protection to other applicants, as well as to LPs — Presence of those entities within ambit of initial order was necessary to effect orderly winding-up of FLG — This conclusion was supported by insolvency of overall FLG and high degree of inter-connectedness amongst members of FLG — Consequently, whether particular applicant fell under initial order as debtor company, or as necessary party as part of intertwined whole, was distinction without practical difference.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous

Liquidation under Act — FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — CCAA was available to applicants in circumstances — Both CRO and proposed monitor possessed extensive knowledge about workings of applicants and supported process conducted under CCAA — No party contested availability of CCAA to conduct orderly winding-up, although some parties questioned whether certain entities should be included within scope of initial order — Given that state of affairs, there was no reason not to accept professional judgment of CRO and proposed monitor that liquidation under CCAA was most appropriate route to take — There was no prejudice to claimant creditors by permitting winding-up under CCAA instead of under Bankruptcy and Insolvency Act in view of convergence between these two Acts on issue of priorities.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Constitutional issues

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Initial order included super-priority for administration charges and director and officer's charges (charges sought) — It was necessary to grant charges sought in order to secure services of estate professionals and to ensure continuation of directors in their offices — Amounts of charges sought were reasonable in circumstances — Adjournment requested by mortgagee and construction lien claimants (opposed creditors) was not granted — Opposed creditors had been given notice required by ss. 11.51(1) and 11.52(1) of CCAA — To ensure integrity of CCAA process, issue of priority of charges sought, including possible issue of paramountcy, should be raised on initial order application — Case relied on by opposed creditors was quite different, as it involved fiduciary duty owed by debtor company to pensioners — Caution had to be exercised before extending holding of that case to ordinary secured creditors — It was difficult to see how constitutional issues of paramountcy arose as between secured creditors and persons granted super-priority charge under ss. 11.51 and 11.52 of CCAA — Applicants were eligible for protection of federal CCAA, which expressly brings mortgagees and construction lien claimants within its regime.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Costs and expenses of administrators — Priority over other claims

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Initial order included super-priority for administration charges and director and officer's charges (charges sought) — It was necessary to grant charges sought in order to secure services of estate professionals and to ensure continuation of directors in their offices — Amounts of charges sought were reasonable in circumstances — Adjournment requested by mortgagee and construction lien claimants (opposed creditors) was not granted — Opposed creditors had been given notice required by ss. 11.51(1) and 11.52(1) of CCAA — To ensure integrity of CCAA process, issue of priority of charges sought, including possible issue of paramountcy, should be raised on initial order application — Case relied on by opposed creditors was quite different, as it involved fiduciary duty owed by debtor company to pensioners — Caution had to be exercised before extending holding of that case to ordinary secured creditors — It was difficult to see how constitutional issues of paramountcy arose as between secured creditors and persons granted super-priority charge under ss. 11.51 and 11.52 of CCAA — Applicants were eligible for protection of federal CCAA, which expressly brings mortgagees and construction lien claimants within its regime.

Table of Authorities

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Associated Investors of Canada Ltd., Re (1987), 1987 CarswellAlta 330, 56 Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, 67 C.B.R. (N.S.) 237, (sub nom. *First Investors Corp., Re)* 46 D.L.R. (4th) 669 (Alta. Q.B.) — considered

Brake Pro Ltd., Re (2008), 2008 CarswellOnt 3195 (Ont. S.C.J.) — considered

Canadian Western Bank v. Alberta (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — considered

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — considered

Indalex Ltd., Re (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.) — considered

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

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.)* 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re)* 99 O.R. (3d) 708 (Ont. C.A.) — referred to

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Rothmans, Benson & Hedges Inc. v. Saskatchewan (2005), [2005] 1 S.C.R. 188, 2005 SCC 13, 2005 CarswellSask 162, 2005 CarswellSask 163, 250 D.L.R. (4th) 411, [2005] 9 W.W.R. 403 (S.C.C.) — considered

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

Ted Leroy Trucking Ltd., Re (2010), *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

s. 2 "insolvent person" — considered

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

s. 2 — considered

s. 2 "secured creditor" — considered

s. 3(1) — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
Generally — referred to

s. 91 ¶ 21 — considered

s. 92 ¶ 13 — considered

APPLICATION by members of insolvent group of companies for initial order under *Companies' Creditors Arrangement Act*.

***D.M. Brown J.*:**

I. Overview: CCAA Initial Order

1 On Thursday, February 23, 2012, I granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, in respect of the Applicants. These are my Reasons for that decision.

II. The applicant corporations

2 The Applicants are members of the First Leaside group of companies. They are described in detail in the affidavit of Gregory MacLeod, the Chief Restructuring Officer of First Leaside Wealth Management ("FLWM"), so I intend only refer in these Reasons to the key entities in the group. The parent corporation, FLWM, owns several subsidiaries, including the applicant, First Leaside Securities Inc. ("FLSI"). According to Mr. MacLeod, the Group's operations centre on FLWM and FLSI.

3 FLSI is an Ontario investment dealer that manages clients' investment portfolios which, broadly speaking, consist of non-proprietary Marketable Securities as well as proprietary equity and debt securities issued by First Leaside (the so-called "FL Products"). All segregated Marketable Securities are held in segregated client accounts with Penson Financial Services Canada Inc.

4 First Leaside designed its FL Products to provide investors with consistent monthly distributions. First Leaside acts as a real estate syndicate, purchasing real estate through limited partnerships with a view to rehabilitating the properties for lease at higher rates or eventual resale. First Leaside incorporated special-purpose corporations to act as general partners in the various LPs it set up. The general partners of First Leaside's Canadian LPs — i.e. those which own property in Canada — are applicants in this proceeding. First Leaside also seeks to extend the benefits of the Initial Order to the corresponding LPs.

5 First Leaside has two types of LPs: individual LPs that acquire and operate a single property or development, and aggregator LPs that hold units of multiple LPs. Investors have invested in both kinds of LPs. In paragraph 49 of his affidavit Mr. MacLeod detailed the LPs within First Leaside. While most First Leaside LPs hold interests in identifiable properties, for a few, called "Blind Pool LPs", clients invest funds without knowing where the funds likely were to be invested. Those LPs are described in paragraph 51 of Mr. MacLeod's affidavit.

6 The applicant, First Leaside Finance Inc. ("FL Finance"), acted as a "central bank" for the First Leaside group of entities.

III. The material events leading to this application

7 In the fall of 2009 the Ontario Securities Commission began investigating First Leaside. In March, 2011, First Leaside retained the proposed Monitor, Grant Thornton Limited, to review and make recommendations about First Leaside's businesses. Around the same time First Leaside arranged for appraisals to be performed of various properties.

8 Grant Thornton released its report on August 19, 2011. For purposes of this application Grant Thornton made several material findings:

> (i) There exist significant interrelationships between the entities in the FL Group which result in a complex corporate structure;
>
> (ii) Certain LPs have been a drain on the resources of the Group as a result of recurring operating losses and property rehabilitation costs; and,
>
> (iii) The future viability of the FL Group was contingent on its ability to raise new capital:
>
> > If the FL Group was restricted from raising new capital, it would likely be unable to continue its operations in the ordinary course, as it would have insufficient revenue to support its infrastructure, staffing costs, distributions, and to meet their funding requirements for existing projects.

9 As a result of the report First Leaside hired additional staff to improve accounting resources and financial planning. Last November the Board appointed an Independent Committee to assume all decision-making authority in respect of First Leaside; the Group's founder, David Phillips, was no longer in charge of its management.

10 FLSI is regulated by both the OSC and the Investment Industry Regulatory Organization of Canada ("IIROC"). In October, 2011, IIROC issued FLSI a discretionary early warning level 2 letter prohibiting the company from reducing capital and placing other restrictions on its activities. At the same time the OSC told First Leaside that unless satisfactory arrangements were made to deal with its situation, the OSC almost certainly would take regulatory action, including seeking a cease trade order.

11 First Leaside agreed to a voluntary cease trade, retained Grant Thornton to act as an independent monitor, informed investors about those developments, and made available the August Grant Thornton report.

12 Because the cease trade restricted First Leaside's ability to raise capital, the Independent Committee decided in late November to cease distributions to clients, including distributions to LP unit holders, interest payments on client notes/debts, and dividends on common or preferred shares.

13 In December the Independent Committee decided to retain Mr. MacLeod as CRO for First Leaside and asked him to develop a workout plan, which he finalized in late January, 2012. Mr. MacLeod deposed that the downturn in the economy has resulted in First Leaside realizing lower operating income while incurring higher operational costs. In his affidavit Mr. MacLeod set out his conclusion about a workout plan:

> After carefully analyzing the situation, my ultimate conclusion was that it was too risky and uncertain for First Leaside to pursue a resumption of previous operations, including the raising of capital. My recommendation to the Independent Committee was that First Leaside instead undertake an orderly wind-down of operations, involving:
>
> (a) Completing any ongoing property development activity which would create value for investors;
>
> (b) Realizing upon assets when it is feasible to do so (even where optimal realization might occur over the next 12 to 36 months);
>
> (c) Dealing with the significant inter-company debts; and,
>
> (d) Distributing proceeds to investors.

Mr. MacLeod further deposed:

> [T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues — especially the numerous investor and creditor claims and inter-company claims — can be dealt with in one forum under the supervision of the court.

The Independent Committee approved Mr. MacLeod's recommendations. This application resulted.

IV. Availability of CCAA

A. The financial condition of the applicants

14 According to Mr. MacLeod, First Leaside has over $370 million in assets under management. Some of those, however, are Marketable Securities. First Leaside is proposing that clients holding Marketable Securities (which are held in segregated accounts) be free to transfer them to another investment dealer during the *CCAA* process. As to the value of FL Products, Mr. MacLeod deposed that "it remains to be determined specifically how much value will be realized for investors on the LP units, debt instruments, and shares issued by the various First Leaside entities."

15 First Leaside's debt totals approximately $308 million: $176 million to secured creditors (mostly mortgagees) and $132 million to unsecured creditors, including investors holding notes or other debt instruments.

16 Mr. MacLeod summarized his assessment of the financial status of the First Leaside Group as follows:

> [S]ince GTL reported that the aggregate value of properties in the First Leaside exceeded the value of the properties, there will be net proceeds remaining to provide at least some return to subordinate creditors or equity holders (i.e., LP unit holders and corporation shareholders) in many of the First Leaside entities. The recovery will, of course, vary depending on the entity. At this stage, however, it is fair to conclude that there is a material equity deficit both in individual First Leaside entities and in the overall First Leaside group.

17 In his affidavit Mr. MacLeod also deposed, with respect to the financial situation of First Leaside, that:

> (i) The cease trade placed severe financial constraints on First Leaside as almost every business unit depended on the ability of FLWM and its subsidiaries to raise capital from investors;
>
> (ii) There are immediate cash flow crises at FLWM and most LPs;
>
> (iii) FLWM's cash reserves had fallen from $2.8 million in November, 2011 to $1.6 million at the end of this January;
>
> (iv) Absent new cash from asset disposals, current cash reserves would be exhausted in April;
>
> (v) At the end of December, 2011 Ventures defaulted by failing to make a principal mortgage payment of $4.25 million owing to KingSett;
>
> (vi) Absent cash flow from FLWM a default is imminent for Investor's Harmony property;
>
> (vii) First Leaside lacks the liquidity or refinancing options to rehabilitate a number of the properties and execute on its business plan; and,
>
> (viii) First Leaside generally has been able to make mortgage payments to its creditors, but in the future it will be difficult to do so given the need to expend monies on property development and upgrading activities

18 In his description of the status of the employees of the Applicants, Mr. MacLeod did not identify any issue concerning a pension funding deficiency. [1] The internally-prepared 2010 FLWM financial statements did not record any such liability. Grant Thornton did not identify any such issue in its Pre-filing Report.

19 First Leaside is not proposing to place all of its operations under court-supervised insolvency proceedings. It does not plan to seek Chapter 11 protection for its Texas properties since it believes they may be able to continue operations over the anticipated wind-up period using cash flows they generate and pay their liabilities as they become due. Nor does First Leaside seek to include in this *CCAA* proceeding the First Leaside Venture LP ("Ventures") which owns and operates several properties in Ontario and British Columbia. On February 15, 2012 Ventures and Bridge Gap Konsult Inc. signed a non-binding term sheet to provide some bridge financing for Ventures. First Leaside decided not to include certain Ventures-related limited partnerships in the *CCAA* application at this stage, [2] while reserving the right to later bring a motion to extend the Initial Order and stay to these Excluded LPs. The Initial Order which I signed reflected that reservation.

20 As noted above, over the better part of the past year the proposed Monitor, Grant Thornton, has become familiar with the affairs of the First Leaside Group as a result of the review it conducted for its August, 2011 report. Last November First Leaside retained Grant Thornton as an independent monitor of its business.

21 In its Pre-filing Report Grant Thornton noted that the last available financial statements for FLWM were internally prepared ones for the year ended December 31, 2010. They showed a net loss of about $2.863 million. The Pre-filing Report contained a 10-week cash flow projection (ending April 27, 2012) prepared by the First Leaside Group. The Cash Flow Projection does not contemplate servicing interest and principal payments during the projection period. On that basis the Cash Flow Projection showed the Group's combined closing bank balance declining from $6.97 million to $4.144 million by the end of the projection

period. Grant Thornton reviewed the Cash Flow Projection and stated that it reflected the probable and hypothetical assumptions on which it was prepared and that the assumptions were suitably supported and consistent with the plans of the First Leaside Group and provided a reasonable basis for the Cash Flow Projection.

22 Grant Thornton reported that certain creditors, specifically construction lien claimants, had commenced enforcement proceedings and it concluded:

> Given creditors' actions to date and due to the complicated nature of the FL Group's business, the complex corporate structure and the number of competing stakeholders, it is unlikely that the FL Group will be able to conduct an orderly wind-up or continue to rehabilitate properties without the stability provided by a formal Court supervised restructuring process.
>
> . . .
>
> As the various stakeholder interests are in many cases intertwined, including intercompany claims, the granting of the relief requested would provide a single forum for the numerous stakeholders of the FL Group to be heard and to deal with such parties' claims in an orderly manner, under the supervision of the Court, a CRO and a Court-appointed Monitor. In particular, a simple or forced divestiture of the properties of the FL Group would not only erode potential investor value, but would not provide the structure necessary to reconcile investor interests on an equitable and ratable basis.
>
> A stay of proceedings for both the Applicants and the LPs is necessary if it is deemed appropriate by this Honourable Court to allow the FL Group to maintain its business and to allow the FL Group the opportunity to develop, refine and implement their restructuring/wind-up plan(s) in a stabilized environment.

B. Findings

23 I am satisfied that the Applicants are "companies" within the meaning of the *CCAA* and that the total claims against the Applicants, as an affiliated group of companies, is greater than $5 million.

24 Are the Applicant companies "debtor companies" in the sense that they are insolvent? For the purposes of the *CCAA* a company may be insolvent if it falls within the definition of an insolvent person in section 2 of the *Bankruptcy and Insolvency Act* or if its financial circumstances fall within the meaning of insolvent as described in *Stelco Inc., Re* which include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring". [3]

25 When looked at as a group the Applicants fall within the extended meaning of "insolvent": as a result of the cease trade their ability to raise capital has been severely restricted; cash reserves fell significantly from November until the time of filing, and the Cash Flow Projection indicates that cash reserves will continue to decline even with the cessation of payments on mortgages and other debt; Mr. MacLeod estimated that cash reserves would run out in April; distributions to unit holders were suspended last November; and, some formal mortgage defaults have occurred.

26 However, a secured creditor mortgagee, Midland Loan Services Inc., submitted that to qualify for *CCAA* protection each individual applicant must be a "debtor company" and that in the case of one applicant, Queenston Manor General Partner Inc., that company was not insolvent. In his affidavit Mr. MacLeod deposed that the Queenston Manor LP is owned by the First Leaside Expansion Limited Partnership ("FLEX"). Queenston owns and operates a 77-unit retirement complex in St. Catherines, has been profitable since 2008 and is expected to remain profitable through 2013. Queenston has been listed for sale, and management currently is considering an offer to purchase the property. Midland Loan submitted that in light of that financial situation, no finding could be made that the applicant, Queenston Manor General Partner Inc., was a "debtor company".

27 Following that submission I asked Applicants' counsel where in the record one could find evidence about the insolvency of each individual Applicant. That prompted a break in the hearing, at the end of which the Applicants filed a supplementary affidavit from Mr. MacLeod. Indicating that one of the biggest problems facing the Applicants was the lack of complete and up-to-date records, in consultation with the Applicants' CFO Mr. MacLeod submitted a chart providing, to the extent possible,

further information about the financial status of each Applicant. That chart broke down the financial status of each of the 52 Applicants as follows:

Insolvent	28
Dormant	15
Little or no realizable assets	5
More information to be made available to the court	3
Other: management revenue stopped in 2010; $70,000 cash; $270,000 in related-company receivables	1

Queenston Manor General Partner Inc. was one of the applicants for which "more information would be made available to the court".

28 As I have found, when looked at as a group, the Applicants fall within the extended meaning of "insolvent". When one descends a few levels and looks at the financial situation of some of the aggregator LPs, such as FLEX, Mr. MacLeod deposed that FLEX is one of the largest net debtors — i.e. it is unable to repay inter-company balances from operating cash flows and lacks sufficient net asset value to settle the intercompany balances through the immediate liquidation of assets. The evidence therefore supports a finding that the corporate general partner of FLEX is insolvent. Queenston Manor is one of several assets owned by FLEX, albeit an asset which uses the form of a limited partnership.

29 If an insolvent company owns a healthy asset in the form of a limited partnership does the health of that asset preclude it from being joined as an applicant in a *CCAA* proceeding? In the circumstances of this case it does not. The jurisprudence under the *CCAA* provides that the protection of the Act may be extended not only to a "debtor company", but also to entities who, in a very practical sense, are "necessary parties" to ensure that that stay order works. Morawetz J. put the matter the following way in *Priszm Income Fund, Re*:

> The *CCAA* definition of an eligible company does not expressly include partnerships. However, *CCAA* courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehndorff, supra*, and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (S.C.J.).
>
> The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies. [4]

30 Although section 3(1) of the *CCAA* requires a court on an initial application to inquire into the solvency of any applicant, the jurisprudence also requires a court to take into account the relationship between any particular company and the larger group of which it is a member, as well as the need to place that company within the protection of the Initial Order so that the order will work effectively. On the evidence filed I had no hesitation in concluding that given the insolvency of the overall First Leaside Group and the high degree of inter-connectedness amongst the members of that group, the protection of the *CCAA* needed to extend both to the Applicants and the limited partnerships listed in Schedule "A" to the Initial Order. The presence of all those entities within the ambit of the Initial Order is necessary to effect an orderly winding-up of the insolvent group as a whole. Consequently, whether Queenston Manor General Partner Inc. falls under the Initial Order by virtue of being a "debtor company", or by virtue of being a necessary party as part of an intertwined whole, is, in the circumstances of this case, a distinction without a practical difference.

31 In sum, I am satisfied that those Applicants identified as "insolvent" on the chart attached to Mr. MacLeod's supplementary affidavit are "debtor companies" within the meaning of the *CCAA* and that the other Applicants, as well as the limited partnerships listed on Schedule "A" of the Initial Order, are entities to which it is necessary and appropriate to extend *CCAA* protection.

C. "Liquidation" CCAA

32 While in most circumstances resort is made to the *CCAA* to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets" and to create "conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all", the reality is that "reorganizations of differing complexity require different legal mechanisms." [5] That reality has led courts to recognize that the *CCAA* may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership, [6] or to wind-up or liquidate it. In *Lehndorff General Partner Ltd., Re* [7] Farley J. observed:

> 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.).

33 In the decision of *Associated Investors of Canada Ltd., Re* referred to by Farley J., the Alberta Court of Queen's Bench stated:

> The realities of the modern marketplace dictate that courts of law respond to commercial problems in innovative ways without sacrificing legal principle. In my opinion, the Companies' Creditors Arrangement Act is not restricted in its application to companies which are to be kept in business. Moreover, the Court is not without the ability to address within its jurisdiction the concerns expressed in the Ontario cases. The Act may be invoked as a means of liquidating a company and winding-up its affairs but only if certain conditions precedent are met:
>
> 1. It must be demonstrated that benefits would likely flow to Creditors that would not otherwise be available if liquidation were effected pursuant to the Bankruptcy Act or the Winding-Up Act.
>
> 2. The Court must concurrently provide directions pursuant to compatible legislation that ensures judicial control over the liquidation process and an effective means whereby the affairs of the company may be investigated and the results of that investigation made available to the Court.
>
> 3. A Plan of Arrangement should not receive judicial sanction until the Court has in its possession, all of the evidence necessary to allow the Court to properly exercise its discretion according to standards of fairness and reasonableness, absent any findings of illegality. [8]

The editors of *The 2012 Annotated Bankruptcy and Insolvency Act* take some issue with the extent of those conditions:

> With respect, these conditions may be too rigorous. If the court finds that the plan is fair and reasonable and in the best interests of creditors, and there are cogent reasons for using the statute rather than the *BIA* or *WURA*, there seems no reason why an orderly liquidation could not be carried out under the *CCAA*. [9]

34 Mr. MacLeod, the CRO, deposed that no viable plan exists to continue First Leaside as a going concern and that the most appropriate course of action is to effect an orderly wind-down of First Leaside's operations over a period of time and in a manner which will create the opportunity to realize improved net asset value. In his professional judgment the *CCAA* offered the most appropriate mechanism by which to conduct such an orderly liquidation:

> [T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues — especially the numerous investor and creditor claims and the inter-company claims — can be dealt with in one forum under the supervision of the court.

In its Pre-filing Report the Monitor also supported using the *CCAA* to implement the "restructuring/wind-up plan(s) in a stabilized environment".

35 Both the CRO and the proposed Monitor possess extensive knowledge about the workings of the Applicants. Both support a process conducted under the *CCAA* as the most practical and effective way in which to deal with the affairs of this insolvent group of companies. No party contested the availability of the *CCAA* to conduct an orderly winding-up of the affairs of the Applicants (although, as noted, some parties questioned whether certain entities should be included within the scope of the Initial Order). Given that state of affairs, I saw no reason not to accept the professional judgment of the CRO and the proposed Monitor that a liquidation under the *CCAA* was the most appropriate route to take.

36 Moreover, I saw no prejudice to claimant creditors by permitting the winding-up of the First Leaside Group to proceed under the *CCAA* instead of under the *BIA* in view of the convergence which exists between the *CCAA* and *BIA* on the issue of priorities. As the Supreme Court of Canada pointed out in *Century Services*:

> Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [10]

As the British Columbia Court of Appeal observed in *Caterpillar Financial Services Ltd. v. 360networks Corp.* interested parties also use that priorities backdrop to negotiate successful *CCAA* reorganizations:

> While it might be suggested that *CCAA* proceedings may require those with a financial stake in the company, including shareholders and creditors, to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless. The right of creditors to realize on any security may be suspended pending the final approval of the court, but this does not render their potential priority nugatory. Priorities are always in the background and influence the decisions of those who vote on the plan. [11]

37 I therefore concluded that the *CCAA* was available to the Applicants in the circumstances, and I so ordered.

V. Representative Counsel, CRO and Monitor

38 The Applicants sought the appointment of Fraser Milner Casgrain ("FMC") as Representative Counsel to represent the interests of the some 1,200 clients of FLSI in this proceeding, subject to the right of any client to opt-out of such representation. The proposed Monitor expressed the view that it would be in the best interests of the FL Group and its investors to appoint Representative Counsel. No party objected to such an appointment. I reviewed the qualifications and experience of proposed Representative Counsel and its proposed fees, and I was satisfied that it would be appropriate to appoint FMC as Representative Counsel on the terms set out in the Initial Order.

39 The Applicants sought the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside. No party objected to that appointment. The Applicants included a copy of the CRO's December 21, 2011 Retention Agreement in their materials. The proposed Monitor stated that the appointment of a CRO was important to ensure an adequate level of senior corporate governance leadership. I agree, especially in light of the withdrawal of Mr. Phillips last November from the management of the Group. The proposed Monitor reported that the terms and conditions of the Retention Agreement were consistent with similar arrangements approved by other courts in *CCAA* proceedings and the remuneration payable was reasonable in the circumstances. As a result, I confirmed the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside.

40 Finally, I appointed Grant Thornton as Monitor. No party objected, and Grant Thornton has extensive knowledge of the affairs of the First Leaside Group.

VI. Administration and D&O Charges and their priorities

A. Charges sought

41 The Applicants sought approval, pursuant to section 11.52 of the *CCAA*, of an Administration Charge in the amount of $1 million to secure amounts owed to the Estate Professionals — First Leaside's legal advisors, the CRO, the Monitor, and the Monitor's counsel.

42 They also sought an order indemnifying the Applicants' directors and officers against any post-filing liabilities, together with approval, pursuant to section 11.51 of the *CCAA*, of a Director and Officer's Charge in the amount of $250,000 as security for such an indemnity. Historically the First Leaside Group did not maintain D&O insurance, and the Independent Committee was not able to secure such insurance at reasonable rates and terms when it tried to do so in 2011.

43 The Monitor stated that the amount of the Administration Charge was established based on the Estate Professionals' previous history and experience with restructurings of similar magnitude and complexity. The Monitor regarded the amount of the D&O Charge as reasonable under the circumstances. The Monitor commented that the combined amount of both charges ($1.25 million) was reasonable in comparison with the amount owing to mortgagees ($176 million).

44 In its Pre-filing Report the Monitor did note that shortly before commencing this application the Applicants paid $250,000 to counsel for the Independent Committee of the Board. The Monitor stated that the payment might "be subject to review by the Monitor, if/when it is appointed, in accordance with s. 36.1(1) of the *CCAA*". No party requested an adjudication of this issue, so I refer to the matter simply to record the Monitor's expression of concern.

45 Based on the evidence filed, I concluded that it was necessary to grant the charges sought in order to secure the services of the Estate Professionals and to ensure the continuation of the directors in their offices and that the amounts of the charges were reasonable in the circumstances.

B. Priority of charges

46 The Applicants sought super-priority for the Administration and D&O Charges, with the Administration Charge enjoying first priority and the D&O Charge second, with some modification with respect to the property of FLSI which the Applicants had negotiated with IIROC.

47 In its Pre-filing Report the proposed Monitor stated that the mortgages appeared to be well collateralized, and the mortgagees would not be materially prejudiced by the granting of the proposed priority charges. The proposed Monitor reported that it planned to work with the Applicants to develop a methodology which would allocate the priority charges fairly amongst the Applicants and the included LPs, and the allocation methodology developed would be submitted to the Court for review and approval.

48 In *Indalex Ltd., Re* [12] the Court of Appeal reversed the super-priority initially given to a DIP Charge by the motions judge in an initial order and, instead, following the sale of the debtor company's assets, granted priority to deemed trusts for pension deficiencies. In reaching that decision Court of Appeal observed that affected persons — the pensioners — had not been provided at the beginning of the *CCAA* proceeding with an appropriate opportunity to participate in the issue of the priority of the DIP Charge. [13] Specifically, the Court of Appeal held:

> In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".
>
> While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the

> charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund. [14]

49 In his recent decision in *Timminco Ltd., Re* [15] ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:

> In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings. [16]

50 In its Pre-filing Report the proposed Monitor expressed the view that if the priority charges were not granted, the First Leaside Group likely would not be able to proceed under the *CCAA*.

51 In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.

52 Accordingly I raised that issue at the commencement of the hearing last Thursday and requested submissions on the issues of priority and paramountcy from any interested party. Several parties made submissions on those points: (i) the Applicants, proposed Monitor and proposed Representative Counsel submitted that the Court should address any priority or paramountcy issues raised; (ii) IIROC advised that it did not see any paramountcy issue in respect of its interests; (iii) counsel for Midland Loan submitted that a paramountcy issue existed with respect to its client, a secured mortgagee, because it enjoyed certain property rights under provincial mortgage law; she also argued that the less than full day's notice of the hearing given by the Applicants was inadequate to permit the mortgagee to consider its position, and her client should be given seven days to do so; and, (iv) counsel for a construction lien claimant, Structform International, who spoke on behalf of a number of such lien claimants, made a similar submission, contending that the construction lien claimants required 10 days to determine whether they should make submissions on the relationship between their lien claims and any super-priority charge granted under the *CCAA*.

53 I did not grant the adjournment requested by the mortgagee and construction lien claimants for the following reasons. First, the facts in *Indalex* were quite different from those in the present case, involving as they did considerations of what fiduciary duty a debtor company owed to pensioners in respect of underfunded pension liabilities. I think caution must be exercised before extending the holding of *Indalex* concerning *CCAA*-authorized priority charges to other situations, such as the one before me, which do not involve claims involving pension deficiencies, but claims by more "ordinary" secured creditors, such as mortgagees and construction lien claimants.

54 Second, I have some difficulty seeing how constitutional issues of paramountcy arise in in a *CCAA* proceeding as between claims to the debtor's property by secured creditors, such as mortgagees and construction lien claimants, and persons granted a super-priority charge by court order under sections 11.51 and 11.52 of the *CCAA*. At the risk of gross over-simplification, Canadian constitutional law places the issue of priorities of secured creditors in different legislative balliwicks depending on the health of the debtor company. When a company is healthy, secured creditor priorities usually are determined under provincial

laws, such as personal property security legislation and related statutes, which result from provincial legislatures exercising their powers with respect to "property and civil rights in the province". [17] However, when a company gets sick — becomes insolvent — our *Constitution* vests in Parliament the power to craft the legislative regimes which will govern in those circumstances. Exercising its power in respect of "bankruptcy and insolvency", [18] Parliament has established legal frameworks under the *BIA* and *CCAA* to administer sick companies. Priority determinations under the *CCAA* draw on those set out in the *BIA*, as well as the provisions of the *CCAA* dealing with specific claims such as Crown trusts and other claims.

55 As it has evolved over the years the constitutional doctrine of paramountcy polices the overlapping effects of valid federal and provincial legislation: "The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers." [19] Since 1960 the Supreme Court of Canada has travelled a "path of judicial restraint in questions of paramountcy". [20] That Court has not been prepared to presume that, by legislating in respect of a matter, Parliament intended to rule out any possible provincial action in respect of that subject, [21] unless (and it is a big "unless"), Parliament used very clear statutory language to that effect. [22]

56 I have found that the Applicants have entered the world of the sick, or the insolvent, and are eligible for the protection of the federal *CCAA*. The federal legislation *expressly* brings mortgagees and construction lien claimants within its regime — the definition of "secured creditor" contained in section 2 of the *CCAA* specifically includes "a holder of a mortgage" and "a holder of a ...lien...on or against...all or any of the property of a debtor company as security for indebtedness of the debtor company". The federal legislation also *expressly* authorizes a court to grant priority to administration and D&O charges over the claims of such secured creditors of the debtor. [23] In light of those express provisions in sections 2, 11.51 and 11.52 of the *CCAA*, and my finding that the Applicants are eligible for the protection offered by the *CCAA*, I had great difficulty understanding what argument could be advanced by the mortgagees and construction lien claimants about the concurrent operation of provincial and federal law which would relieve them from the priority charge provisions of the *CCAA*. I therefore did not see any practical need for an adjournment.

57 Finally, sections 11.51(1) and 11.52(1) of the *CCAA* both require that notice be given to secured creditors who are likely to be affected by an administration or D&O charge before a court grants such charges. In the present case I was satisfied that such notice had been given. Was the notice adequate in the circumstances? I concluded that it was. To repeat, making due allowance for the unlimited creativity of lawyers, I have difficulty seeing what concurrent operation argument could be advanced by mortgagee and construction lien claims against court-ordered super-priority charges under sections 11.51 and 11.52 of the *CCAA*. Second, as reported by the proposed Monitor, the quantum of the priority charges ($1.25 million) is reasonable in comparison with the amount owing to mortgagees ($176 million) and the mortgages appeared to be well collateralized based on available information. Third, the Applicant and Monitor will develop an allocation methodology for the priority charges for later consideration by this Court. The proposed Monitor reported:

> It is the Proposed Monitor's view that the allocation of the proposed Priority Charges should be carried out on an equitable and proportionate basis which recognizes the separate interests of the stakeholders of each of the entities.

The secured creditors will be able to make submissions on any proposed allocation of the priority charges. Finally, while I understand why the secured creditors are focusing on their specific interests, it must be recalled that the work secured by the priority charges will be performed for the benefit of all creditors of the Applicants, including the mortgagees and construction lien claimants. All creditors will benefit from an orderly winding-up of the affairs of the Applicants.

58 In the event that I am incorrect that no paramountcy issue arises in this case in respect of the priority charges, I echo the statements made by Morawetz J. in *Timminco* which I reproduced in paragraph 49 above. In *Indalex* the Court of Appeal accepted that "the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation". [24] I find that it is both necessary and appropriate to grant super priority to both the Administration and D&O Charges in order to ensure that the objectives of the *CCAA* are not frustrated.

59 For those reasons I did not grant the adjournment requested by Midland Loan and the construction lien claimants, concluding that they had been given adequate notice in the circumstances, and I granted the requested Administration and D&O Charges.

VII. Other matters

60 At the hearing counsel for one of the construction lien claimants sought confirmation that by granting the Initial Order a construction lien claimant who had issued, but not served, a statement of claim prior to the granting of the order would not be prevented from serving the statement of claim on the Applicants. Counsel for the Applicants confirmed that such statements of claim could be served on it.

61 At the hearing the Applicants submitted a modified form of the model Initial Order. Certain amendments were proposed during the hearing; the parties had an opportunity to make submissions on the proposed amendments.

VIII. Summary

62 For the foregoing reasons I was satisfied that it was appropriate to grant the *CCAA* Initial Order in the form requested. I signed the Initial Order at 4:08 p.m. EST on Thursday, February 23, 2012.

Application granted.

Footnotes

1 MacLeod Affidavit, paras. 104 to 106.

2 The Excluded LPs were identified in paragraph 134 of Mr. MacLeod's affidavit.

3 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]).

4 2011 ONSC 2061 (Ont. S.C.J.), paras. 26-27.

5 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), paras. 15, 77 and 78.

6 *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.), para. 46; see Kevin P. McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), pp. 284 et seq.

7 [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]). In *Brake Pro Ltd., Re*, [2008] O.J. No. 2180 (Ont. S.C.J.), Wilton-Siegel J. stated, at paragraph 10: "While reservations are expressed from time to time regarding the appropriateness of a "liquidating" *CCAA* proceeding, such proceedings are permissible under the *CCAA*."

8 *Associated Investors of Canada Ltd., Re* (1987), 46 D.L.R. (4th) 669 (Alta. Q.B.), para. 36.

9 Houlden, Morawetz & Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act*, N§1, p. 1099.

10 *Century Services*, *supra.*, para. 23.

11 (2007), 279 D.L.R. (4th) 701 (B.C. C.A.), para. 42.

12 2011 ONCA 265 (Ont. C.A.).

13 *Ibid*., para. 155.

14 *Ibid.*, paras. 178 and 179.

15 2012 ONSC 506 (Ont. S.C.J. [Commercial List]).

16 *Ibid*., para. 66.

17 *Constitution Act, 1867*, s. 92 ¶13.

18 *Ibid*., s. 91 ¶21.

19 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), para. 69.

20 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 (S.C.C.), para. 21

21 *Canadian Western Bank*, *supra.*, para. 74.

22 *Rothmans*, *supra.*, para. 21.

23 *CCAA* ss. 11.51(2) and 11.52(2).

24 *Indalex*, *supra.*, para. 176.

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TAB 7

2003 CarswellOnt 275
Ontario Superior Court of Justice

General Publishing Co., Re

2003 CarswellOnt 275, 39 C.B.R. (4th) 216

In the Matter of the Bankruptcy of General Publishing Limited et al

Ground J.

Heard: October 28, 2002
Judgment: January 22, 2003
Docket: 02-CL-004508

Counsel: *Lisa LaHorey*, *Anthony Cole*, for ACE INA Insurance Co.
John B. Marshall, for Bank of Nova Scotia
Lawrence Theall, for Former Directors

Subject: Corporate and Commercial; Insurance; Insolvency

Headnote

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

Initial Order in Companies' Creditors Arrangement Act proceedings was issued — Bank, which was first secured creditor of company and its subsidiaries, then advanced financing — Insurer held liability insurance policy covering directors' officers of company — Directors' liability policy was renewed and extended — Companies' Creditors Arrangement Act proceedings were terminated and bankruptcy proceedings commenced — Issue arose as to entitlement of insurer to subrogation against directors' charge fund — Insurer was not entitled to subrogation — Purpose of directors' charge, in case of Companies' Creditors Arrangement Act proceedings which have legitimate prospect of restructuring, is to keep directors in place during restructuring period by providing them with additional protection for additional exposure which directors have as result of insolvency of company — No logic in extending benefit of directors' charge to insurer by way of subrogation rights — Insurer continued to be liable for claims made against directors covered by directors' liability policy and continued to have subrogation rights which directors would have against company in event of claims made against directors personally — This situation was not changed as result of institution of Companies' Creditors Arrangement Act proceedings — If claims were made against directors were claims which would have been covered by directors' liability policy in any event, they should not be claims which could be made against directors' charge fund.

Insurance --- Principles applicable to specific types of insurance — Directors' and officers' liability insurance

Initial Order in Companies' Creditors Arrangement Act proceedings was issued — Bank, which was first secured creditor of company and its subsidiaries, then advanced financing — Insurer held liability insurance policy covering directors' officers of company — Directors' liability policy was renewed and extended — Companies' Creditors Arrangement Act proceedings were terminated and bankruptcy proceedings commenced — Issue arose as to entitlement of insurer to subrogation against directors' charge fund — Insurer was not entitled to subrogation — Purpose of directors' charge, in case of Companies' Creditors Arrangement Act proceedings which have legitimate prospect of restructuring, is to keep directors in place during restructuring period by providing them with additional protection for additional exposure which directors have as result of insolvency of company — No logic in extending benefit of directors' charge to insurer by way of subrogation rights — Insurer continued to be liable for claims made against directors covered by directors' liability policy and continued to have subrogation rights which directors would have against company in event of claims made against

directors personally — This situation was not changed as result of institution of Companies' Creditors Arrangement Act proceedings — If claims were made against directors were claims which would have been covered by directors' liability policy in any event, they should not be claims which could be made against directors' charge fund.

Table of Authorities

Statutes considered:

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

MOTION by insurer regarding its entitlement to subrogation against directors' charge fund.

***Ground J.*:**

1 The order sought by ACE INA Insurance Co., the insurer of the liability insurance policy covering the directors and officers of General Publishing Co. Limited (the "Insurer") seeks to delete from the Initial Order in the General Publishing CCAA proceedings dated April 30, 2002, all references to Directors' Liability Insurance and to subrogation so that it may argue on some future occasion that subrogation rights against the Directors' Charge Fund established by the Initial Order would apply in the event of any payments made by the Insurer under the policy with respect to claims made against the directors. I am not at all certain that this would be the result of the order sought by the Insurer. It appears to me that if the Initial Order was silent as to the directors' insurance and subrogation, the insurance policy would be applicable if claims were made against the directors and, pursuant to the common law of subrogation and the provisions of the policy relating to subrogation, the Insurer would have subrogation rights to the Directors' Charge Fund and the benefit of the superpriority granted to claims against that Fund by virtue of the Initial Order. Accordingly, in my view, the issue of the entitlement of the Insurer to subrogation against the Directors' Charge Fund must be decided on this motion.

2 The Initial Order was issued on April 30, 2002. The decision of this court on the issue of the ownership of accounts receivable was released and the appeal from such order dismissed in late May, 2002. The Bank of Nova Scotia ("BNS"), the first secured creditor of General Publishing and its subsidiaries, then advanced DIP financing. The Directors' Liability Policy was renewed and extended effective July 31, 2002. The CCAA proceedings were terminated August 23, 2002, and the bankruptcy proceedings commenced. The first time that the issue of Directors' Liability Insurance and subrogation was raised by the Insurer was at the time of the distribution motion on October 28, 2002 and, at that time, leave was granted to the Insurer to bring a motion to vary the Initial Order in view of the fact that the Insurer was not given notice of the initial application. The Insurer's motion was brought by notice of motion dated December 17, 2002 and was heard by this court on January 8, 2003.

3 The Bank of Nova Scotia ("BNS") takes the position that the delay by the Insurer in raising the issue of Directors' Liability Insurance and subrogation and the fact that such issue was not raised until after BNS had advanced the DIP financing based upon the terms of the Initial Order are sufficient, in themselves, to dismiss the motion. It is evident from the material before this court that the Insurer was aware of the Initial Order at least by mid-July, 2002. It is inconceivable to me that the Insurer was not aware of the CCAA proceedings long before that time, in view of the substantial publicity that such proceedings received in the media, and could have sought and obtained a copy of the Initial Order. The Insurer certainly did not move expeditiously to vary the Initial Order and, I am not unsympathetic to the position of BNS, that that is reason in and of itself to dismiss the motion. The motion does, however, raise important matters of substance on which there seems to be a paucity of judicial determination or precedent and accordingly, I propose to deal with the motion on its merits.

4 I am also not prepared to dismiss the motion on the basis that the CCAA proceedings have terminated. Obviously, there is still the potential for claims against the directors, the Directors Charge still applies and the issue of subrogation with respect to claims made against the Directors' Charge Fund is an issue which must be determined in spite of the termination of the CCAA proceedings.

5 Counsel for the Insurer made the submission on the hearing of this motion that the Insurer would take the position that any payments received by the Insurer from the Directors' Charge Fund by way of subrogation would not reduce the Fund by the amount of such payment, so that the total protection for the directors would remain at $5,000,000 under the policy and $1,000,000 under the Directors' Charge Fund. I do not understand this submission. It appears to me that any payment out of the Directors' Charge Fund as a result of a subrogated claim by the Insurer would, under the terms of the Initial Order, automatically reduce the Directors' Charge Fund by that amount.

6 With respect to the substance of the motion, the purpose of a Directors' Charge, in the case of CCAA proceedings which have a legitimate prospect of restructuring, is to keep the directors in place during the restructuring period by providing them with additional protection for the additional exposure which directors have as a result of the insolvency of the company. There seems to me to be no logic in extending the benefit of the Directors' Charge to the Insurer by way of subrogation rights. The Insurer continues to be liable for claims made against the directors covered by the Directors' Liability Policy and continues to have subrogation rights which the directors would have against the company in the event of claims made against the directors personally. This situation is not changed as the result of the institution of CCAA proceedings. If the claims made against the directors are claims which would have been covered by the Directors' Liability Policy in any event, they should not be claims which could be made against the Directors' Charge Fund in that the fund was put in place to give the directors further protection, over and above the protection accorded by the Directors' Liability Policy, as a result of the increased exposure of the directors due to the company's insolvency.

7 What the Insurer is seeking in the order now sought before this Court is an additional benefit which the Insurer would not otherwise have in the event that a claim is paid pursuant to the policy. The subrogation right of the Insurer, in the event of such a payment, would be subrogation to the directors' claims against the company for indemnity and would be simply an unsecured claim in the bankruptcy of the company. The effect of granting subrogation rights to the Insurer to access the Directors' Charge Fund would elevate the Insurer's unsecured claim to a secured claim with priority over the first charge held by BNS. As stated above, I see no logical reason why such additional benefit should be conferred upon the Insurer as a result of the establishment of the Directors' Charge which is instituted for the purpose of keeping the directors in place during the restructuring period and providing additional protection to them. It appears to me that this is particularly true when the Directors' Liability Insurance Policy was extended during the period of the CCAA proceedings, as in the case at bar.

8 In any event, it seems to me that the court, in a CCAA proceeding, should interfere with existing priority rights only to the extent necessary in order for the CCAA proceedings to continue and to provide the company with an opportunity to work out a restructuring or arrangement. There is no necessity to give the Insurer a superpriority right against the Directors' Charge Fund in order to accomplish this purpose.

9 The motion is dismissed.

10 Counsel may make brief written submissions to me as to the costs of this motion on or before February 15, 2003.

Motion dismissed.

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2004 CarswellOnt 49
Ontario Court of Appeal

General Publishing Co., Re

2004 CarswellOnt 49, 1 C.B.R. (5th) 202

IN THE MATTER OF AN APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-43

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GENERAL PUBLISHING CO. LIMITED, GENERAL DISTRIBUTION SERVICES LIMITED, STODDART PUBLISHING CO. LIMITED, THE BOSTON MILLS PRESS LTD. and HOUSE OF ANANSI PRESS LIMITED and IRWIN PUBLISHING LTD.

Borins, Catzman, Laskin JJ.A.

Heard: January 12, 2004
Judgment: January 12, 2004
Docket: CA C40561

Proceedings: affirming (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.)

Counsel: Howard Borlack, Lisa La Horey for Appellant, ACE INA Insurance
J.D. Marshall for Respondent, Bank of Nova Scotia
Jeffrey Brown for Respondents, Jack Stoddart et al.

Subject: Insolvency; Insurance; Corporate and Commercial

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Insurer issued liability insurance policy covering directors of company — Initial order was made under Companies' Creditors Arrangement Act (CCAA) in respect of company — Initial order established directors' charge fund for claims against directors — Bank as first secured creditor of company then advanced debtor in possession financing — Liability insurance policy for directors was renewed and extended — Insurer subsequently raised issue of entitlement to subrogation against directors' charge fund — Insurer brought motion for order deleting all references to directors' liability insurance and to subrogation from initial order — Motion was dismissed — Motion judge held that purpose of directors' charge fund in case of CCAA proceedings is to keep directors in place during restructuring period by providing them with protection for additional exposure which they have as result of insolvency of company — Motion judge held there was no reason to extend benefit of directors' charge fund to insurer by way of subrogation rights — Motion judge held that insurer was seeking additional benefit which it would not otherwise have in event that claim was paid pursuant to policy — Motion judge held that effect of granting subrogation rights to insurer to access charge fund would elevate insurer's unsecured claim to secured claim with priority over first charge held by bank — Insurer appealed — Appeal dismissed — Motion judge's reasoning was correct.

Insurance --- Principles applicable to specific types of insurance — Directors' and officers' liability insurance

Insurer issued liability insurance policy covering directors of company — Initial order was made under Companies' Creditors Arrangement Act (CCAA) in respect of company — Initial order established directors' charge fund for claims

against directors — Bank as first secured creditor of company then advanced debtor in possession financing — Liability insurance policy for directors was renewed and extended — Insurer subsequently raised issue of entitlement to subrogation against directors' charge fund — Insurer brought motion for order deleting all references to directors' liability insurance and to subrogation from initial order — Motion was dismissed — Motion judge held that purpose of directors' charge fund in case of CCAA proceedings is to keep directors in place during restructuring period by providing them with protection for additional exposure which they have as result of insolvency of company — Motion judge held there was no reason to extend benefit of directors' charge fund to insurer by way of subrogation rights — Motion judge held that insurer was seeking additional benefit which it would not otherwise have in event that claim was paid pursuant to policy — Motion judge held that effect of granting subrogation rights to insurer to access charge fund would elevate insurer's unsecured claim to secured claim with priority over first charge held by bank — Insurer appealed — Appeal dismissed — Motion judge's reasoning was correct.

APPEAL by insurer from judgment reported at *General Publishing Co., Re* (2003), 2003 CarswellOnt 275, 39 C.B.R. (4th) 216 (Ont. S.C.J.) dismissing motion for order deleting references to directors' liabilty insurance and to subrogation from initial order made in proceedings under *Companies' Creditors Arrangement Act*.

***Per curiam*:**

1 We agree with the decision of Ground J. and with his reasoning as it appears in paras. 6, 7 and 8 of his endorsement.

2 The appeal is dismissed with costs fixed in the total sum of $10,000.

Appeal dismissed.

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TAB 8

2005 CarswellQue 2700
Cour supérieure du Québec

Jetsgo Corp., Re

2005 CarswellQue 2700, J.E. 2005-881, EYB 2005-89398

In the matter of the companies' creditors arrangement act, as amended: and in the matter of the plan of compromise or arrangement of: Jetsgo Corporation, Debtor, and RSM Richter Inc., Monitor, v. Greater Toronto Airport Authority (GTAA), Aéroports de Montréal, Vancouver International Airport Authority, Ottawa MacDonald-Cartier International Airport Authority, Winnipeg Airports Authority inc., Aéroports de Québec inc., Edmonton Regional Airports Authority, The Calgary Airport Authority, Halifax International Airport Authority [Airport Authorities] and NAV Canada [NAV], Petitioners

Rolland J.C.S.

Judgment: 21 april 2005
Docket: C.S. Qué. Montréal 500-11-025198-058

Counsel: *Me Louis Gouin, Me Sylvain Rigaud*, for Debtor
Me Bernard Boucher, for Aeroturbine Inc.
Me Mark E. Meland, for AeroUSA, Airplanes IAL Finance, Airplanes Holding Limited, GE Capital Aviation Services Inc., Jets MD Lease Limited, Calyon Aviation Group
Me Donald G. Gray, for AeroUSA, Airplanes IAL Finance, Airplanes Holding Limited, GE Capital Aviation Services Inc., Jets MD Lease Limited, Calyon Aviation Group
Me Gerry Apostolatos, Me Dimitri Maniatis, Me François Valin, for Montreal Airports, Vancouver International Airport Authority, Ottawa MacDonald-Cartier International Airport Authority, Winnipeg Airports Authority Inc., Québec City Airport Inc., Edmonton Regional Airports Authority, Calgary Airport Authority and Ha
Me Sandra Abitan, Me David Tardif-Latourelle, for Greater Toronto Airport Authority
Me Kirk M. Baert, for Jetsgo Pilots' Association
Me Sylvain Vauclair, for RSM Richter Inc.
Me Alain Riendeau, for Moneris Solutions Corporation
Me Edmond F.B. Lamek, Me Donald E. Milner, for Moneris Solutions Corporation
Me Patrice Benoît, for National Bank of Canada
Me Clifton Prophet, Me Denis St-Onge, Me Louise Lalonde, for NAV Canada
Me Pierre Lecavalier, for Procureur général du Canada
Me Seth Mandell, for Red Seal Tours Inc.
Me Claude Paquet, for Rolls-Royce
Me François Parizeau, for Med-Air Inc.

Subject: Insolvency

***François Rolland, Chief Justice*:**

1 GTAA and Airport Authorities are asking the lift of the stay of proceedings and the authorization to seize and detain aircraft of Jetsgo because of its failure to pay the Airport Charges and other fees.

2 Furthermore, Petitioners ask that the proceeds of sale of any aircraft be segregated and held for the benefit of Petitioners.

3 GTAA and Airport Authorities request the seizure in accordance with section 9 of the Airport Transfer Act (ATA) which reads as follows :

> Seizure and detention for fees and charges
>
> 9. (1) Where the amount of any landing fees, general terminal fees or other charges related to the use of an airport, and interest thereon, set by a designated airport authority in respect of an airport operated by the authority has not been paid, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on application to the superior court of the province in which any aircraft owned or operated by the person liable to pay the amount is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.
>
> Idem
>
> (2) Where the amount of any fees, charges and interest referred to in subsection (1) has not been paid and the designated airport authority has reason to believe that the person liable to pay the amount is about to leave Canada or take from Canada any aircraft owned or operated by the person, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on ex parte application to the superior court of the province in which any aircraft owned or operated by the person is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.
>
> Release on payment
>
> (3) Subject to subsection (4), except where otherwise directed by an order of a court, a designated airport authority is not required to release from detention an aircraft seized under subsection (1) or (2) unless the amount in respect of which the seizure was made is paid.
>
> Release on security
>
> (4) A designated airport authority shall release from detention an aircraft seized under subsection (1) or (2) if a bond or other security in a form satisfactory to the authority for the amount in respect of which the aircraft was seized is deposited with the authority.
>
> Same meaning
>
> (5) Words and expressions used in this section and section 10 have the same meaning as in the Aeronautics Act.

4 GTAA and Airport Authorities claim that they are entitled to exercise their seizure and detention rights under section 9 of the ATA with respect to all landing fees, general terminal fees or other charges related to the use of their respective airports, and interest thereon, owing by Jetsgo to the Airport Authorities, including without limitation the Airport Charges, Ongoing Charges, and estimated Airport Improvement Fee(AIF), as same may be adjusted from time to time.

5 For its part, NAV is asking for the same authorization for non payment of various fees and charges for services rendered.

6 NAV is basing its request on section 56 of the Civil Air and Navigation Services Commercialization (the NAV Canada Act) :

> Seizure and Detention of Aircraft
>
> 56. (1) In addition to any other remedy available for the collection of an unpaid and overdue charge imposed by the Corporation for air navigation services, and whether or not a judgment for the collection of the charge has been obtained, the Corporation may apply to the superior court of the province in which any aircraft owned or operated by the person liable to pay the charge is situated for an order, issued on such terms as the court considers appropriate, authorizing the

Corporation to seize and detain any such aircraft until the charge is paid or a bond or other security for the unpaid and overdue amount in a form satisfactory to the Corporation is deposited with the Corporation.

(2) An application for an order referred to in subsection (1) may be made ex parte if the Corporation has reason to believe that the person liable to pay the charge is about to leave Canada or take from Canada any aircraft owned or operated by the person.

(3) The Corporation shall release from detention an aircraft seized under this section if

(a) the amount in respect of which the seizure was made is paid;

(b) a bond or other security in a form satisfactory to the Corporation for the amount in respect of which the seizure was made is deposited with the Corporation; or

(c) an order of a court directs the Corporation to do so.

57. (1) An order under section 56 does not apply if the aircraft is exempt form seizure under the laws of the province in which the court that issued the order is situated.

(2) State aircraft are exempt from seizure and detention under an order issued under section 56.

7 The Motions raise the issue of the characterization of the rights granted to the Petitioners pursuant to the relevant legislation and whether such rights could be recognized by the Court when an Initial Order has been rendered pursuant to the Companies' Creditors Arrangement Act (CCAA) ordering the stay of proceedings and appointing a Monitor.

8 The facts may be summarized as follows.

9 On March 11, 2005, the Court issued an initial order (the « Initial Order ») pursuant to the CCAA, inter alia declaring that Jetsgo Corporation (« Jetsgo ») was a company to which the CCAA applies, granting a stay of proceedings in respect of Jetsgo and its assets and property up until and including April 11, 2005, and appointing RSM Richter as Monitor (« Monitor »).

10 On April 8, 2005, the Court extended the Initial Order until May 13, 2005.

11 The GTAA is a lessee, operator and manager of Lester B. Pearson International Airport.

12 Jetsgo ceased its operations on Friday, March 11, 2005, which coincided with the beginning of Ontario public school March break. Pearson International Airport was the main hub for Jetsgo operations.

13 GTAA is alleging that on or after March 11, 2005, it incurred costs in the amount of $36,361.00 because of Jetsgo's interruption of business and alleges that it is owed by Jetsgo the AIF in the amount of 2.5 million dollars and other fees consisting of landing fees, General Terminal charges, Central De-icing facility, Aircraft Parking, Exclusive Use Space, Employee Parking, Interest accrued to March 11, 2005 and GST, for a total of $2,977,397,93.

14 For their part, Airport Authorities allege that Jetsgo owes them for Landing fees and other fees an amount of $1,687,363.33 plus an amount of $1,117,842.47 which is an estimate of the Airport Improvement Fee.

15 NAV alleges that Jetsgo owes it an amount of $1,603,602.56 $ representing various costs for services rendered to Jetsgo.

16 On March 7, 2005, NAV made an application before the Ontario Superior Court to obtain an authorization to seize and detain an aircraft. However, it desisted from its proceedings because an Agreement intervened with Jetsgo as to the payment of the arrears.

17 At the time of the issuance of the Initial Order, no legal proceedings had been undertaken by GTAA, the Airport Authorities, or NAV with regards to the payment of the arrears.

18 For the purpose of this judgment, the parties have agreed to the following :

« In order to simplify and reduce the length of the hearing all parties agree to the facts enumerated therein.

Furthermore, the parties understand that the following issues will not be debated before the Court next week but rather deferred to a later date for proof and hearing, the whole in light of the judgment to be rendered in connection with the specific matters to be debated, namely:

1. the quantum of the claims owed to Petitioners by the Debtor;

2. the subordination of the Administration Charge and other charges granted under the Initial Order to the rights of Petitioners to seize and detain the aircraft; and

3. the subordination of Petitioners' seizure and detention rights to the retention rights asserted by NordTech et al.

Accordingly, the only issues to be debated before the Court are the following.

1. the cancellation of the D & O Charge, and

2. the authorization to seize and detain the Fokker Aircraft, and for these purposes the lifting of the stay of proceedings granted under the CCAA proceedings.

19 All the parties have made the following admissions :

« **Joint statement of facts**

1. Each of the Petitioners constitutes a « designated airport authority » under the Airport Transfer (Miscellaneous Matters) Act, R.S.C., c. A-10.4 (the « ATA »);

2. There are « landing fees, general terminal fees or other charges related to the use of an airport », as those terms are defined in the ATA (the « Fees »), owing to each of the Petitioners by the Debtor. The parties do not agree as to whether airport improvement fees shall constitute « Fees » for the purposes of Section 9.

3. The Fees owing by the Debtor to each of the Petitioners were set by each of the Petitioners in their respective capacities as designated airport authorities in respect of the airport operated by each of them. The quantum of the Fees is not admitted by Respondent Jetsgo Corporation.

4. The aircraft sought to be seized and detained by Petitioners are located in the Province of Quebec and are owned and operated by the Debtor;

5. The aircraft sought to be seized and detained by Petitioners are not exempt from seizure under a writ of execution issued by the Superior Court of the province of Quebec.

20 NAV, Jetsgo and the other parties have also agreed to the following joint statement of facts :

1. Nav Canada has a statutory mandate to provide all aircraft operators in Canadian sovereign or controlled airspace with civil air navigation services, as set forth in the Civil Air Navigation Services Commercialization Act, S.C. 1996, Chapter 20.

2. Nav Canada has provided civil air navigation services to the Debtor for which the Debtor owes to Nav Canada civil air navigation charges (« Nav Charges »).

3. The Nav Charges owing by the Debtor to Nav Canada were levied by the latter in accordance with its mandate under the Act.

4. On March 7th, 2005 Nav Canada issued an application in the Ontario Superior Court of Justice (the « Ontario Application ») seeking an order authorizing the seizure and detention of the aircraft;

5. On the same date, an agreement was reached with the Debtor as to payment of amounts outstanding for Nav Charges and Nav Canada agreed to withdraw the Ontario Application without prejudice.

6. The Debtor failed to complete the payments under the Letter Agreement and filed proceedings under the CCAA;

7. The aircraft sought to be seized and detained by Nav Canada are located in the Province of Quebec and are owned and operated by the Debtor.

8. The aircraft sought to be seized and detained by Nav Canada are not exempt from seizure under a writ of execution issued by the Superior Court of the province of Quebec.

21 Also, GTAA, Airport Authorities and Nav are seeking the cancellation of the Directors and Officers' charge.

22 GTAA, Airport Authorities and Nav are finally requesting the cancellation of paragraph 16.1 of the Initial Order which reads as follows :

« 16.1 AUTHORIZES Petitioner to pay, with the consent of the Monitor, and if deemed necessary by the Monitor, obtain Court approval concerning same, to its employees all wages owing in consideration of services rendered up until the date of this Order, and all wages and other amounts to which an employee is entitled under Part III of the Canada Labour Code, R.S.C. 1985, c. L-2, for which Directors may be held personally liable; »

ISSUES

A) Authorization to seize and detain :

23 There are presently two judgments relating to similar issues : one from the Court of Appeal of Quebec and the other from the Court of Appeal of Ontario. They address the interpretation of section 9 of the ATA and section 56 of the NAV Canada Act.

24 The Court has been informed that an application for leave to appeal to the Supreme Court of Canada has been filed from these two decisions, one on March 18, 2004 and the other on January 14, 2005. No decision has been rendered yet.

25 In the case of *Wilmington Trust Co.* vs. *Nav Canada* [1] , Mr. Justice Morissette writing for the majority of the Court of Appeal states :

[106] De l'ensemble de cette analyse, il se dégage que, en l'absence d'un texte spécifique et clair, les ordonnances de saisie-rétention prévues aux articles 9 (1) L.C.A. et 56 (1) L.C.S.N.A.C. ne peuvent avoir l'effet de conférer aux autorités aéroportuaires et à Nav Canada un droit de suite sur les aéronefs des appelantes non plus qu'un droit de préférence sur le produit de leur vente en justice ou sous contrôle de justice. Autrement dit, ces aéronefs ne sont tenus d'aucune façon aux dettes d'Inter-Canadien pour la simple et bonne raison qu'ils n'appartiennent pas à cette débitrice.

[107] On peut dès lors s'interroger sur la nature véritable des droits que prévoient les dispositions à l'étude. Avec égards, contrairement à ce qu'affirme le premier juge, celles-ci n'accordent pas un droit de rétention à Nav Canada et aux autorités aéroportuaires; ce qu'elles leur confèrent, c'est plutôt le droit d'obtenir une ordonnance qui, aux conditions que l'autorité judiciaire estimera appropriées, leur conférera alors, et seulement alors, le droit de saisir et retenir.

[108] De plus, à notre avis, il est erroné de dissocier les termes « saisir et retenir », en anglais « seize and detain », que l'on retrouve aux articles 9 (1) L.C.A. et 56 (1) L.C.S.N.A.C. Ces termes forment un tout et servent en réalité à qualifier la nature de l'ordonnance que Nav Canada ou les autorités aéroportuaires peuvent obtenir. En l'occurrence,

> il s'agit d'une ordonnance d'immobilisation des aéronefs. Sa finalité consiste à empêcher l'utilisateur de se servir du bien jusqu'au paiement des redevances dues.
>
> [109] Pour l'obtenir, Nav Canada et les autorités aéroportuaires n'ont pas à établir de lien spécifique entre l'aéronef qu'elles cherchent à immobiliser et les dettes qui ont été créées par l'utilisateur parce qu'aucun droit réel ne naît du prononcé d'une semblable ordonnance. Se révèle donc bien fondé l'argument proposé par les appelantes selon lequel les deux lois dont il s'agit ne confèrent aux autorités aéroportuaires et à Nav Canada qu'un simple moyen de pression.

26 Mr. Justice Morissette adds :

> « [110] Celui-ci est puissant mais d'un maniement délicat, car il peut précipiter la déconfiture de l'utilisateur. Son dosage dépend à la fois de l'initiative du créancier, que ce soit Nav Canada ou les autorités aéroportuaires, et du pouvoir d'appréciation et de pondération dont est investi le juge saisi de la demande. »
>
> (underlining added)

27 In the case of *Greater Toronto Airport Authority et al* vs. *International Lease Finance*[2], Mrs. Justice Cronk, writing for the majority, comes to the conclusion that the seizure and detention provided for in section 9 of the ATA and section 56 to the Nav Canada Act do not create any priority or preference and constitute a measure of pressure when and if granted by the Court.

28 The Court is of the view that the rulings of the Courts of Appeal apply in the present case notwithstanding the fact that Jestgo is the owner of the 15 Fokker Aircraft and not the lessee as in the cases before the Courts of Appeal.

29 The remedy provided for in section 9 of the ATA and 56 of the Nav Canada is to be authorized in the discretion of the Court.

30 Even if the seizure had been authorized prior to the Initial Order, that seizure would have been superseded by the effect of the Initial Order and the sale of the aircraft must then be made through the Monitor with the authorization of the Court and not as a consequence of the seizure.

31 In the case at bar, the Initial Order was issued on March 11 th , 2005 by this Court and the aircraft of Jetsgo were grounded and are presently located at the Quebec City Airport.

32 The Petitioners have not been in possession of these aircraft, which are under the control of the Monitor appointed by the Court. Jetsgo is trying to sell these 15 Fokker but they may not be sold without the autorization of this Court.

33 Considering the decisions of the Courts of Appeal cited above, the Court comes to the conclusion that there is no reason at this stage to lift the stay of proceedings to allow Petitioners to seize and detain the aircraft.

34 Allowing the seizure and setting money aside for Petitioners in these circumstances could jeopardize the restructuring and reorganization of Jestgo since, in all probabilities, the creditors would not agree to put aside almost half of the net proceeds of the sale of the assets for the benefit of the Petitioners who would have to wait for an extended period of time until the Supreme Court determines the rights contained in section 9 of ATA and section 56 of Nav Canada Act.

35 In an often quoted judgment on that subject, Mr. Justice Tysoe of the British Columbia Supreme Court summarized well what is meant by maintaining the status quo when a debtor company seeks the protection of the CCAA[3] :

> It is my view that the maintenance of the status quo is intended to attempt to accomplish the following three objectives:
>
> 1. To suspend or freeze the rights of all creditors as they existed as at the date of the stay order (which, in British Columbia, is normally the day on which the C.C.A.C. proceedings are commenced). This objective is intended to allow the insolvent company an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor.

2. To postpone litigation in which the insolvent company is involved so that the human and monetary resources of the company can be devoted to the reorganization process. The litigation may be resolved by way of the reorganization.

3. To permit the insolvent company to take certain action that is beneficial to its continuation during the period of reorganization or its attempt to reorganize or, conversely, to restrain a non-creditor or a creditor with rights arising after the stay from exercising rights that are detrimental to the continuation of the company during the period of reorganization or its attempt to reorganize. This is the objective recognized by Quintette and Alberta-Pacific Terminals. The first case to recognize that the maintenance of the status quo could affect the rights of non-creditors was Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1989), 72 C.B.R. (N.S.) 20, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139 (Q.B.). This is the objective that takes into account the broad constituency of interests served by the C.C.A.A. As the overriding intent of the C.C.A.A. is to facilitate reorganizations, this is the overriding objective of maintaining the status quo and it may produce results that are not entirely consistent with the other objectives. The most common example of an inconsistency is a situation where the giving of effect to this objective results in an unequal treatment of creditors.

36 Indeed, maintaining the status quo will involve balancing the interests of all the parties and avoiding advantages to some over the others. Under the CCAA, the restructuring process and the general interest of all the creditors is to be preferred over the particular interests of a class of creditors.

37 The Court concludes that the authorization to seize and detain the aircraft could cause a prejudice such that any reorganization process might fail.

38 Therefore, the Court dismisses Petitioners' Motions for seizure and detention of the Aircraft.

B) The Directors and officers'charge :

39 Paragraphs 21 and 22 of the Initial Order read as follows :

Directors Indemnification and Charge

21. Orders that, in addition to any existing indemnities, Petitioner shall indemnify each of the Directors from and against the following (collectively, "**D&O Claims**");

(a) all costs (including, without limitation, full defence costs), charges, expenses, claims, liabilities and obligations, of any nature whatsoever, which may arise on or after the date of the Order or as a result of the cessation of operations (including, without limitation, an amount paid to settle an action or a judgment in a civil, criminal, administrative or investigative action or proceeding to which a Director may be made a party), provided that any such liability relates to such Director in that capacity, and, provided that such Director (i) acted honestly and in good faith in the best interests of Petitioner and (ii) in the case of a criminal or administrative action or proceeding in which such Director would be liable to a monetary penalty, such Director had reasonable grounds for believing his or her conduct was lawful, except if such Director has actively breached any fiduciary duties or has been grossly negligent or guilty of wilful misconduct; and

(b) all costs, charges, expenses, claims, liabilities and obligations relating to the failure of Petitioner to make any payments or to pay amounts in respect of employee or former employee entitlements to wages, vacation pay, termination pay, severance pay, pension or other benefits, or any other amount for services performed on or after the date of the Order and that such Directors sustain, by reason of their association with Petitioner as a Director, except to the extent that they have actively breached any fiduciary duties or have been grossly negligent or guilty of wilful misconduct.

The foregoing shall not constitute a contract of insurance or other valid and collectible insurance, as such term may be used in any existing policy of insurance issued in favour of Petitioner or any of the Directors.

> 22. DECLARES that, as a security for the obligation of Petitioner to indemnify the Directors pursuant to paragraph 21 hereof, the Directors are hereby granted a hypothec on, mortgage of, lien on and security interest in the Property to the extent of the aggregate amount of $5,000,00.00 (the "D&O Charge"), having the priority established by paragraphs 30 and 31 hereof. Such D&O Charge, shall not constitute or form a trust. Such D&O Charge, notwithstanding any language in any applicable policy of insurance to the contrary, shall only apply to the extent that the Directors do not have coverage under any directors' and officers' insurance, which shall not be excess insurance to the D&O Charge. In respect of any D&O Claim against any of the Directors (collectively, the "Respondent Directors"), if such Respondent Directors do not receive confirmation from the applicable insurer within 21 days of delivery of notice of the D&O Claim to the applicable insurer, confirming that the applicable insurer will provide coverage for and indemnify the Respondent Directors, then, without prejudice to the subrogation rights hereinafter referred to, Petitioner shall pay the amount of the D&O Claim upon expiry. Failing such payment, the Respondent Directors may enforce the D&O Charge provided that the Respondent Directors shall reimburse Petitioner to the extent that they subsequently receive insurance benefits for the D&O Claim paid by Petitioner, and provided further that Petitioner shall, upon payment, be subrogated to the rights of the Respondent Directors to recover payment from the applicable insurer as if no such payment had been made. »

40 Petitioners are asking the Court to cancel the D&O Charge since there is an insurance policy covering the Directors and Officers' liability for $10,000,000.00 and said policy will be in force until July 9th, 2005. The second Monitor's report states that the Director, Michel Leblanc, may be liable for statutory severance pay pursuant to the *Canadian Labour Code* in the approximate amount of $2.5 million, for amounts advanced by the company's pilots, aggregating $2,900,000.00, for unpaid deduction at source $430,000.00 and for an amount of approximately $3,050,000.00 claimed pursuant to the Canadian Air Transport Security.

41 The Monitor states that it is important that the D&O Charge be maintained in order to secure the cooperation of Michel Leblanc in the restructuring efforts and in the orderly disposal of the assets.

42 The purpose of creating the D&O Charge is to protect the Directors and Officers against liabilities that they could incur during the restructuring and reorganization of the company. As Pamela L.J. Huff and Line A. Rogers write in the Commercial Insolvency Reporter [4]:

> Thus, against the backdrop of a potential business failure, a CCAA restructuring creates new risks and potential liabilities for another group of critical participants in an insolvency : the directors and officers of a debtor corporation. It has become standard to include in an initial order a charge securing the indemnity granted by the debtor to directors and senior corporate officers (including a Chief Restructuring Officer, who may be court- appointed) against liabilities that emerge during and, sometimes, prior to, a CCAA filing.

43 However, the Court takes into account that there is a D&O liability insurance policy in force for an amount of $10,000,000.00.

44 Maintaining the D&O Charge for pre-filing liability would create a preference in favour of otherwise unsecured creditors.

45 The purpose of the D&O Charge is not to overprotect the Directors and Officers and the Court finds appropriate to limit the D&O Charge to post-filing liabilities in the present case.

C) Payment of employees wages:

46 Petitioners ask for the cancellation of paragraph 16.1 of the Initial Order which reads as follows:

> AUTHORIZES Petitioner to pay, with the consent of the Monitor, and if deemed necessary by the Monitor, obtain Court approval concerning same, to its employees all wages owing in consideration of services rendered up until the date of this Order, and all wages and other amounts to which an employee is entitled under Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2, for which Directors may be held personally liable; »

47 In accordance with paragraph 16.1 of the Initial Order, Jetsgo, with the consent of the Monitor (and possibly the Court approval), could pay its employees all wages owing up until the date of the Order and all wages and other amounts to which they would be entitled under Part III of the *Canada Labour Code*.

48 The Court is of the view, that this issue can be resolved by modifying paragraph 16.1 of the Initial Order by subjecting the payment to the Court's prior approval:

49 The modified paragraph16.1 will read as follows :

> AUTHORIZES Petitioner to pay, with the consent of the Monitor if deemed necessary by the Monitor and with the Court's prior approval, to its employees all wages owing in consideration of services rendered up until the date of this Order, and all wages and other amounts to which an employee is entitled under Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2, for which Directors may be held personally liable;

50

51 *GRANTS* in part Petitioners' Motions.

52 *DISMISSES* Petitioners' Motions for the issuance of a seizure and detention.

53 *ORDERS* that the D&O Charge in the Initial Order, as extended on April 8, 2005, be limited to liabilities arising after filing on Mach 11, 2005.

54 *ORDERS* that paragraph 16.1 of the Initial Order extended on April 8, 2005 be replaced by the following :

> AUTHORIZES Petitioner to pay, with the consent of the Monitor if deemed necessary by the Monitor and with the Court's prior approval, to its employees all wages owing in consideration of services rendered up until the date of this Order, and all wages and other amounts to which an employee is entitled under Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2, for which Directors may be held personally liable;

55 Without costs.
Solicitors of record:
Ogilvy, Renault, for Debtor
Blake Cassels & Graydon, for Aeroturbine Inc.
Goldstein, Flanz & Fishman, for AeroUSA, Airplanes IAL Finance, Airplanes Holding Limited, GE Capital Aviation Services Inc., Jets MD Lease Limited, Calyon Aviation Group
Cassels Brock & Blackwell, for AeroUSA, Airplanes IAL Finance, Airplanes Holding Limited, GE Capital Aviation Services Inc., Jets MD Lease Limited, Calyon Aviation Group
Langlois Kronström Desjardins, for Montreal Airports, Vancouver International Airport Authority, Ottawa MacDonald-Cartier International Airport Authority, Winnipeg Airports Authority Inc., Québec City Airport Inc., Edmonton Regional Airports Authority, Calgary Airport Authority and Ha
Osler, Hoskin & Harcourt, for Greater Toronto Airport Authority
Koskie Minsky, for Jetsgo Pilots' Association
McCarthy Tétrault, for RSM Richter Inc.
Fasken Martineau Dumoulin, for Moneris Solutions Corporation
Fasken Martineau DuMoulin, for Moneris Solutions Corporation
Gowling Lafleur Henderson, for National Bank of Canada
Goling Lafleur Henderson, for NAV Canada
Côté, Marcoux & Joyal, for Procureur général du Canada
Chaitons LLP, for Red Seal Tours Inc.
Heenan Blaikie, for Rolls-Royce

Desjardins Ducharme Stein Monast, for Med-Air Inc.

Footnotes

1 [2004] R.J.Q. (C.A.) p. 2988

2 Dominion Law Reports 235 D.L.R. (4th) 618

3 Woodward's Ltd (Re), (1993) 100 D.L.R. (4th) 133 (B.C.S.C.) p. 140

4 Commercial Insolvency Reporter, Volume 16, Number 6, August 2004, p.66

End of Document

TAB 9

2013 BCSC 2043
British Columbia Supreme Court

League Assets Corp., Re

2013 CarswellBC 3408, 2013 BCSC 2043, [2013] B.C.W.L.D. 9463,
[2013] B.C.W.L.D. 9464, 234 A.C.W.S. (3d) 837, 7 C.B.R. (6th) 74

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

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, As Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, As Amended

In the Matter of A Plan of Compromise and Arrangement of League Assets Corp. and Those Parties Listed on Schedule "A" Petitioners

Fitzpatrick J.

Heard: October 25, 2013
Judgment: November 8, 2013
Docket: Vancouver S137743

Counsel: D.E. Gruber, T.M. Tomchak, R. Morse, T.C. Louman-Gardiner for Petitioners
J.R. Sandrelli, T.R.M. Jeffries for PricewaterhouseCoopers Inc. as Monitor
C.D. Brousson for Quest Mortgage Corp., Quest Capital Management Corp.
K.E. Siddall for BCMP Mortgage Investment Corporation and Interior Savings Credit Union
Geoffrey Thompson, R.B. Dawkins for TCC Mortgage Holdings Inc. FCC Mortgage Associates Inc., Citizens Bank of Canada, First Calgary Financial Credit Union Limited, Firm Capital Mortgage Fund Inc.
A. Frydenlund for Canadian Western Bank
S.H. Stephens for Romspen Investment Corporation
D.B. Hyndman for Business Development Bank of Canada
William C. Kaplan, Q.C., H. Sevenoaks, for Timbercreek Mortgage Investment Corporation
W.E.J. Skelly for Ad Hoc Committee of Convertible Promissory Noteholders of League Opportunity Fund Ltd.
H. Ferris for Export Development Canada, Bank of Montreal and Churchill Real Estate Inc.
G.J. Gehlen for Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (Proposed DIP Lenders)
P.J. Reardon for Maxium Financial Services
D.K. Fitzpatrick for Roynat Inc.
J. Grieve for Proposed Representative / Investors

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

League Group obtained protection under Companies' Creditors Arrangement Act and initial order was granted — Majority of League Group entities were owned by IGW Assets Limited Partnership — League Group sought approval of debtor in possession (DIP) facility from DIP Lenders for operating funding, payment of tax arrears, mortgage payments and to payout existing mortgage lenders — League Group brought application for DIP financing claiming it urgently needed interim funding until comeback hearing — Notice of application for DIP financing was given to secured creditors and secured creditors objected — Proposed DIP lender's charge was to rank after administration charge but before director's charge and any representative counsel charge — Most of assets owned by League Group were complex real estate holdings — Application for DIP facility granted to extent of $1.6 million needed to time of comeback hearing — DIP financing sought on application was urgently needed in order to fund operations within proceedings until comeback hearing — Funding would enhance prospects of arrangement by League Group to creditors — Nature of assets of League Group was such that even if secured creditors were to take steps to realize on their security, they would inevitably be incurring some of same types of expenses as were being proposed to be paid in accordance with cash flow forecast — Secured creditors would suffer some prejudice in terms of delay in realization of their security in event of failure to restructure by League Group — Beyond that there was no material prejudice to secured creditors given debt levels disclosed — Allocation provision proposed would alleviate many of secured creditors' concerns as to how DIP lender's charge might be borne.

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

Appointment of representative counsel — League Group obtained protection under Companies' Creditors Arrangement Act and initial order was granted — Majority of League Group entities were owned by IGW Assets Limited Partnership — League Group sought approval of debtor in possession (DIP) facility from DIP Lenders for operating funding, payment of tax arrears, mortgage payments and to payout existing mortgage lenders — League Group brought application for DIP financing claiming it urgently needed interim funding until comeback hearing — Notice of application for DIP financing was given to secured creditors and secured creditors objected — Proposed DIP lender's charge was to rank after administration charge but before director's charge and any representative counsel charge — Most of assets owned by League Group were complex real estate holdings — Monitor brought application to appoint representative counsel for investor group — Monitor's application granted — Appointment of representative counsel was appropriate — Monitor was not able to assist any further in alerting investors to proceedings, organizing investor group and advising them of issues that may affect them either as group or individually — Investor group was significant one and it was important that they be properly represented so they could take appropriate positions in insolvency proceedings — It was somewhat imperative that investors obtain legal representation in respect of comeback hearing — Investor group had sufficient commonality of interest that could best be served by one counsel — Appointment of representative counsel would allow their positions to be advanced in efficient manner to benefit of stakeholders.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 9398 (Ont. S.C.J. [Commercial List]) — considered

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — referred to

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — followed

Catalyst Paper Corp., Re (2012), 2012 CarswellBC 883, 2012 BCSC 451, 89 C.B.R. (5th) 292, 98 C.C.P.B. 1, 2012 C.E.B. & P.G.R. 8481 (B.C. S.C.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — followed

Eron Mortgage Corp., Re (1998), 56 B.C.L.R. (3d) 220, [1999] 4 W.W.R. 375, 1998 CarswellBC 1851 (B.C. S.C.) — referred to

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — considered

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — considered

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — considered

TBS Acquireco Inc., Re (2013), 3 C.B.R. (6th) 261, 2013 CarswellOnt 9481, 2013 ONSC 4663 (Ont. S.C.J. [Commercial List]) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 1466, 2012 ONSC 948, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 (Ont. S.C.J. [Commercial List]) — followed

Timminco Ltd., Re (2012), 2 C.B.R. (6th) 332, 2012 CarswellOnt 9633, 2012 ONCA 552 (Ont. C.A.) — referred to

Statutes considered:

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

s. 2 "debtor company" — considered

s. 3 — considered

s. 11 — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.52(1)(c) [en. 2007, c. 36, s. 66] — considered

s. 11.52(2) [en. 2007, c. 36, s. 66] — considered

APPLICATION by group of companies for debtor in possession financing; APPLICATION by monitor for appointment of representative counsel for investor group.

***Fitzpatrick J.*:**

Introduction

1 This proceeding was recently commenced, on October 17, 2013, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). On October 18, 2013, an Initial Order (the "Initial Order") was granted by Madam Justice Brown of this court. That Initial Order included an Administration Charge of $750,000 and a Directors' Charge of $500,000. PricewaterhouseCoopers Inc. was appointed as Monitor (the "Monitor").

2 The organization of the petitioner group of companies (the "League Group") is exceedingly complex, as I will describe in more detail below. In broad terms, there is a complicated corporate structure comprised of real estate investment trusts, limited partnerships and corporations involved in the development and/or management of various real estate projects in British Columbia, Alberta, Ontario and Quebec. The assets of the League Group include certain securities and income producing and development properties which have been said to have an "implied" equity of over $210 million. Liabilities of the League Group are in excess of $410 million, including claims from approximately 3,200 investors who paid approximately $352 million for various interests.

3 The comeback hearing has been scheduled for November 18, 2013. Following the granting of the Initial Order, various secured creditors on individual projects have consolidated their opposition to these proceedings. It is expected that they will raise substantial issues at the comeback hearing.

4 In the meantime, the League Group has brought this application for debtor in possession or "DIP" financing, given its contention that it urgently needs interim funding until the comeback hearing. The Monitor has also brought an application to appoint representative counsel for the investor group.

5 On October 25, 2013, I heard both applications and granted both orders, although on somewhat different terms than those sought. I indicated at that time that my reasons would follow. These are those reasons.

Background

6 Emanuel Arruda and Adam Gant started the League Group in 2005 with two projects. Further properties were acquired on the same basis as before, namely using traditional bank financing and individual investor contributions.

7 At present, the majority of the League Group entities are owned by IGW Assets Limited Partnership ("LALP"). The general partner of this limited partnership is owned by two numbered companies, which are owned or controlled by Mr. Arruda and Mr. Gant's family trusts respectively.

8 The League Group, which has sought and obtained protection under the *CCAA* and related entities, and their general business activities can be generally summarized as follows:

a) IGW Real Estate Investment Trust ("IGW REIT"): IGW REIT does business mainly through the IGW REIT Limited Partnership ("IGW LP") which undertakes certain project development directly or through separate limited partnerships located in B.C., Alberta, Quebec and Ontario. IGW REIT has issued various notes totalling approximately $10 million. In addition, there are numerous unsecured loans outstanding and outstanding mortgages in respect of various projects;

b) LALP project specific limited partnerships: LALP also operates another set of such limited partnerships designed for short term investments, located in B.C., Alberta and Ontario. Each project general partner is owned by LALP with investors buying units in the limited partnership. Some of the project entities are said to be solvent and not financially tied to the filing petitioners (such as through guarantees) and are therefore not filing parties themselves;

c) League Assets Corp. ("LAC"): LAC owns various general partners of a number of limited partnerships which are involved in various projects, the main ones being Redux Duncan, Colwood Development and Fort St. John, all located in B.C. There are other entities owned by LAC with diverse, but it seems mostly inactive, operations. As with LALP, a number of LAC related entities (and hence projects) are said to be solvent and not financially tied to the filing petitioners. They are therefore not filing parties themselves;

d) "Other" project limited partnerships: these have a similar structure to that of LAC and LALP, save that Mr. Gant and Mr. Arruda own the general partners for the project specific limited partnerships in B.C., Quebec and Ontario. This is said to be an oversight and in any event, these "other" limited partnerships are managed within the League Group, with LAC providing management services for these projects;

e) League Opportunity Fund ("LOF"): LOF is wholly owned by LALP. It is a vehicle for investors and it has issued promissory notes of approximately $13.5 million. The money was loaned by LOF to other members of the League Group. IGW LP(majority owned by IGW REIT) and LAC have guaranteed these notes;

f) investment and wealth management: there are a number of entities within the League Group's investment division which relate to investment and wealth management, including the Harris Fraser Group Limited which was recently acquired in July 2013; and

g) asset management: LAC is retained by IGW REIT, IGW LP and various project limited partnerships to provide asset management, for which it charges fees.

9 The causes of the League Group's financial difficulties have been attributed to a number of factors. Firstly, the 2008 worldwide financial crisis caused a number of delays to certain projects; reduced demand resulted in increased borrowing costs in the long term. Secondly, the recovery from the financial downturn has resulted in many investors seeking to redeem their investments with the League Group to look for higher risk/higher return investments. Thirdly, financing difficulties have been experienced on some projects, such as Redux Duncan and Colwood Development. Generally speaking, Mr. Gant states that the League Group has outgrown both its current corporate structure, which is too complex, and also its project by project funding model.

10 The League Group currently has approximately 105 employees in various roles in Victoria, Vancouver, Toronto and Calgary. The fairly recent acquisition of the Harris Group is adding a further 20 employees in Hong Kong.

11 There has been substantial evidence introduced in Mr. Gant's affidavits regarding the value of the various assets and projects and the secured debt against them. Aside from some Marketable Securities, there are 17 income producing properties and four development properties, for a total of 21 properties.

12 There are 34 mortgage lenders and some have charges on multiple properties. Exhibit "E" to Mr. Gant's affidavit #2 sets out a summary of the various properties or projects, including the appraised values ($395.6 million), the outstanding mortgage debt ($184.6 million) and the "implied equity" in those properties or projects. I will revisit the reliability of this document in further detail below, but it will suffice at this stage to refer to the indicated "implied equity" in the Marketable Securities ($5.8 million), Income Producing Properties ($76.2 million) and Development Properties ($128.9), for a total of approximately $211 million.

13 Unsecured creditors include the note holders in the various project limited partnerships and IGW REIT, inter-corporate debt primarily between IGW LP and other members of the League Group, trade creditors (mostly relating to Colwood Development) and professional service firms (although some of them recently obtained security for their debts just before the filing).

14 Mr. Gant indicates that government remittances are substantially up to date, including those owed to Canada Revenue Agency and the British Columbia government. Income taxes are paid in full for 2012. All of these amounts continue to be paid in the ordinary course of business. However, property taxes are substantially in arrears.

15 Finally, the investor group is comprised mostly of individuals and Mr. Gant believes that some of them have invested a significant portion of their net worth in the League Group. There are also some institutional investors. As of September 2013, IGW REIT ceased making distributions to its investors.

16 Mr. Gant states that the League Group has already taken steps to attempt a restructuring but has been hampered by the lack of funds. He states that any restructuring would likely involve: simplifying the corporate structure, divesting underperforming projects, seeking a stable and comprehensive funding for the various projects, changing the IGW loan process and finally, a potential public offering to increase equity and reduce credit requirements.

Secured Creditor's Objections

17 It quickly became apparent during this hearing that a substantial number of the secured creditors were opposed to these proceedings generally and also specifically opposed to the relief sought on these applications. The secured creditors appearing on these applications included BCMP Mortgage Investment Corporation, Interior Savings Credit Union, Firm Capital Mortgage Fund Inc., Citizens Bank of Canada, First Calgary Financial Credit Union Limited, Canadian Western Bank, Romspen Investment Corporation, Business Development Bank of Canada, Timbercreek Mortgage Investment Corporation, Export Development Canada, Bank of Montreal, Churchill Real Estate Inc., Maxium Financial Services and Roynat Inc.

18 I will not address the complaints or arguments of each individual secured creditor. Many of the arguments are interrelated. Those arguments can be generally summarized in the broad categories as follows:

> a) Service/notice: despite the preamble to the Initial Order stating that the court was advised "that the secured creditors and others who are likely to be affected by the charges created herein were given notice", many of the secured creditors state that they did not receive any notice of that hearing or that notice was sent directly to the general offices of the secured creditors which inevitably meant that it was not addressed by them after the hearing had taken place.
>
> No evidence was before me concerning service/notice to the secured creditors. It is apparent that many of the secured creditors intend to argue at the comeback hearing that the Initial Order was granted on an *ex parte* basis and is therefore subject to being set aside for material non-disclosure, including that there was no true urgency in hearing the matter on an *ex parte* basis. It is now generally agreed that the comeback hearing will be heard on a *de novo* basis with the League Group having the onus of justifying to the court the continuation of the provisions in the Initial Order in accordance with the *CCAA*, s. 11.02(3).

b) Statutory Prerequisites: it is argued that individual entities within the League Group do not meet the definition of "debtor company" in s. 2 of the *CCAA* (i.e. they are not "insolvent") and therefore, those entities do not qualify to file for protection under s. 3. I note, however, that this particular issue was addressed before Brown J. prior to the granting of the Initial Order.

In addition, at least one secured creditor intends to argue that the Initial Order should be set aside because the plan of arrangement was doomed to fail (see for example, *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, [1990] B.C.J. No. 2384 (B.C. C.A.));

c) The Enforcing Mortgagees: The secured creditors argue that there was no justification for two of the secured creditors, being TCC Mortgage Holdings Inc. ("TCC") and Quest Mortgage Corp. ("Quest"), being exempted from the stay under the Initial Order (para. 18).

TCC had commenced foreclosure proceedings in May 2013 in respect of the Redux Duncan property. An Order Nisi of foreclosure was granted in August 2013 with the redemption period due to expire in January 2014. Apparently, TCC had brought an application for the appointment of a receiver about the time that the Initial Order was granted. In addition, Quest's mortgages over the Colwood Development property were in default and demands for payment were served in early October 2013. The time for enforcement of those demands would have expired just before the granting of the Initial Order. It is my understanding that Quest has now also commenced a foreclosure proceeding against the Colwood Development.

Unfortunately, the exclusion of these "Enforcing Mortgagees" has engendered a response by the other secured creditors who, not surprisingly, wish to be treated in the same fashion. The fact that they are being treated differently has given rise to the other secured creditors taking the position that these proceedings are, unfairly, affecting only them in terms of their ability to enforce their security. In addition, it is only their security which is being primed by the various charges granted in these proceedings, since the security of the Enforcing Mortgagees has been exempted from the Administration Charge and the Directors' Charge and it is also proposed to be exempted from any DIP Lender's Charge or Representative Counsel Charge.

In many *CCAA* proceedings, foreclosing mortgagees are stayed in a variety of circumstances including when they have already begun enforcement proceedings. Although it was described as an"Enforcing Mortgagee" in the Initial Order, Quest had not yet commenced any foreclosure proceeding or at best, had only recently filed the action. Reasons for the exclusion of these parties were said to be not only that there were monetary defaults under their security, but also to avoid arguments by them as to the appropriateness of this *CCAA* proceeding, based on well-known British Columbia authorities such as *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.). Accordingly, while the League Group may have avoided that argument from the Enforcing Mortgagees, the decision to exempt them has resulted in the other secured creditors now being resolved to make those same arguments, in addition to arguing that the League Group was not acting in good faith by agreeing to that exemption.

My only preliminary comment on the issue at this point is that while the court strives to achieve fairness in the proceedings, the task of the court in imposing the stay is in part to ensure that it is "appropriate": *CCAA*, s. 11.02(3)(a). As Deschamps J. stated in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), appropriateness in part extends to treating stakeholders "as advantageously and fairly as the circumstances permit": para. 70. Often there are good reasons to depart from a blanket stay affecting various stakeholders, as is evidenced from the provisions of the model order. Typical examples would include payment of employees and critical suppliers. However, in respect of stakeholders having what seems to be a commonality of interest (and commonality of potential prejudice), I would expect that there would be cogent and compelling evidence to support an order that treated them differently.

d) The "White Boxes" Entities: The secured creditors also make certain arguments in respect of certain members of the League Group who are *not* part of the petitioning group. I have already referred to the extremely complex

structure of the League Group. The organizational chart includes various entities marked in yellow which are part of the League Group and who are also petitioning debtors. Many other entities are identified in what have been called the "white boxes" on the organization chart which include those entities that were not part of the petitioning debtor group. I have already referred to some of these "white box" entities above, but it is said by Mr. Gant that they also generally include firstly, shell companies where there are no assets and secondly, entities where the sole liability is to investors and as such, they are not insolvent.

The secured creditors argue that the exclusion of these "white box" entities is suspicious in that there has been inadequate disclosure of the financial circumstances relating to them. In particular, the suggestion has been made that there may be sufficient income or assets in those other entities to support the operations of the League Group in these proceedings without the necessity of priming charges which prejudice their security. If these entities are indeed solvent, then this argument would appear to be diametrically opposed to the other argument of some secured creditors (discussed above) that only *insolvent* entities should be petitioning debtors.

Despite these objections, and for the purposes of these applications, I am satisfied that the materials generally disclose the circumstances relating to these "white box" entities and why these entities have not been included in the *CCAA*filing. I do, however, appreciate that the stakeholders, including the secured creditors, may require further information about these "white box" entities beyond what is contained in Mr. Gant's affidavits. I expect that the League Group, possibly with the assistance of the Monitor, can provide reasonable and relevant material to them so that they might explore this matter. At present, I simply acknowledge that this may be the basis for arguments to be advanced by the secured creditors at the comeback hearing in respect of whether the League Group is operating in a *bona fide* manner.

e) Conflicts: Last, but not least, the secured creditors have raised a number of conflicts on the part of counsel involved in these proceedings. It is clear to me that these conflicts have significantly coloured the perceived fairness of these proceedings from the outset. The original counsel for the League Group (who has since withdrawn) disclosed, after the Initial Order was granted, that she has also acted in the past for Quest. Some of the secured creditors intend to argue at the comeback hearing that there was material nondisclosure of this conflict to Brown J. and that this relationship between the law firm and Quest may have affected the League Group's decision to exclude Quest from the stay.

In addition, in the days following the granting of the Initial Order and in the face of the League Group's application for DIP financing, it was disclosed that the law firm acting for the Monitor (who ceased to act at the end of this hearing) had also undertaken to act for the DIP Lenders in respect of the preparation of financing documents. The explanation is that the DIP Lenders urgently required counsel to address the League Group's pressing need for this DIP financing. Although screens were put in place between the individual lawyers at the law firm, it has unfortunately resulted in the perception that the Monitor's support of the DIP financing, or at least the legal advice relating to the Monitor's support, has been influenced by that relationship. This turn of events was extremely unfortunate, particularly in light of the unquestioned duties of the Monitor as an officer of this court and its overriding duty to act fairly in respect of all stakeholders, whether they are in support of or opposed to the DIP financing.

Finally, current counsel for the League Group has disclosed that his law firm is an unsecured creditor. I am not aware of any objections arising from this fact. However, it does appear that the law firm was giving legal advice to the DIP Lenders at one point.

19 I am advised that all of the issues above may be raised at the comeback hearing. In addition, the secured creditors raised these issues on this application arguing that, in these circumstances, the court should be extremely reluctant to authorize DIP financing and grant a DIP charge or any other charge based on the substantial attacks that will be made on the Initial Order and on the continuation of this proceeding. It is no doubt the strategy of the secured creditors at this time to attempt to inject sufficient uncertainty into these proceedings such that any DIP lender will be reluctant to advance monies to the League Group.

20 It not my intention or role at this time to revisit the basis upon which the Initial Order was granted. Presumably, the Initial Order was granted having regard to the statutory requirements under the *CCAA* and based on well-known principles applicable on such applications, including those set out in *Century Services Inc.* at paras.15-18, 57-71. I appreciate that the issues raised by the secured creditors are significant and if substantiated, may have serious consequences. Nevertheless, I am not convinced that these arguments are sufficient to dissuade the court from granting interim relief at this time, simply to see the League Group through to the comeback hearing, some 24 days away at the time of this hearing.

21 Accordingly, it is my intention to proceed to hear and decide these applications before me based on the Initial Order being extant and based on the updated and current circumstances of the League Group. I have specifically rejected the suggestion of one of the secured creditors to grant these orders on a "without prejudice" basis.

DIP Financing

22 In its application materials, the League Group sought approval of a DIP facility in the amount of $31.5 million from Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (whom I will collectively call the "DIP Lenders"). This proposed facility was not only for what was said to be operating funding for the next 13 weeks ($5 million), but for other purposes such as payment of tax arrears ($3.5 million), mortgage payments for 13 weeks($5 million) and to payout one of the existing mortgage lenders, TCC ($18 million).

23 Despite this, the League Group only sought a DIP Lender's Charge of $1.6 million which was said to be the amount of emergency funding that was urgently needed to get to the comeback hearing on November 18. The DIP Lenders supported this restricted charge, based on their submissions that they had no intention of funding, save and except with a DIP Lender's Charge. I understand that given the urgency, and despite the objections of the secured creditors, the DIP Lenders are prepared to immediately fund this amount and in doing so, waive the following conditions: that advances would only be made after expiry of the appeal period and that certain administrative matters, such as insurance, be in place.

24 The test for DIP funding is now mandated by the *CCAA*, s. 11.2:

> **Interim financing**
>
> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **Priority — secured creditors**
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **Priority — other orders**
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;

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

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

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

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

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

25 In accordance with the *CCAA*, s. 11.2(1), the League Group has filed a cash flow forecast to the date of the comeback hearing.

26 As a preliminary matter, no one has challenged the adequacy of the efforts by the League Group to obtain satisfactory interim financing. Nor is there any challenge to the appropriateness of the business terms arranged with the DIP Lenders, including the term, interest rate and level of various fees for monitoring the commitment itself and professionals. The Monitor comments favourably on the process by which the DIP financing was sought by the League Group and the reasonableness of the terms proposed by the DIP Lenders.

27 It is proposed that the DIP Lender's Charge would rank after the Administration Charge but before the Directors' Charge and any Representative Counsel Charge.

28 Notice of this application for DIP financing has been given to secured creditors likely to be affected, as required by the *CCAA*, s. 11.2(1). The secured creditors attending on this application object to the financing for a variety of reasons (as discussed above), and also on the basis that this funding is not urgent, there is an insufficient evidentiary basis for the relief sought and that they will be prejudiced by the DIP Lender's Charge ranking ahead of their security.

29 I will address each of the factors identified in *CCAA*, s.11.2(4).

(a) The period during which the League Group is expected to be subject to proceedings under the CCAA

30 The DIP financing that is sought today is simply to allow the League Group to continue its operations until the comeback hearing on November 18 by allowing it to make certain core payments.

(b) How the League Group's business and financial affairs are to be managed during the proceedings

31 Mr. Gant states in his affidavit that the League Group has been working closely with the Monitor regarding its financial affairs, including reviewing all payments made by the League Group. The Monitor similarly says that it has been working cooperatively with the League Group in terms of preparing the cash flow forecast and other financial documentation.

32 In addition, the League Group had already made certain efforts to reduce operating expenses in anticipation of the *CCAA* filing.

(c) Whether the League Group's management has the confidence of its major creditors

33 Not surprisingly, most of the counsel for the secured creditors appearing on this application voiced their clients' lack of confidence in the League Group's management. However, these types of bald assertions, without more, and without evidence, do little to provide the court with a satisfactory basis upon which to assess this factor. In addition, the position of the secured creditors must be considered in the context of other evidence that suggests that they are fully secured and that payments owed to them by the League Group are current: *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]) at para. 49(c).

34 Counsel for certain noteholders of LOF raised the matter of governance of the League Group during his submissions. While supporting the application for DIP financing, it appears that those stakeholders are considering whether an application for a chief restructuring officer (CRO) might be appropriate in the circumstances. I do not wish or need to predict what might happen at the comeback hearing or any later court application but presumably, if an application for such relief is brought, it will be based on evidence as to the willingness and/or ability of the current management of the League Group to proceed with its restructuring efforts.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made by the League Group

35 Substantial arguments were advanced, by a number of the secured creditors, that the DIP funding was not necessary or urgent. With respect, I disagree.

36 The cash flow forecast indicates that in the period leading up to November 18, approximately $1.6 million will be required in respect of corporate operating expenses. A large portion of that amount, $1.1 million, will be required for payroll, with the first payroll of approximately $550,000 due the very date of the hearing and the second payroll being due on November 8, 2013. The cash flow forecast indicates proposed payments of $339,000 for "project funding" which I am advised relates to supporting certain income producing properties which are operating on a negative cash flow basis. Notwithstanding that the evidence on the project operating expenditures is somewhat thin, in my view, it is reasonable to expect that the League Group has some ongoing operations in the specific projects that require support in this interim period. Again, I would emphasize that it is the overarching intention of the League Group to conduct business in the ordinary course, at least in the initial period of the restructuring until a longer term strategy can be formulated.

37 The anticipated cash receipts of approximately $1.9 million over this time frame are clearly not sufficient to fund the anticipated costs of approximately $3.5 million. Nor is the timing of some of those receipts during the week of October 28 certain in terms of making the payroll as soon as possible after it was due on October 25.

38 Finally, the cash flow forecast anticipates restructuring and financing costs of $1.45 million until the comeback hearing. There are strenuous objections to payment of these amounts; however, it cannot be argued that professionals who are assisting in the restructuring of these proceedings should be denied payment of their reasonable remuneration on an ongoing basis, if such payments are possible: *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para. 66. The amounts are large but not unusual given the complexity of these proceedings and the issues raised. These professionals should not be required to simply rely on a court ordered charge to protect their outstanding fees. The Administration Charge in any event would not have been sufficient to cover the amounts expected to be incurred to the date of the comeback hearing.

39 Further, if they wish, the stakeholders will have the opportunity to review all professional fees at the end of this matter. In particular, paragraph 34 of the Initial Order provides that the Monitor and its legal counsel will pass their accounts before this court. Paragraphs 6 and 7 of the Initial Order provide for the payment of *reasonable* fees and disbursements to the League Group's counsel.

40 Without the proposed DIP funding, the League Group readily admits that it will be unable to continue. The Monitor states:

> ... If the financing is not approved, the current liquidity situation is such that League will not be able to fund payroll on Friday, October 25th, which will require an immediate cessation of operations and the accompanying liquidation of its assets in a forced and distressed manner.

41 I am satisfied that the DIP financing sought on this application is urgently needed in order to fund operations within these proceedings until the comeback hearing. Accordingly, I agree that such funding will enhance the prospects of an arrangement by the League Group to its creditors.

(e) The nature and value of the League Group's property

42 As I have stated numerous times, many of the secured creditors oppose the continuation of this proceeding and wish to take steps to realize on their security.

43 Most of the assets owned by the League Group are complex real estate holdings including income producing properties and development properties, some of which are not yet completed.

44 The Monitor points out what might be said to be fairly obvious; namely, that such a realization scenario is not in the interests of the creditors, including even these secured creditors, or the numerous other stakeholders in these proceedings:

> A forced and distressed liquidation is clearly not in the interests of the creditors or Investors, nor is it in the interests of many of the mortgage lenders who do not enjoy first mortgage security and whose security is spread across multiple properties and assets. Such lenders will then be compelled to deal with complicated scenarios where their recovery on one property will determine the extent to which they must rely on another property for the recovery of their loans. If a liquidation of League's assets is to occur, it is imperative that such a liquidation should occur on an orderly and controlled basis.

45 In addition, as pointed out by counsel for the League Group, the nature of the assets is such that even if the secured creditors were to take steps to realize on their security, they would inevitably be incurring some of the same types of expenses, including professional fees, as are currently being proposed to be paid in accordance with the cash flow forecast: *Pacific Shores Resort & Spa Ltd.* at para. 49(f).

(f) Whether any creditor would be materially prejudiced as a result of the DIP Lender's Charge

46 The issue of material prejudice to the secured creditors was largely focused on the evidence as to the value of the secured assets and the "implied equity" which was calculated based on certain mortgage amounts stated to be outstanding.

47 Again, I do not intend to focus on each individual secured creditor. Many of the secured creditors take issue with what has been described as the appraised value of the various projects over which they hold security and also with what is calculated to be the mortgage debt outstanding on those projects.

48 The League Group and the Monitor do not dispute that this calculation of $210.9 million of "implied equity" is not a certain calculation. In particular, the Monitor emphasizes that it has only, to this time, performed a "high level review" of the calculation of equity in the various projects. The Monitor notes:

> a) Marketable Securities: those amounts are based on recent trading prices of units in the Partners REIT, which are publicly traded;
>
> b) The Income Producing Properties: the ascribed values of these properties are supported by appraisals, although it is apparent that some of those appraisals are dated. In addition, the Monitor notes that most of the appraisals have been prepared for financing purposes which in their experience, tend to be higher than values recoverable in the market. Nevertheless, the Monitor concludes that there appears to be "significant positive equity available in these properties"; and
>
> c) The Development Properties: the values ascribed are based on book values which represent the monies the League Group has spent to date to develop the properties. Again, based on the Monitor's experience, if the development is not completed, the recovery for these projects will be substantially less than the costs incurred to date. With respect to the Colwood Development specifically, the Monitor is of the view that even if the League Group completes the project, it is unlikely that the project costs will be fully recovered. Accordingly, the Monitor states that the $129.9 million "implied" equity in the development properties is overstated, although it is unclear at this time to what degree.

49 I agree that the exact financial position of the League Group in the income producing and development properties is unknown to some extent. These proceedings have only begun and the Monitor is no doubt continuing its investigation and analysis of the various projects. I anticipate that the equity position in these properties will be further clarified in the near

future and that this further information can be communicated to the stakeholders. The Monitor points to the fact that after the granting of the Initial Order, the mortgage lenders needed "time and a better understanding of League's complexity and possible restructuring plan to consider supporting this refinancing".

50 In the meantime, despite the shortcomings in the financial calculations, there appears to be substantial equity in those properties. Most of the secured creditors appearing on the application did not have any more reliable information towards a calculation of the equity in the projects. When asked about their own specific secured positions, most were not able to state convincingly or conclusively that their loans were in jeopardy, although some submissions were made that certain loan positions were "on the bubble". Even if any of the secured creditors are in or close to a deficit position, the intention of the League Group is to continue funding the mortgage payments, subject to obtaining further DIP financing to do so. In that event, any further prejudice will be lessened. None of the secured creditors were able to say that their loans were subject to any financial defaults, although I am assuming that given the *CCAA* filing, there are likely to be many non-financial defaults in accordance with the usual security documentation.

51 As I noted in *Pacific Shores Resort & Spa Ltd.* atpara. 49(f), material prejudice to secured creditors is only one factor to be considered in equal measure with the others listed in the *CCAA*, s. 11.2(4).

52 On the basis of the evidence presented, I am satisfied that at the very least, the secured creditors will suffer some prejudice in terms of delays in realization of their security in the event of a failure to restructure by the League Group. Beyond that, I am not satisfied that there is *material* prejudice to the secured creditors given the asset/debt levels disclosed to date. Further prejudice may arise in the event that the "implied equity" amounts are reduced or perhaps eliminated.

53 Based on the current values disclosed, it is, as Mr. Gant suggests, really the unsecured creditors and the investor group who are facing the material prejudice at this time and any prejudice to the secured creditors must also be considered in light of that material prejudice. As I have noted above, there are also a substantial number of employees.

54 In light of the concerns expressed by the secured creditors, the League Group, with the support of the Monitor, has proposed certain allocation provisions in the order authorizing DIP financing, should an allocation issue arise in the future. In accordance with these provisions, costs that may be specifically attributed to a certain asset shall be allocated to that asset. Costs that are not attributable to any asset are to be allocated as follows: firstly, to unencumbered or not fully encumbered assets and secondly, to assets generally based on a *pro rata* allocation based on the actual value of an asset.

55 I agree that this allocation provision should alleviate many of the secured creditors concerns as to how the DIP Lender's Charge may be borne. It remains to be seen, of course, whether any allocation issues will in fact arise as that will be dependent on the success of the restructuring.

(g) The Monitor's report

56 The Monitor's first report to the court is dated October 23, 2013. The Monitor supports the proposed DIP financing and the granting of a DIP Lender's Charge, having reviewed the financial terms of the DIP Lenders and being satisfied that those are reasonable terms and the bestavailable in the marketplace.

57 The Monitor is also satisfied that the restriction of the DIP Lender's Charge to $1.6 million will allow for the minimum cash requirements for the League Group to meet its operating and restructuring obligations until the time of the comeback hearing.

58 Finally, the Monitor has expressed the view that it supports both the DIP Lender's Charge and the Representative Counsel Charge referred to below to a total of $1.85 million notwithstanding that those charges would prime the existing secured creditors, other than the Enforcing Mortgagees. The Monitor states that it is sensitive to concerns being raised by the mortgage lenders as a result of the priming but that it supports the priming on the basis that there appears to be equity in the properties such that it is unlikely the mortgage lenders will ultimately be impacted by these priority charges.

59 As the Monitor notes, it is usual in these types of cases that a DIP Lender will advance monies into those proceedings only where the loans are supported by a court ordered priority charge over existing charge holders. All of the parties who submitted offers to the League Group to provide DIP financing required such a priority charge. In *Timminco Ltd., Re*, 2012 ONSC 948 (Ont. S.C.J. [Commercial List]), aff'd 2012 ONCA 552 (Ont. C.A.), Mr. Justice Morawetz stated:

> [49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders ...

60 The same considerations discussed in *Timminco Ltd.* are at play here. It is unreasonable to expect that any DIP lender would advance the required DIP financing, save and except with a charge having priority over existing creditors. As stated by the League Group and as confirmed by the Monitor, this DIP financing is necessary and urgently required to continue the operations of the League Group for a very short period of time until the comeback hearing. Failure to obtain that financing will result in a liquidation scenario - one which, given the different stakeholder groups and the complexity of the assets, will no doubt result in a multiplicity of realization proceedings at great cost. In that liquidation scenario, there will likely be prejudice to those who are said, at this time, to be the stakeholders who have significant equity in the assets.

61 It is a fundamental objective of the *CCAA* to avoid such an outcome if at all possible.

62 In conclusion, the DIP financing is urgently required by the League Group and is necessary to fund the operations for a very short period of time to the comeback hearing. The order approving the DIP facility is granted. However, in my view, there is no need to approve any DIP facility beyond the $1.6 million financing needed to the time of the comeback hearing. The League Group is at liberty to bring a further application in respect of any further DIP financing.

Representative Counsel

63 The Monitor applies for the appointment of Fasken Martineau DuMoulin LLP ("Faskens") as representative counsel for the investor group. In addition, the Monitor seeks an order that Faskens be granted a charge in the amount of $250,000 in respect of its fees and disbursements. The proposed ranking of that charge is that it will stand in priority to all of the security and charges (including the Director's Charge) but be subordinate to the Administration Charge, the DIP Lender's Charge and the security of the Enforcing Mortgagees.

64 As noted above, the investor group has been identified as comprising approximately 3,200 individuals and some institutional investors who have supplied approximately $352 million to the League Group to fund its real estate properties and business operations. Generally speaking, these investors have contributed funds in the form of secured notes, unsecured notes and equity to IGW REIT, LOF and to individual project limited partnerships, either directly or through an RRS Peligible investment vehicle. I understand that the various investment vehicles have different conversion, redemption or retraction features.

65 The Monitor advises that while there are certain common attributes amongst the investor group, there are other circumstances relating to the various investments that would suggest that some individuals or sub-groups may have positions that may differ from others within the overall group. For example, it may be such that different project specific investments have equity, while others do not.

66 The Monitor has already fielded over 100 enquiries from various investors. On October 23, 2013, the Monitor scheduled and held a conference call for the purpose of informing investors of the *CCAA*proceedings and the anticipated process and also to answer any questions. I am advised that over 460 investors participated in that call. At that time, the investors were introduced to counsel from Faskens and the concept of a representative counsel was discussed.

67 If representative counsel is to be appointed, there is no opposition to the appointment of Faskens given their extensive experience in insolvency matters and in particular, matters involving large and disparate stakeholder groups where representative counsel were appointed, such as in the Eron Mortgage Corporation proceedings.

68 The Monitor states that it is unlikely that many of the individual investors will either have the financial wherewithal or means to engage legal counsel to provide for their meaningful participation in these insolvency proceedings. In addition, if a number of separate law firms are retained by investors, a multiplicity of representation by those having a commonality of interest will add to the cost and therefore the complexity of the proceedings. Finally, the Monitor notes that these investors are the stakeholders to be "most keenly affected by this restructuring" and representation of their interests may be beneficial so as to ensure that all stakeholders have adequate input into the course of these proceedings.

69 I am satisfied that the Monitor is not in a position to assist any further in alerting the investors to these proceedings, organizing the investor group and advising them of issues that may affect them either as a group or individually.

70 The statutory jurisdiction upon which such representative charges are considered is found in the *CCAA*, s. 11, which provides that the court may make any order that it considers "appropriate" in the circumstances:

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

71 The appropriateness of such orders has been considered numerous times by the Ontario Superior Court of Justice (Commercial List): see *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]), *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]), *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 (Ont. S.C.J. [Commercial List]), and *TBS Acquireco Inc., Re*, 2013 ONSC 4663 (Ont. S.C.J. [Commercial List]) and by this court: *Catalyst Paper Corp., Re*, 2012 BCSC 451 (B.C. S.C.).

72 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) summarized many of the factors that have been considered in granting these types of order:

> [21] Factors that have been considered by courts in granting these orders include:
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> • the vulnerability and resources of the group sought to be represented;
>
> • any benefit to the companies under CCAA protection;
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> • any social benefit to be derived from representation of the group;
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> • the facilitation of the administration of the proceedings and efficiency;
>
> • the avoidance of a multiplicity of legal retainers;
>
> • the balance of convenience and whether it is fair and just including to the creditors of the Estate;
>
> • whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
>
> • the position of other stakeholders and the Monitor.

73 The stakeholder groups for which representative counsel were appointed in *Nortel Networks Corp.*, *Fraser Papers Inc.*, *Canwest Global Communications Corp.* and *Canwest Publishing Inc.* were current and former employees of the debtors. In those cases, the Ontario court noted the particular vulnerability of certain of those stakeholders. The vulnerability of the investor group here has not yet been fully investigated, but the Monitor and Mr. Gant certainly suggest that similar concerns arise in relation to the individuals who have invested a significant portion of their net worth in the League Group. In addition, the indications of equity in the League Group's assets would also suggest that their interests in these proceedings are real and not merely illusory.

74 In *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]), Mr. Justice D.M. Brown appointed representative counsel in those *CCAA* proceedings for some 1,200 clients who were investors in one of the debtor companies (para. 38). Representative counsel were also appointed in the Eron Mortgage Corporation proceedings for certain investor groups: see *Eron Mortgage Corp., Re* (1998), [1999] 4 W.W.R. 375 (B.C. S.C.) at para. 3.

75 I am satisfied that the appointment of representative counsel in this case is appropriate for the reasons stated by the Monitor. As matters stand, the investor group is a significant one and it is important that they be properly represented so that they can take appropriate positions in these insolvency proceedings. From a timing perspective, it is somewhat imperative that the investors obtain some legal representation in respect of the comeback hearing which, as I have alluded to, is expected to be highly contentious principally from the perspective of the secured creditors.

76 At this point in time, the investor group has a sufficient "commonality of interest" that can be best served by one counsel: *Nortel Networks Corp.* at paras. 62-63, *Fraser Papers Inc.* at paras. 11-12. The appointment of representative counsel will allow their positions to be advanced in an efficient manner, to the benefit of all stakeholders. Separate representation may be required at a later time once Faskens has had an opportunity to investigate the claims of the investors and determine what positions might be advanced in these proceedings. That matter can be addressed if and when it arises.

77 The statutory jurisdiction to order that the fees and disbursements of any representative counsel be secured by a charge is found in the *CCAA*, s. 11.52(1)(c):

> **Court may order security or charge to cover certain costs**
>
> **11.52** (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> . . .
>
> (*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.
>
> **Priority**
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

78 Having forecast to the secured creditors my conclusions with respect to the DIP financing, I encouraged the parties to discuss what interim accommodations could be agreed upon in order that representative counsel could be retained for the investors in the short period of time leading up to the comeback hearing.

79 As a result of those discussions, it was generally agreed and subsequently ordered that Faskens would be appointed as representative counsel with authorized fees of $125,000. The League Group was authorized to pay a retainer of $75,000. It was also recognized that a charge would be necessary in order to allow for Faskens' "effective participation" in the proceedings and a Representative Counsel Charge was ordered to the extent of $50,000, with priority save and except with respect to the Administration Charge, the DIP Lender's Charge and the security of the Enforcing Mortgagees.

80 This modest cost for representative counsel at this stage is fair and reasonable and is intended to benefit the proceedings generally. Therefore, the Representative Counsel Charge is properly borne by stakeholders based on the proposed priority: *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 54.

81 It is anticipated that the Representative Counsel will have met at least to some degree with the investor group prior to the comeback hearing and will be in a position to report to the court on what efforts have been made to organize the group. It is also hoped that by then, the Representative Counsel will have assessed the investor group's interests so as to be able to advise, if possible, what issues might be raised by the investor group. Finally, it is anticipated that Faskens will make efforts to determine whether it is possible to raise retainer funds within the investor group itself for any representation beyond the comeback hearing, rather than securing further amounts from the League Group.

Disposition

82 The Initial Order is amended and restated on the terms proposed with respect to the DIP financing and the DIP Lender's Charge, save and except that the authorized credit facility shall not exceed $1.6 million. The League Group and the DIP Lenders are to file a copy of the amended commitment letter in this court once that is signed.

83 The order is granted appointing Faskens as Representative Counsel for the investor group on the terms proposed. The authorized fees for the Representative Counsel will be $125,000, to be secured by a retainer of $75,000 paid by the League Group and a Representative Counsel Charge of $50,000 with the indicated priority.

84 The remainder of the applications, including the applications of FCC Mortgage Associates Inc. and Export Development Canada, are adjourned to November 18, 2013 to be heard at the same time as the comeback hearing.

Order accordingly.

End of Document

TAB 10

1998 CarswellOnt 5922
Ontario Court of Justice, General Division (Commercial List)

Skydome Corp., Re

1998 CarswellOnt 5922, 16 C.B.R. (4th) 118

In the Matter of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.

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

In the Matter of the Business Corporations Act, R.S.O. 1990, c. B.16, as Amended

In the Matter of a Proposed Plan of Compromise or Arrangement of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.

Blair J.

Judgment: November 27, 1998
Docket: 98-CL-3179

Counsel: *David E. Baird*, *Michael B. Rotsztain* and *Richard A. Conway*, for Applicants.
R.G. Marantz, Q.C., and *Andrew Diamond*, for Respondents Province of Ontario and Stadium Corporation.
Derrick Tay and *John Porter*, for Trustee for Bondholders and Bondholder.
James Dube and *Craig Thornburn*, for Respondents The Toronto Blue Jays Baseball Club.
Alex Ilchenko, for Respondent Ticketmaster Canada Ltd.
Ronald Slaght, for Respondent McDonald's Restaurants.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

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

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Three related corporations were involved in operation of sporting and entertainment facility — Corporations became insolvent because of changes in sporting, entertainment and economic environment, non-payment of disputed municipal taxes, competition from other facilities, heavy debt load, and costly negotiations with sports team that was facility's primary user — Corporations brought application for protection under Companies' Creditors Arrangement Act — Corporations sought as part of declaration court's approval of interim lease, and authorization of super priority loan from sports team in order to finance necessary operating expenses and essential capital expenditures — Corporations also sought authorization to withdraw sum from capital reserve account that was held as part of security arrangements regarding outstanding indebtedness to group of bondholders — Application granted — Facility held large number of functions that drew millions of people to city throughout year and employed large number of employees — Substantial economic and financial effects would result to city, merchants, suppliers, entertainers and employees in tourist industry if facility were shut down — Broader public dimension was required to be considered in determining application — Authority existed in case law for granting of super priority — Proposed interim lease and super priority were so closely integrated that one could not be approved without other — Interim lease was key to ability of corporations to pursue attempt to put forward plan that

would be acceptable to creditors — Importance of stability in situation in connection with presence of sports team and ability to attract other functions outweighed other concerns that could arise in relation to negotiation and execution of interim lease — Corporations proposed to make appropriate use of withdrawn reserve funds, and bondholders would not be prejudiced as many of proposed expenditures were for matters that had priority over bondholders — It is acceptable under Act for creditor's security to be weakened as part of balancing of prejudices between parties — Circumstances existed to make initial order under Act appropriate, and it was fair and reasonable to grant order requested — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Blair J*:

Anvil Range Mining Corp., Re (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — applied

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

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, *(*sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500 (Ont. Gen. Div.) — referred to

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

Statutes considered:

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

s. 8 — considered

s. 11 [rep. & sub. 1997, c. 12, s. 124] — referred to

s. 11(6) [en. 1997, c. 12, s. 124] — considered

APPLICATION by related corporations for protection under *Companies' Creditors Arrangement Act*.

Endorsement. *Blair J*:

1 Skydome Corporation, Skydome Food Services and SAI Subco Inc. — all related and presently insolvent companies — apply for the protection of the Court available in appropriate circumstances under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 Once considered to be the Crown Jewel of the sports and entertainment facility world the Skydome, it seems, has developed a few financial fissures. It has insufficient funds or sources of funds to meet all of its ongoing liabilities as they become due. The same is true for all 3 Applicants, which I shall refer to generically in this endorsement as "The Skydome" unless the context requires otherwise. Various reasons are put forward for this in the materials, but in summary they are the following:

1. Changes in the sporting, entertainment and economic environment in recent years have place financial strains on the operations of the facility. These changes include, but are not limited to, declining revenues as a result of a significant downturn in attendance at Blue Jays games since the halcyon World Series days of the early 1990's, and the cost of

competing for entertainment providers in an environment where the entertainers must be paid in U.S. dollars but the revenue is received in weakened Canadian dollars.

2. Non-payment of Municipal taxes of approximately $3.6 million (Skydome contests its liability for such taxes in the sense that it has been engaged in a lengthy battle with the taxing authorities over the proper assessment base for its municipal taxes);

3. The Skydome now faces competition from other entertainment facilities in this City and elsewhere.

4. The Applicants carry a very heavy debt load, which is the legacy of the construction of the domed stadium and the initial development and marketing of the Skydome.

5. In connection with the latter, there are various outstanding executory contracts which provide benefits to those who were involved in supporting the initial Sydome venture, in continuing consideration of that support, but which as a result reduce the benefits provided by revenues that can be generated by the Skydome now.

6. Because renters of Skyboxes were called upon to pay first and last years rent in advance, there are no revenues coming in for the last year of the 10 year leases which are now about to expire; and,

7. The Skydome faces a major negotiating battle with its primary source of financial life, the Blue Jays, over the Blue Jays sub-lease (or, more accurately, license) of the premises.

3 This latter problem has been resolved, subject to approval and granting of CCAA protection, through the execution of an Interim Licensing Agreement (which I will call the Interim Lease, since everyone else does), under which the Blue Jays will remain in the Skydome for a further one year period (subject to a right to renew for a further one year period) on the same terms as those contained in the present lease which expires at the end of this year. There is also an agreement *in principal only* between Skydome and the Baseball Club with respect to a long-term 10 year arrangement; but this arrangement has not yet been finalized and, indeed, its negotiation and acceptance is proposed to be made the subject of the Plan of Arrangement which the Applicants are hoping to be able to put forward.

4 The Applicants seek the usual declaratory relief that is sought on these applications; namely, an order declaring that they are corporations to which the Act applies; and a broad stay order which, although there are quibbles with certain provisions in it, is more or less of the sort generally sought and granted when Initial Orders are made under s. 11 of the CCAA. They also ask for the appointment of PricewaterhouseCoopers Inc. as monitor. In addition, however, and as part of the package, the Applicants ask the Court to approve the Interim Lease and authorize the parties to enter into it, and they ask the Court to authorize a "Super Priority" loan of up to $3.5 million from the Blue Jays in order to finance their necessary operating expenses, and certain capital expenditures which they say are essential, and as well the costs of restructuring. Finally, they seek additional authorization to withdraw the sum of $1,260,000 from a capital reserve account with Montreal Trust Company of Canada — which reserve fund is held as part of the security arrangements regarding $58 million of outstanding indebtedness to a group of Skydome Bondholders. The withdrawal would be for the purpose of making necessary capital expenditures with respect to YK2 compliance enhancements, improvements to the Skydome sound system and renovation regarding the Skydome Hotel.

5 No one seriously submits that it is in anyone's interests for the Skydome to be shut down or, indeed, for the Blue Jays not to continue to play ball from that facility. It would be folly to suggest otherwise, at least for the moment. The Skydome is a popular facility which draws about 4 million people to its various functions throughout the year — there have been 270 such events in 1998. It has 160 full-time employees and 1100 part-time employees who work there during the baseball season. Without going into to them in detail, there are very substantial economic and financial ripple effects for merchants, suppliers, entertainers, people working and employed in the tourist industry in Toronto, and Governments in the form of tax revenues of various sorts from the continued operation of the Skydome. It is said, for instance, that Skydome related activities generate $326 million in revenues for the economy of the GTA and $45 million in sales taxes for the Province of Ontario.

6 Thus there is a broader public dimension which must be considered and weighed in the balance on this Application as well as the interests of those most directly affected: see *Re Anvil Range Mining Corp.*, unreported decision of Ontario Court of Justice General Division August 20, 1998 [reported at(1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List])]. As was stated in that case:

> The Court in its supervisory capacity has a broader mandate. In a receivership such as this one which works well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must be weighed in the balance as the process works its way through.

7 The Anvil Range case concerned a CCAA proceeding which had been turned into a receivership, but the same principles apply in my view to a case such as this. While it may be engaging a trifle in hyperbole to raise the interests of Blue Jays fans to the level of "the social and economic fabric" of the region, they too can't be ignored altogether and the true economic ramifications of a failed Skydome are surely something that must be considered.

8 The two issues that raised the most concern were those dealing with the "Super Priority" loan and with the use of the capital reserve fund for the purposes requested. What is at stake here is protection of the Bondholders (who say their outstanding loan, with default ramifications taken into account is about $70 million) and the Province of Ontario (which has secured loans behind that of the Bondholders totalling about $24 million) with regard to a potential $3.5 million loan and the reduction of the Bondholders' security by less than $1.3 million. While these numbers are large numbers to the ordinary person they are really not very significant numbers relevant to the overall numbers involved.

9 There is ample authority in previous decisions of the Court for the granting of a Super Priority in CCAA situations — even to shareholders who are advancing funds — and I see no reason in principle why such a Super Priority should not be approved here. Although the Bondholders oppose the Interim Lease — indeed it is really at the heart of their objections — the Province does not. The two are so closely integrated in the proposal being put forward by the Applicants that I do not see how one can be approved (the Interim Lease) and the other (the Super Priority Loan) not.

10 The Interim Lease is key to the ability of the Skydome to pursue its attempt to put forward a Plan that will be acceptable to its creditors, including the Bondholders who will have the opportunity to vote and to approve or reject that Plan. The proposed Plan, as I have indicated, will include a Long-Term Lease component. The Bondholders main complaint, it seems to me, is that they have been excluded from the negotiation process — as they see it — to this point, and that their consent was not sought with respect to the Interim Lease. Mr. Tay did not say what the response would have been had the consent been sought. The Bondholders are also suspicious that the object of this exercise is to solidify the position of the major shareholders of the Skydome — Labatts and the CIBC — who are also part owners of the Blue Jays, by putting in place an Interim Lease that will be binding for up to two years regardless of whether the CCAA proceedings succeed or not, and which will in any event put them under subtle pressures to approve a final Plan with a final lease that they might otherwise have been able to resist.

11 There is no evidence to support such a suggestion. Whether there is anything in it or not I do not know, but one of the characteristics of a CCAA restructuring is that by nature, it leaves the debtor company in possession and in charge of the show while it attempts to work out an acceptable arrangement with its creditors. If there are underlying business agenda in that process, they are not precluded; whether they ultimately succeed or fail will depend upon the dynamics of the negotiating game that will follow.

12 In weighing all of these factors, I am satisfied that the importance of stability in the situation at the Skydome for the next year or two in connection with not only the Blue Jays presence but also the ability to attract other revenue generating functions, outweighs other concerns that may arise in relation to the negotiation and execution of the Interim Lease.

13 As to the use of the funds in the capital reserve held by Montreal Trust, it makes sense in my view for them to be used for the purposes suggested by the Applicants. The Capital reserve fund withdrawal will be used for the YK2 enhancements, the improvements in the sound system, and the Hotel renovation — all of which will preserve the overall security. A significant

portion of the total funds to be advanced, including the super-priority loan — which were deposited in the first place in order to — will be used to pay Municipal taxes and Rent which are matters that have priority over the Bondholders in any event. Thus there is little overall prejudice in that regard. I am satisfied that the Court has the authority either under s. 8 of the CCAA or under its broad discretionary powers in such proceedings, to make such an order. This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors — in the exercise of balancing the prejudices between the parties which is inherent in these situations — have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

14 What subsection 11(6) of the CCAA requires for purposes of an Initial Order is that the applicant satisfy the court "that circumstances exist that make such an order appropriate". I am satisfied that such circumstances exist here and that it is fair and reasonable to grant the Order requested, although the detailed terms of the Order may require further clarification which the lateness of the day precludes for the present.

15 Mr. Tay raised a substantial issue when he pointed out that the Order as presently drafted, when read in conjunction with the Term Sheet reflecting the agreement between the Skydome and the Blue Jays for the Super Priority loan, could lead to a situation where, if the CCAA proceeding fails, the Blue Jays (called in that context "the CCAA Lender") could move to put in a receiver and to realize upon their security without further court order. I would not have approved such a provision in the circumstances, but it is not necessary to make such a determination because Mr. Dube undertook to the Court on behalf of the Blue Jays that they would not seek to do so without approval of the Court.

16 Mr. Slaght argued on behalf of Macdonalds that the super priority should not extend to his client's lease regarding the food outlets. While I agree that the position of Macdonalds is somewhat different than that of other secured creditors — because Macdonalds must continue to pay a percentage of revenue as rent, and thus pour new monies in — I don't think that that circumstance is in itself sufficient to make distinctions from the position of other secured creditors.

17 As to other matters respecting the form of the Order, I will make the change suggested by Mr. Marantz and accepted by Mr. Baird regarding the necessity of consent of all secured creditors to any out of ordinary course disposition by the Skydome during the CCAA period. Other details I leave to counsel to agree to and to come back for a variation of the Order at a later date.

18 Accordingly, an Initial Order is granted as sought, subject to the foregoing.

Application granted.

End of Document

TAB 11

2009 CarswellOnt 391
Ontario Superior Court of Justice [Commercial List]

Smurfit-Stone Container Canada Inc., Re

2009 CarswellOnt 391, [2009] O.J. No. 349, 174 A.C.W.S. (3d) 933, 50 C.B.R. (5th) 71

In the Matter of a Plan of Compromise or Arrangement of Smurfit-Stone Container Canada Inc. and others

Pepall J.

Judgment: January 27, 2009
Docket: CV-09-7966-00CL

Counsel: Sean F. Dunphy, Alexander D. Rose for Applicants
Robert J. Chadwick, Christopher G. Armstrong for Proposed Monitor
Susan Grundy for DIP Lenders

Subject: Insolvency

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

American parent entities of debtor companies commenced Chapter 11 proceedings — Debtor companies were principal Canadian operating entities of American parent companies — Debtor companies brought application for relief under CCAA and requested that terms of initial CCAA order apply to two Canadian partnerships ("CCAA entities") affiliated with applicants — Application granted — Applicants were insolvent, had indebtedness in excess of $5 million and qualified pursuant to CCAA — Proposed outline for plan included continuing process of selling and realizing value in respect of closed and discontinued operations and coordinating with US entities to achieve balance sheet restructuring — Due to Chapter 11 filing, pre-filing secured credit facility was not available and as such, absent some additional facility CCAA entities would be required to repay amounts owing under pre-filing credit agreement — CCAA entities would also no longer have access to operating credits, would not longer be able to benefit from accounts receivable securitization program, would be unable to operate in ordinary course or satisfy ongoing obligations — Extensive process was undertaken to obtain new debt financing — Proposed monitor was of view that restructuring and continuation of debtor companies and CCAA entities as going concern was best option available — Successful restructuring of CCAA entities appeared to be intertwined with successful restructuring of American entities in Chapter 11 proceeding — In order to continue day-to-day operations and facilitate restructuring, debtor companies required access to significant funding.

Table of Authorities

Cases considered by *Pepall J.*:

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

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

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

APPLICATION by debtor companies for relief under *Companies' Creditor Arrangement Act* and order for extension of terms of initial CCAA order to two affiliated partnerships.

***Pepall J.*:**

1 Smurfit-Stone Container Canada Inc. ("SSC Canada"), Stone Container Finance Company of Canada II, MBI Limited, 3083527 Nova Scotia Company, BC Shipper Supplies Ltd., Specialty Containers Inc., 639647 British Columbia Limited, 605681 N.B. Inc. Canada, and Francobec Company (the "Applicants") seek relief under the CCAA. They also request that the terms of the Initial CCAA order apply to two Canadian partnerships affiliated with the Applicants, namely Smurfit-MBI and SLP Finance General Partnership (the "CCAA Entities"). Each of these CCAA Entities has filed for Chapter 11 protection in the U.S. Deloitte and Touche Inc. has consented to act as Monitor in the CCAA proceedings.

2 On January 26, 2009, Smurfit-Stone Container Corporation ("Smurfit-Stone") and certain of its affiliates including SSC Canada commenced Chapter 11 proceedings in the U.S. Smurfit-Stone is based in St. Louis, Missouri and in Chicago, Illinois. It is a leading North American producer of paperboard products, market pulp, corrugated containers and other specialty packaging products. It is also one of the world's biggest recyclers of paper. It currently holds approximately 18% of the North American container board market. Its operations have been negatively affected by the global economic downturn, the decrease in consumer spending, the manufacturing exodus from North America, a rise in costs, and a general market shift away from paper-based packaging. It has numerous direct and indirect subsidiaries.

3 SSC Canada and Smurfit-MBI, an Ontario limited partnership, are its principal Canadian operating entities. SSC Canada operates mills and plants producing liner board, corrugating medium and food board. Smurfit-MBI is a converting operation that produces corrugated containers using liner board from the mills. Its general partner is MBI Limited which carries on no business other than acting as Smurfit-MBI's general partner and has no assets other than its interest in Smurfit-MBI.

4 3083527 Nova Scotia Company is wholly-owned by SSC Canada. It does not carry on business except that it is one of the two Smurfit-MBI limited partners (the other being SSC Canada). BC Shipper Supplies Ltd. is no longer active. Specialty Containers Inc.'s assets were all sold in 2008. 639647 British Columbia Limited has no operations and holds the shares of BC Shippers Supplies Ltd. and Specialty Containers Inc.

5 SLP Finance General Partnership is owned by two Delaware companies. It does not carry on operations but owns the shares of 605681 N. B. Inc. which was liquidated in 2005 and of Francobec Company, a Nova Scotia company which previously operated a hardwood chipping facility which is now inactive. It has US$574 million in investment assets.

6 Stone Container Finance Company of Canada II does not carry on business except that it issued notes, the proceeds of which were remitted to SSC Canada. It has assets of US$62 million and liabilities of US$207 million. Collectively all of these companies and partnerships are referred to as the CCAA Entities.

7 The CCAA Entities employ approximately 2,600 people across Canada many of whom are unionized.

8 Smurfit-Stone operates as a North American company rather than as a collection of individual business units. The U.S. and Canadian operations are fully integrated. In this regard, they have a centralized cash management system. All high level management decisions are made by a U.S. management team and it will have responsibility for the restructuring plan for the CCAA entities.

9 A secured credit facility covers both the Canadian and American operations. The amount outstanding on this pre-filing secured credit facility as of January 23, 2009 was approximately US$1 billion of which approximately US$367 million is attributable to SSC Canada. Security over all material Canadian assets had been provided as part of this facility.

10 The debt of the CCAA Entities also includes Canadian notes of US$200 million and trade creditor payables of US$53.4 million. In addition, there is a Canadian accounts receivable securitization programme, the outstanding balance of which is US$38 million as of January 23, 2009. There are six defined benefit registered pension plans in Canada for which there is an aggregate solvency deficiency of approximately $132 million as at December 31, 2007.

11 The Applicants are insolvent, have indebtedness in excess of $5 million and qualify pursuant to the CCAA. The proposed outline for a plan includes continuing the process of selling and realizing value in respect of closed and discontinued operations and coordinating with the US entities to achieve a balance sheet restructuring.

12 As a result of the Chapter 11 filing, the pre-filing secured credit facility is no longer available. In addition, the Chapter 11 filing constitutes an event of termination under the receivables agreement that governs the accounts receivable securitization programme. As such, absent some additional facility, the CCAA Entities would be required to repay amounts owing under the pre-filing credit agreement. In addition, they would no longer be able to benefit from the accounts receivable securitization programme, would have no access to operating credits, would be unable to operate in the ordinary course, and would be unable to satisfy ongoing obligations.

13 Under the DIP facility that is proposed, both SSC Canada and the U.S. company, Smurfit-Stone Container Enterprises, Inc. ("SSCUS") are borrowers; the total commitment is US$750 million comprised of US$315 million in revolving facilities available to both SSCUS and SSC Canada, a US$400 million term loan available to SSCUS; and a US$35 million term loan available to SSC Canada. The term loan facilities are being used to take out the accounts receivable securitization programme. The loans to SSCUS are guaranteed by SSCC and most of the U.S. debtors and by SSC Canada and the latter provides a charge over its assets for all advances made to SSCUS. There would be rights of subrogation. The loans to SSC Canada are guaranteed by SSCUS and most of its U.S. subsidiaries and secured by a charge over substantially all of the assets of Smurfit-Stone's U.S. entities. The borrowings of SSC Canada are guaranteed by the other CCAA entities.

14 While some of the DIP lenders also participated in the pre-filing secured credit facility, the DIP financing involves new money and is not a refinancing. New lenders are also participating in the DIP facility. The lenders of the pre-filing secured credit facility are unopposed to the order sought.

15 The DIP lenders are unwilling to extend the DIP facility to SSC Canada absent its guarantee of the obligations of SSCUS under the DIP facility. In addition, the business is fully integrated making it impracticable particularly in the current credit environment to secure alternate financing on a stand-alone basis. To continue operations, the DIP facility is required. Estimated cash on hand for the Canadian operating entities at January 23, 2009 was $704,517 and the accounts payable balance is estimated to be in excess of US$53 million.

16 The amount borrowed is to be secured by a charge on the Applicants' property following an Administration charge of $1 million and a Directors' charge of $8.6 million. Until a final order has been granted by the U.S. court approving continued lending under the DIP facility and until approved by this court, and prior to February 18, 2009, no more than $100,000 million of the U.S. revolving commitment and $15 million of the SSC Canada revolving commitment will be available for borrowing. During the initial 30-day stay period, the CCAA Entities anticipate they will require US$50 million of which US$31 million of the term loan is to be used to refinance the account receivables securitization programme. This will result in an increase in cash receipts.

17 The proposed Monitor filed a report. It described the extensive process undertaken to obtain new debt financing. It further understands that Smurfit-Stone, having thoroughly canvassed the market, does not have any satisfactory alternative financing arrangements available. The proposed Monitor is of the view that the restructuring and continuation of Smurfit-Stone and the CCAA Entities as a going concern is the best option available given that a going concern restructuring would preserve the value

of Smurfit-Stone and the CCAA Entities whereas a liquidation and wind-down would likely result in a substantial diminution in value that could ultimately reduce creditors' recoveries. Significantly, the liquidation and wind-down of the CCAA Entities could eliminate a significant number of jobs, many of which would be preserved if the CCAA Entities are able to continue as a going concern. The proposed Monitor has also been advised that the CCAA Entities have recently been "net debtors", relying on advances from SSCUS to fund working capital requirements. Based on the information available to it, it is supportive of the DIP facility including SSC Canada's guarantee. In this regard, however, it is unable to provide views of the value of the guarantee or the probability that it will be called upon. Smurfit-Stone has advised the Monitor that SSC Canada's guarantee of SSCUS' obligations is contingent and that the DIP facility was negotiated with a third-party lender on the basis that there would be full recovery of all loans advanced to SSCUS under the DIP facility from the U.S. assets of Smurfit-Stone.

18 The successful restructuring of the CCAA Entities appears to be inextricably intertwined with the successful restructuring of the Smurfit-Stone enterprise in the Chapter 11 proceeding. In order to continue day-to-day operations and to facilitate the company's restructuring, the U.S. debtors and the CCAA Entities require access to significant funding. Given all of these facts, I am prepared to grant the relief requested.

19 As mentioned, the requested order extends the benefits of the protections provided by the order to Smurfit-MBI and SLP Finance General Partnership, both of which are partnerships but not Applicants. The operations of the partnerships are integral and closely interrelated with that of the Applicants and in my view the request is appropriate in the circumstances outlined. See also *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

20 As to the centralized cash management system, the proposed Monitor has reviewed it and will be able to adequately monitor the transfers of cash, including transfers within the system so that transactions applicable to SSC Canada and Smurfit-MBI can be ascertained, traced and properly recorded. The Monitor will review and monitor the system and report to the court from time to time. As of January 23, 2009, SSC Canada was estimated to have US$121,000 and CDN$185,000 in cash and Smurfit-MBI was estimated to have US$97,000 and CDN$414,000 in cash.

21 The CCAA Entities seek to pay certain pre-filing amounts owed to critical suppliers. The proposed Monitor has been advised that SSC Canada's operations depend on a ready supply of key materials such as wood, chemicals, fuel and energy from third party suppliers and, in addition, SSC Canada's and Smurfit-MBI's operations are reliant on rail and trucking services, custom brokers and third party warehouses. I am satisfied that the request to pay these pre-filing amounts is appropriate.

22 According to Smurfit-Stone, it is very difficult to separate the creditors of the U.S. debtors from the creditors of the CCAA Entities. Smurfit-Stone intends to engage Epiq Bankruptcy Solutions LLC to send notice of the Chapter 11 proceedings to all creditors owed more than $1,000. The proposed Monitor has suggested that such notice include notice of the CCAA proceedings to the creditors of the CCAA Entities. I am in agreement with this proposed course of action but request that the Monitor report to the court when service has been effected.

23 I also note and rely upon the comeback provision found in paragraph 57 of the order which allows any interested party to apply to the court to vary or amend this order on not less than seven days' notice.

24 There are obviously numerous other provisions in the order that I have not addressed specifically as I believe they are all self-evident. In all of the circumstances I am prepared to grant the order requested. Counsel will re-attend on Wednesday at 10:00 a.m. to address a further recognition order.

Application granted.

TAB 12

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act

Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its

lenders or access to further outside funding — S Inc. had negative equity of $647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

Table of Authorities

Cases considered by *Farley J.*:

A Debtor (No. 64 of 1992), Re (1993), [1993] 1 W.L.R. 264 (Eng. Ch. Div.) — considered

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

Bank of Montreal v. I.M. Krisp Foods Ltd. (1996), [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33, 148 Sask. R. 135, 134 W.A.C. 135, 6 C.P.C. (4th) 90, 1996 CarswellSask 581 (Sask. C.A.) — considered

Barsi v. Farcas (1923), [1924] 1 W.W.R. 707, 2 C.B.R. 299, 18 Sask. L.R. 158, [1924] 1 D.L.R. 1154, 1923 CarswellSask 227 (Sask. C.A.) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Challmie, Re (1976), 22 C.B.R. (N.S.) 78, 1976 CarswellBC 63 (B.C. S.C.) — considered

Clarkson v. Sterling (1887), 14 O.R. 460 (Ont. C.P.) — considered

Consolidated Seed Exports Ltd., Re (1986), 69 B.C.L.R. 273, 62 C.B.R. (N.S.) 156, 1986 CarswellBC 481 (B.C. S.C.) — considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

Davidson v. Douglas (1868), 15 Gr. 347, 1868 CarswellOnt 167 (Ont. Ch.) — considered

Diemaster Tool Inc. v. Skvortsoff (Trustee of) (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.) — referred to

Enterprise Capital Management Inc. v. Semi-Tech Corp. (1999), 1999 CarswellOnt 2213, 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) — considered

Gagnier, Re (1950), 30 C.B.R. 74, 1950 CarswellOnt 101 (Ont. S.C.) — considered

Gardner v. Newton (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Kenwood Hills Development Inc., Re (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bktcy.) — considered

King Petroleum Ltd., Re (1978), 29 C.B.R. (N.S.) 76, 1978 CarswellOnt 197 (Ont. S.C.) — considered

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

Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd. (1989), 92 N.S.R. (2d) 283, 75 C.B.R. (N.S.) 317, 45 B.L.R. 14, 237 A.P.R. 283, 1989 CarswellNS 27 (N.S. T.D.) — considered

Montreal Trust Co. of Canada v. Timber Lodge Ltd. (1992), 15 C.B.R. (3d) 14, *(*sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1))* 101 Nfld. & P.E.I.R. 73, *(*sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1))* 321 A.P.R. 73, 1992 CarswellPEI 13 (P.E.I. C.A.) — referred to

MTM Electric Co., Re (1982), 42 C.B.R. (N.S.) 29, 1982 CarswellOnt 170 (Ont. Bktcy.) — considered

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — referred to

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

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2001), 2001 CarswellOnt 2954, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294 (Ont. S.C.J. [Commercial List]) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2003), 2003 CarswellOnt 5210, 46 C.B.R. (4th) 313, *(*sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.)* 180 O.A.C. 158 (Ont. C.A.) — considered

Optical Recording Laboratories Inc., Re (1990), 2 C.B.R. (3d) 64, 75 D.L.R. (4th) 747, 42 O.A.C. 321, *(*sub nom. *Optical Recording Laboratories Inc. v. Digital Recording Corp.)* 1 O.R. (3d) 131, 1990 CarswellOnt 143 (Ont. C.A.) — referred to

Pacific Mobile Corp., Re (1979), 32 C.B.R. (N.S.) 209, 1979 CarswellQue 76 (Que. S.C.) — referred to

PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 103 D.L.R. (4th) 609, 49 C.P.R. (3d) 456, 64 O.A.C. 274, 15 O.R. (3d) 730, 10 B.L.R. (2d) 109, 1993 CarswellOnt 149 (Ont. C.A.) — considered

PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 49 C.P.R. (3d) ix, 10 B.L.R. (2d) 244 (note), 104 D.L.R. (4th) vii, 68 O.A.C. 21 (note), 164 N.R. 78 (note), 16 O.R. (3d) xvi (S.C.C.) — referred to

R. v. Proulx (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — considered

Standard Trustco Ltd. (Trustee of) v. Standard Trust Co. (1993), 13 O.R. (3d) 7, 21 C.B.R. (3d) 25, 1993 CarswellOnt 219 (Ont. Gen. Div.) — considered

TDM Software Systems Inc., Re (1986), 60 C.B.R. (N.S.) 92, 1986 CarswellOnt 203 (Ont. S.C.) — referred to

Viteway Natural Foods Ltd., Re (1986), 63 C.B.R. (N.S.) 157, 1986 CarswellBC 499 (B.C. S.C.) — referred to

Webb v. Stenton (1883), 11 Q.B.D. 518 (Eng. C.A.) — referred to

633746 Ontario Inc. (Trustee of) v. Salvati (1990), 79 C.B.R. (N.S.) 72, 73 O.R. (2d) 774, 1990 CarswellOnt 181 (Ont. S.C.) — considered

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3
Generally — referred to

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

s. 2(1) "insolvent person" — referred to

s. 2(1) "insolvent person" (a) — considered

s. 2(1) "insolvent person" (b) — considered

s. 2(1) "insolvent person" (c) — considered

s. 43(7) — referred to

s. 121(1) — referred to

s. 121(2) — referred to

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

s. 2 "debtor company" — referred to

s. 2 "debtor company" (a) — considered

s. 2 "debtor company" (b) — considered

s. 2 "debtor company" (c) — considered

s. 2 "debtor company" (d) — considered

s. 12 — referred to

s. 12(1) "claim" — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

Words and phrases considered:

debtor company

It seems to me that the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no

material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> 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.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .
>
> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant

would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;
>
> (e) developing restructuring alternatives; and
>
> (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis

with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a

> company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.

> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different

results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be

generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for

that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

Motion dismissed.

Appendix

2004 CarswellOnt 2936
Ontario Court of Appeal

Stelco Inc., Re

2004 CarswellOnt 2936, [2004] O.J. No. 1903

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Stelco Inc. and the other Applicants Listed on Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended

Doherty J.A., Laskin J.A., Moldaver J.A.

Judgment: May 5, 2004
Docket: CA M31129

Counsel: David P. Jacobs, for Moving Party
Michael E. Barrack, for Responding Party

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency

Per Curiam:

1 Leave to appeal refused. Costs to the respondents Stelco in the amount by $2,000 and to the "primary lender" in the amount of $1000.

End of Document

2004 CarswellOnt 5200
Supreme Court of Canada

Stelco Inc., Re

2004 CarswellOnt 5200, 2004 CarswellOnt 5201, [2004] S.C.C.A. No. 336, 338 N.R. 196 (note)

Local Union No. 1005 United Steelworkers of America, Local Union No. 5328 United Steelworkers of America, Local Union No. 8782 United Steelworkers of America v. Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd., and Welland Pipe Ltd. (collectively "STELCO"), CIT Business Credit Canada Inc., GE Commercial Finance, Fleet Capital Canada (collectively the "Senior Lenders")

Binnie J., Charron J., McLachlin C.J.C.

Judgment: December 9, 2004
Docket: 30447

Proceedings: Leave to appeal refused, 2004 CarswellOnt 2936 (Ont. C.A.); Leave to appeal refused, 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List])

Counsel: None given

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

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

Headnote

Bankruptcy and insolvency

Per Curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number M31129, dated May 5, 2004, is dismissed with costs.

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TAB 13

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

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Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Related Abridgment Classifications

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

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount

held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant

à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait

une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention

explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

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s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

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s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8
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s. 23(3) — referred to

s. 23(4) — referred to

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Generally — referred to

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

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

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

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

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s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

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s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

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s. 128 — referred to

s. 131 — referred to

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s. 67(3) — considered

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Generally — referred to

s. 23 — considered

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Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — referred to

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Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

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s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

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Interpretation Act, R.S.C. 1985, c. I-21
s. 2(1)"enactment" — considered

s. 44(f) — considered

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Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic

challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy*

Minister of Revenue) c. Rainville (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *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; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (Que. S.C.), leave to appeal granted, 2010 QCCA 183 (Que. C.A.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions *(CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers

in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999),

12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. 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.

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.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA*

to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA.*

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> **67** (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> **(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the

near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11 [1] of the *CCAA* stated:

> **11**. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
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> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant)*. But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005, [2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA.*

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act.* That includes the *ETA.* The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA.* Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — 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 (i);

(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.

(4) Other than initial application court orders — 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.

...

(6) Burden of proof on application — 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.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

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

...

11.02 (1) Stays, etc. — initial application — 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) Stays, etc. — other than initial application — 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.

(3) Burden of proof on application — 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.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn

in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:

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

2 The amendments did not come into force until September 18, 2009.

TAB 14

2007 ABQB 786
Alberta Court of Queen's Bench

Temple City Housing Inc., Re

2007 CarswellAlta 1806, 2007 ABQB 786, [2007] G.S.T.C. 188, [2008] 2 C.T.C. 61, [2008] A.W.L.D. 466, [2008] A.W.L.D. 575, [2008] A.W.L.D. 576, [2008] A.W.L.D. 577, 42 C.B.R. (5th) 274

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

And In the Matter of Temple City Housing Inc. (Applicant)

Romaine J.

Judgment: December 21, 2007 *
Docket: Calgary 0701-12190

Counsel: Frank R. Dearlove, Chris Simard for Applicant, Temple City Housing Inc.
Howard Gorman for Proposed Debtor-In-Possession Lender, Echo Merchant Fund
Jill Medhurst-Tivadar for Canada Revenue Agency

Subject: Estates and Trusts; Goods and Services Tax (GST); Income Tax (Federal); Insolvency

Related Abridgment Classifications

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

Headnote

Tax --- Income tax — Administration and enforcement — Withholding of tax — Trust for monies withheld

Corporate taxpayer owed CRA approximately $870,000 in unremitted source deductions, with an expected GST net tax refund of $150,000 — Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA"), including debtor-in-possession ("DIP") charge — Petition granted — DIP charge was allowed in amount of $300,000 — Granting of DIP charge to take taxpayer through first weeks of CCAA process was necessary and in best interests of company's shareholders — CRA's submission, that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order, was rejected — CCAA proceeding is able to grant super-priority over existing security interests for DIP financing — If it were otherwise, protection of CCAA effectively would be denied to debtor company in many cases — Supreme Court of Canada decision on point held that deemed trust created by s. 227(4.1) had priority, but did not attach specifically to particular assets.

Tax --- Income tax — Administration and enforcement — Collection of tax — Priorities and superpriorities of Minister

Corporate taxpayer owed CRA approximately $870,000 in unremitted source deductions, with an expected GST net tax refund of $150,000 — Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA"), including debtor-in-possession ("DIP") charge — Petition granted — DIP charge was allowed in amount of $300,000 — Granting of DIP charge to take taxpayer through first weeks of CCAA process was necessary and in best interests of company's shareholders — CRA's submission, that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order, was rejected — CCAA proceeding is able to grant super-priority over existing security interests for DIP financing — If it were otherwise, protection of CCAA effectively would be denied to debtor company

in many cases — Supreme Court of Canada decision on point held that deemed trust created by s. 227(4.1) had priority, but did not attach specifically to particular assets.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Corporate taxpayer owed CRA approximately $870,000 in unremitted source deductions, with an expected GST net tax refund of $150,000 — Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA"), including debtor-in-possession ("DIP") charge — Petition granted — DIP charge was allowed in amount of $300,000 — Granting of DIP charge to take taxpayer through first weeks of CCAA process was necessary and in best interests of company's shareholders — CRA's submission, that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order, was rejected — CCAA proceeding is able to grant super-priority over existing security interests for DIP financing — If it were otherwise, protection of CCAA effectively would be denied to debtor company in many cases — Supreme Court of Canada decision on point held that deemed trust created by s. 227(4.1) had priority, but did not attach specifically to particular assets.

Table of Authorities

Cases considered by *Romaine J.*:

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, *(*sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), *(*sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 964, 94 Alta. L.R. (3d) 389, 27 C.B.R. (4th) 236, [2001] 9 W.W.R. 299, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — considered

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, *(*sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Statutes considered:

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

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

PETITION by taxpayer seeking protection under *Companies' Creditors Arrangement Act*, including debtor-in-possession charge.

***Romaine J.*:**

Introduction

1 Temple City Housing Inc. ("Temple") filed a petition seeking protection from its creditors under the *Companies' Creditors Arrangement Act*, including an interim stay, the appointment of a Monitor and a Debtor-In-Possession credit facility ("DIPCharge"). Temple's major creditor is the Canada Revenue Agency ("CRA"), which opposed the priority of the DIP Charge sought in the order. I granted an Initial Order which included a super priority DIP Charge in the amount of $300,000 despite the objection of the CRA, and these are my reasons.

Facts

2 Temple produces pre-engineered packaged homes. Its construction facilities are in Cardston, Alberta, and it employs 170 people in its major business, with 25 additional people in a separate truss production facility. Most of Temple's labour staff are members of local First Nations groups, and it is the largest employer in Cardston.

3 The president of Temple deposes that Temple has been seriously impacted by the labour crisis experienced in Alberta over the past year, necessitating a shift in its business model. He states that Temple has made changes to resolve these labour issues and problems it has had with suppliers, and that it proposes to use the stay period and the financing provided by the DIP lender to put its production lines fully into use. Temple's president deposes that if Temple is able to carry on business as a going concern, rather than liquidating its assets, the CRA and its secured creditors will be paid in full and the return to unsecured creditors will be significantly enhanced.

4 A DIP Charge in the amount of $300,000 was essential in the short term despite the fact that this was the initial application because payroll obligations in the amount of $238,000 gross were due the same day as the application was heard, and a retainer was necessary for the Monitor and legal counsel. The application originally sought approval of DIP financing up to a maximum of $600,000, but counsel conceded that $300,000 was sufficient to allow Temple to continue with its operational plan before creditors received notice of the Initial Order. An order authorizing DIP financing in this amount was justifiable in accordance with the reasoning set out in *Hunters Trailer & Marine Ltd., Re*, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 9 W.W.R. 299 (Alta. Q.B.) at paras. 22 and 23.

5 Counsel for Temple explained that Temple's management had not been aware of the possible availability of the CCAA, and had sought legal advice only a few days before the payroll issue became a crisis.

6 Temple qualifies for protection under the CCAA, and the only contentious issue before me in this application was whether the DIP Charge could rank in priority to the CRA's claim.

7 Temple owes the CRA approximately $870,000 in source deductions which it has failed to remit for about a year. It is likely entitled to a refund of GST in the amount of $150,000, making the CRA claim roughly $720,000 net. The CRA took the position that Temple is undercapitalized, and that its business too unpredictable for the CRA to agree to have its claim subordinated to a DIP lender. The CRA also submitted that its claim for source deductions is a property interest that cannot be subordinated.

8 The CRA relied upon s. 227(4) and (4.1) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.):

> **227. (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to her Majesty in the manner and at the time provided under this Act.
>
> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor

(as defined in subsection 224(1.3)) of that person but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

9 The CRA submitted that the deemed trust created by s. 227(4.1) prevents the CRA's claim from being superceded by the super-priority of a DIP order under the CCAA. I was advised that there was no case authority to support this submission.

10 The Supreme Court of Canada considered this provision of the *Income Tax Act* in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, 2002 CarswellSask 318, 2002 D.T.C. 6998 (Eng.), 2002 D.T.C. 7007 (Fr.), [2002] 3 C.T.C. 285, 212 D.L.R. (4th) 615, 288 N.R. 347, [2003] 1 W.W.R. 1, [2002] 2 S.C.R. 720, 45 C.B.R. (4th) 213, [2002] G.S.T.C. 23, J.E. 2002-960 (S.C.C.). In that case, property had come into the hands of a tax debtor after the deemed trust arose, and was then sold to a third party. One of the issue was whether the sale of the trust property released the property from the ambit of the trust. Iacobucci, J. for the Court found that it did.

11 He noted that the deemed trust takes priority in situations where the CRA and secured creditors of a tax debtor both claim an interest in the tax debtor's property. On the issue of whether the deemed trust attached to after-acquired property, Iacobucci, J. found that the language of the relevant section implied that "Parliament has contemplated a fluidity with respect to the assets of the debtor to which the trust attacks": para. 32. He commented that, since the deemed trust is a statutory creation, it is not subject to the "restraints imposed by ordinary principles of trust law"; para. 34. Thus, while conceptually it could be considered that the source deductions themselves are the corpus of the trust, according to the language of the section, "property of the person . . . equal in value to the amount so deemed to be held in trust is deemed" to be held in trust. As the Court noted, this saves the CRA from having to trace specific assets to the funds originally deducted for source deductions. Iacobucci, J. referenced the comments of Gonthier, J. in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) at para. 31 that the "trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust. . ."

12 Following logically from this characterization of the statutory trust, Iacobucci, J. found on the issue of whether the deemed trust continued to operate on property that had been sold to third parties that "the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default": para. 40. He thus found that while the trust has priority, it does not attach specifically to particular assets, and that the debtor is thus free to alienate property in the ordinary course of business. The Court noted that, from the language of the section, "it is anticipated that the character of the tax debtor's property will change over time." This interpretation allows the tax debtor to carry on business without the uncertainty that would be created if the CRA's claim was allowed to follow an asset that had been sold to innocent third parties, and prevents a situation where the deemed trust, in effect, freezes the debtor's assets and prevents it from carrying on business, "clearly not a result intended by Parliament": para. 45.

13 This interpretation of the deemed trust provision is inconsistent with the CRA's argument that it creates a property interest that cannot be superceded by a DIP Charge, despite the concluding words of s. 227(4.1). As pointed out by counsel for the proposed DIP lender, the characterization of the deemed trust claim as a security interest, albeit one that takes priority over other secured interests, is supported by the definition of "security interest" in the *Income Tax Act* itself, which includes reference to a "deemed or actual trust."

14 It is clear that a court in a CCAA proceeding is able to grant a super-priority over existing security interests for DIP financing. If it were otherwise, and if super-priority could not be granted without the consent of secured creditors, "the protection of the CCAA effectively would be denied a debtor company in many cases": *Hunters Trailers & Marine Ltd.*, at para. 32. It is also undoubtedly true that, since DIP financing may erode the security of creditors, the Court should be cautious in exercising its inherent jurisdiction to order priority for a DIP Charge over the objection of a secured creditor. I am satisfied that, in this case, Temple requires the protection of the CCAA if there is to be any possibility that it will be able to continue in business for the benefit of its creditors, employees and other stakeholders. I am also satisfied that granting a limited DIP Charge to take the company through the first crucial weeks of the process is necessary and in the best interests of the company's stakeholders generally. For this reason, I allowed a DIP Charge in the amount of $300,000.

Petition granted.

Footnotes

* A corrigendum issued by the court on January 8, 2008 has been incorporated herein.

End of Document

2008 ABCA 1
Alberta Court of Appeal

Minister of National Revenue v. Temple City Housing Inc.

2008 CarswellAlta 2, 2008 ABCA 1, [2008] 2 C.T.C. 67, [2008] G.S.T.C. 2, [2008] A.W.L.D. 582, [2008] A.W.L.D. 690, [2008] A.W.L.D. 691, 2008 G.T.C. 1128 (Eng.), 415 W.A.C. 4, 422 A.R. 4, 43 C.B.R. (5th) 35

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

And In the Matter of Temple City Housing Inc.

The Deputy Attorney General on Behalf of Her Majesty the Queen in Right of Canada as Represented by the Minister of National Revenue (Appellant / Respondent) and Temple City Housing Inc. (Respondent / Appellant)

Rowbotham J.A.

Heard: December 20, 2007
Judgment: January 3, 2008
Docket: Calgary Appeal 0701-0335-AC

Counsel: Jill Medhurst-Tivadar for Appellant
Chris D. Simard for Respondent
Howard A. Gorman for Proposed Debtor in Possession Lender, Echo Merchant Fund
G. Scott Watson for Monitor, Hardie & Kelly Inc.

Subject: Estates and Trusts; Goods and Services Tax (GST); Insolvency; Income Tax (Federal)

Related Abridgment Classifications

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

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Leave to appeal from debtor-in-possession order — Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST — Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") — Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 — CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order — CRA brought application for leave to appeal — Application dismissed — CRA did not meet three of four factors for leave to appeal under CCAA — Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA — Amendments included provision granting super-priority to DIP financing — Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings — Moreover, point might not be of significance to action itself — DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order — Further, appeal would hinder proceedings in case at bar — Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

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First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12
Generally — referred to

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

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 224(1.2) — referred to

s. 224(1.3)"security interest" — considered

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47
Generally — referred to

APPLICATION by Canada Revenue Agency for leave to appeal from order under *Companies' Creditors Arrangement Act*, granting debtor-in-possession charge to corporate taxpayer.

***Rowbotham J.A.*:**

Introduction

1 Canada Revenue Agency (CRA) seeks leave to appeal a provision in an order made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), granting the Debtor in Possession Lender, Echo Merchant Fund (DIP Lender), a charge in priority over the claim of the applicant. Should leave be granted, the applicant also seeks a stay pending appeal.

Background Facts

2 The respondent, Temple City Housing Inc. (Temple) is a small private company that manufactures homes and truss beams for homes in Cardston, Alberta. Temple has almost 200 employees but has suffered from a shortage of skilled trade workers

which has slowed its production and lowered its revenues. In September 2007, entire sections of production had to be shut down because of the lack of workers.

3 Temple has debts in excess of $5 million and is unable to meet its current obligations. In November 2007, the respondent sought protection under the CCAA in order to carry on business and restructure as a going concern, rather than liquidating its assets.

4 Temple's largest creditor is the applicant, who has claims for unpaid or unremitted employee source deductions for income tax, Canada Pension Plan and Employment Insurance, as well as GST for 2007, which total approximately $973,000.

5 In order to pay its employees and continue carrying on business, Temple requires additional financing. The DIP Lender made loans of $185,000 and $91,500 on the condition that it obtains a security interest in the property of Temple in first priority or super-priority over all other claims, specifically the claim by CRA.

Decision of the CCAA Judge

6 The CCAA judge considered the sections of the *Income Tax Act*, R.S.C. 1985, c. 1, and the *Excise Tax Act*, R.S.C. 1985, c. E-15, that require employers to deduct and withhold amounts from their employees' wages (source deductions) and remit them to the Receiver General. The source deductions are deemed to be separate and apart from the property of the employer in trust for Her Majesty. A deemed trust attaches to the property of the employer both when source deductions are made and if source deductions are not remitted to the Receiver General by their due date.

7 The applicant submitted to the CCAA judge and again in this application, that the deemed trust overrides all competing security interests.

8 The CCAA judge held that the Supreme Court of Canada's decision in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720, [2002] G.S.T.C. 23 (S.C.C.), was authority that the deemed trust is similar in principle to a floating charge. Thus, although the property of the employer is subject to the deemed trust, Her Majesty's interest in the property did not continue, for example, once property was sold to a third party. She also found that her interpretation was further supported by the definition in the *Income Tax Act*, which states that a "security interest" means "any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a ... deemed or actual trust...". Therefore, she held that Her Majesty's security interest could be treated the same way as any other security interest under the CCAA.

9 Exercising the inherent jurisdiction of a CCAA court, the CCAA judge held that in the circumstances, particularly, given the number of employees affected and the spirit of the CCAA, which is to promote the continuation of the corporation so that it can emerge from insolvency protection, she granted the DIP Lender first priority to the extent of $300,000 over any claims by the applicant.

10 The order under which leave is sought is dated November 23, 2007 at para. 41 provides:

> In particular, the DIP Charge to the extent of $300,000.00 shall have priority over any claims by CRA [Canada Revenue Agency] in relation to unpaid or unremitted employee source deductions and GST as defined pursuant to the *Income Tax Act* and the *Excise Tax Act*.

Proposed Grounds for Appeal

11 The applicant seeks leave to appeal para. 41 of the November 23, 2007 order on the basis that the CCAA judge erred in granting the DIP Lender priority over Her Majesty's deemed trust claims arising under sections 224(1.2), 227(4) and 227(4.1) of the *Income Tax Act*.

Test for Leave

12 The test for leave is well known. In *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22, this Court stated that to obtain leave to appeal an order under the CCAA, there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

(1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action.

Application

13 The applicant is unable to meet the test for leave. The point which the applicant seeks to appeal will not be of significance to CCAA practice because the legislation has been amended. Bill C-12, *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*, 39th Parliament, 2nd Session, 2007, received Royal Assent on December 14, 2007. The amendments to the CCAA include specific authority to grant super-priority to DIP financing such as the loan in this case. This provision has not yet been proclaimed in force. However, once it has been proclaimed in force, the issue of the CCAA judge's inherent jurisdiction to order such priorities will not be an issue in future CCAA proceedings. Counsel for the CRA forcefully submitted that despite the amendments, this case is of significance to the practice because, to her knowledge, it is the first time that a court has given priority to the DIP Lender over the CRA's deemed trust. She made several arguments as to why the decision of the CCAA judge was incorrect, assuming that the standard of review is correctness. It seems to me, however, that these arguments, particularly the application of Iacobucci J.'s decision in the *First Vancouver* case, will still have force in future cases where the matter will be largely one of statutory interpretation. I conclude therefore that this particular appeal would not be of significance to the practice.

14 Moreover, the point may not be of significance to the action itself. As counsel for Temple submitted, this is real time litigation. The CCAA judge makes discretionary decisions in a constantly changing situation. Her decision is owed a high degree of deference. The DIP Lender has advanced $300,000 to Temple in reliance on the November 23 order and, in particular, on the lack of a stay of that order. The proceeds have been paid to Temple's employees and suppliers. It is now virtually impossible to "unscramble the egg", as counsel for Temple submitted; in other words to reverse the effect of para. 41 of the November 23 order and to grant the remedy that the applicant now seeks. As was the case in *Canadian Airlines Corp., Re*, 2000 ABCA 238, 266 A.R. 131 (Alta. C.A. [In Chambers]) at para. 32, this appeal may well be moot.

15 Further, an appeal would hinder the CCAA proceedings because without an order giving the DIP Lender first priority over the applicant's claim, the DIP Lender would not advance funds and without the current and future loans, Temple would be unable to restructure under the CCAA and would be forced to close its business.

16 Given that three of the four factors cannot be met, even if the point on appeal is *prima facie* meritorious, the applicant cannot show that there are serious and arguable grounds of real and significant interest to the parties.

Conclusion

17 As the applicant is unable to meet the test for leave, the application is dismissed and therefore, the application for a stay need not be considered.

Application dismissed.

End of Document

TAB 15

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

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5

The Three Certainties

I. INTRODUCTION

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*,[1] in words adopted by Barker J. in *Renehan v. Malone*[2] and considered fundamental in common law Canada,[3] (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained.[4] Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.

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[1] (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch.).

[2] (1897), 1 N.B. Eq. 506 (N.B. S.C. [In Equity]).

[3] Numerous Canadian cases have referred to the three certainties as essential to the existence of an express trust. A few relatively recent examples include *Goodman Estate v. Geffen* (1987), (sub nom. *Goodman v. Geffen*) 52 Alta. L.R. (2d) 210 (Alta. Q.B.), reversed (1989), 68 Alta. L.R. (2d) 289 (Alta. C.A.), additional reasons at (1990), 80 Alta. L.R. (2d) 289 (Alta. C.A.), reversed (1991), 80 Alta. L.R. (2d) 293 (S.C.C.), leave to appeal allowed (1989), 101 A.R. 160 (note) (S.C.C.); *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (B.C. C.A.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Faucher v. Tucker Estate* (1993), [1994] 2 W.W.R. 1 (Man. C.A.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423, 26 E.T.R. (2d) 1 (Ont. C.A.); *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.); *Parsons v. Cook* (2004), 238 Nfld. & P.E.I.R. 16, 7 E.T.R. (3d) 92 (N.L. T.D.); *McMillan v. Hughes* (2004), 11 E.T.R. (3d) 290 (B.C. S.C.); *Saugestad v. Saugestad*, 2006 CarswellBC 3170, 28 E.T.R. (3d) 210 (B.C. S.C.) at para. 82, reversed in part on other grounds 2008 CarswellBC 123, 37 E.T.R. (3d) 19, 77 B.C.L.R. (4th) 170 (B.C. C.A.); *Re Graphicshoppe Ltd.*, 2005 CarswellOnt 7008, 78 O.R. (3d) 401 (Ont. C.A.) at para. 10; *VanDenBussche v. Craig VanDenBussche Trust (Trustee of)*, 2009 CarswellMan 557, (sub nom. *VanDenBussche v. VanDenBussche Trust*) 247 Man. R. (2d) 174, 55 E.T.R. (3d) 179 (Man. Q.B.); and *Sun Life Assurance Co. of Canada v. Taylor* (2008), 2008 CarswellSask 678, 322 Sask. R. 153, [2009] 2 W.W.R. 286 (Sask. Q.B.).

[4] The property interest which each beneficiary is to take must also be clearly defined. See *infra*, Part III D.

II. CERTAINTY OF INTENTION

There is no need for any technical words or expressions for the creation of a trust.[5] Equity is concerned with discovering the intention to create a trust; provided it can be established that the transferor had such an intention,[6] a trust is set up. There are indeed certain evidentiary requirements which the law regards as mandatory for the transfer of certain kinds of property. For example, the *Statute of Frauds* in 1677, reproduced in common law Canada, required all trusts of land to be evidenced in writing, and under the wills legislation of the common law provinces and the territories a person's last will and testament must be in writing, which means, of course, that a testamentary trust must be in writing, and form part of the will.[7] But these are requirements of the law of evidence, not of the law of trusts, though, as we shall see, the effect of these statutory evidentiary rules has created a variety of problems for trust lawyers.[8]

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[5] See, e.g., *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.) where it was noted that language need not be technical so long as the intention to create a trust can be inferred with certainty.

[6] For an unusual case, see *No. 382 v. Minister of National Revenue* (1957), 16 Tax A.B.C. 274, 57 D.T.C. 48 (Can. Tax App. Bd.) at 282-3 [Tax A.B.C.]. If tax avoidance is the object of a transaction, the courts are likely to be particularly concerned with whether there was indeed an intention to create a trust, or merely a desire to give that appearance. See *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, [1976] C.T.C. 506, 76 D.T.C. 6280 (Fed. C.A.). The fact that the alleged settlor of a number of trusts, purportedly created at the same time, did not know all the details of the scheme in which he was taking part, and that the amount of property initially assigned to the trustees for each trust was minimal, were found to be evidence of a desire only to create appearances. See further, *infra*, chapter 6, note 2.

The question of certainty of intention to create a trust can arise in a wide variety of contexts. One such context that has been considered on several occasions occurs where an employer seeks access to surplus pension funds. If the pension plan is construed such that the employer's contributions are to be held in trust *for the employees* then the employer will not be able to take back surplus contributions. Cases dealing with this issue include *Burke v. Hudson's Bay Co.*, 2010 CarswellOnt 7451, [2010] S.J. No. 34 (S.C.C.); *Mifsud v. Owens Corning Canada Inc.* (2004), 41 C.C.P.B. 81 (Ont. S.C.J.); *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 3 E.T.R. (2d) 1, 115 D.L.R. (4th) 631 (S.C.C.); *LaHave Equipment Ltd. v. Nova Scotia (Superintendent of Pensions)* (1994), 121 D.L.R. (4th) 67 (N.S. C.A.); *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.); *Howitt v. Howden Group Canada Ltd.* (1997), 152 D.L.R. (4th) 185 (Ont. Div. Ct.), leave to appeal allowed (1997), 1997 CarswellOnt 4662 (Ont. C.A.), affirmed (1999), 26 E.T.R. (2d) 1 (Ont. C.A.); *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5) (Administrator of)* (1997), (sub nom. *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5)*) 149 D.L.R. (4th) 200 (N.S. C.A.); *Crownx Inc. v. Edwards* (1994), 20 O.R. (3d) 710, 120 D.L.R. (4th) 270 (Ont. C.A.).

[7] On the requirement of writing, see chapter 7.

[8] But for the formal requirements in cases such as those involving wills or trusts of land, no formal document is required. A trust may arise simply from the words used (see, e.g., *Lev v. Lev* (1992), 40 R.F.L. (3d) 404 (Man. C.A.); and *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.)) or from conduct or circumstances (see note 9 below and the accompanying text). In

A trust may be construed from conduct alone,[9] but it is unlikely that such evidence will conclusively reveal the necessary intention. Words do show that intention, and they must either appear in a document which the maker regarded as final or be orally communicated to another.[10] Evidence extrinsic to words in a

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Armstrong v. Clarke, 2008 CarswellBC 667, 39 E.T.R. (3d) 1, 79 B.C.L.R. (4th) 121 (B.C. C.A.), however, a person's oral statement that he would leave a house to two named persons in his will was not considered sufficient to establish an intent to create a trust. In *Saugestad v. Saugestad* (B.C. C.A.), *supra*, note 3, the conduct of an alleged secret trustee in an e-mail to his solicitor in which he acknowledged he held property in trust, together with the fact that he had transferred one-half of the estate to his nephews, was held to be sufficient evidence of the intention of the secret trustee's mother to create a trust.

[9] Conduct in the form of a sequence of transactions or circumstances may be enough: *Northguard Financial Group v. Wah*, [1977] 3 W.W.R. 3 (B.C. S.C.). See also *Kattler v. Kattler* (1995), 132 Sask. R. 92 (Sask. Q.B.), additional reasons at (June 22, 1995), Doc. Regina Q.B. 015726/ 94 (Sask. Q.B.) (which mentions *Northguard* with respect to a trust potentially arising from conduct alone but then holds that a trust arose on the facts partly on conduct and partly on other evidence); *Eu v. Rosedale Realty Corp. (Trustee of)* (1997), 33 O.R. (3d) 666, 18 E.T.R. (2d) 288 (Ont. Bktcy.); *Randall v. Nicklin* (1984), 58 N.B.R. (2d) 414 (N.B. C.A.), reversing (1984), 54 N.B.R. (2d) 95 (N.B. Q.B.); and *Thomas v. Whitwell* (1991), 45 E.T.R. 75 (Alta. Q.B.). A court may also consider the circumstances surrounding a transaction alleged to give rise to an express trust. See, e.g., *Winisky v. Krivuzoff* (2003), 237 Sask. R. 213, 3 E.T.R. (3d) 147 (Sask. Q.B.). In *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2002), 44 E.T.R. (2d) 155, 22 B.L.R. (3d) 182 (Ont. S.C.J.), additional reasons at (2002), 44 E.T.R. (2d) 175 (Ont. S.C.J.), affirmed (2002), 2002 CarswellOnt 4537 (Ont. C.A.), the court considered whether the incorporation of a foundation (to which the hospital transferred funds) with clauses limiting its objects could itself amount to the creation of a trust. Although there were other circumstances which led the court to conclude that there was no trust, the court also suggested that, particularly without the application of the doctrine of ultra vires to the foundation objects, the incorporation of the foundation alone could not amount to the creation of trust. In *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)*, *supra*, note 3, poker players at a casino made deposits towards a jackpot with set rules for payments out of the jackpot to specified winning poker hands. Brooker J. found that "even though there is no trust document or oral communication establishing the trust, the intention can be inferred from the players' conduct in the circumstances of this game. It seems clear from the nature of the game itself that the players, upon depositing their dollar, expected that the jackpot would go to whomever had the necessary hand. The players did not expect that the jackpot would go into the general coffers of either the casino operator or the charity. The players gave the money for a particular purpose and expected the casino operator to use it for that purpose... Under these circumstances, therefore, I am satisfied that I can infer that it was the players' intention to create an express trust with respect to the funds which they wagered and lost on the jackpot." See also *McMillan v. Hughes*, *supra*, note 3, where the circumstances and the defendant's own statements, corroborated by other witnesses, established the intention to create a trust.

[10] Trust documentation which reveals the intention to create a trust by those documents will exclude the argument that they were mere evidence of an earlier oral trust in the same terms: *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, *supra*, note 6. And an agreement to create a trust will only create a trust there and then if the agreement (a contract) is specifically enforceable: *ibid.*; *North Vancouver (Municipality) v. Macdonald* (1977), 5 B.C.L.R. 89 (B.C. S.C.). The document as a whole must be considered in addition to the specific words of bequest: *LeBlanc Estate v. Belliveau* (1986), 68 N.B.R. (2d) 145, 175 A.P.R. 145 (N.B. Q.B.); *Luscar Ltd. v. Pembina Resources Ltd.* (1995), 165 A.R. 104 (Alta. C.A.); *Canada Permanent Trust Co. v. Lasby*, 42 Sask. R. 73, [1985] 6 W.W.R. 665 (Sask. Q.B.). As to what may constitute evidence of the intent, see *Re Kayford Ltd.* (1974), [1975] 1 W.L.R. 279, [1975] 1 All E.R. 604 (Eng. Ch. Div.); *Re Japan Leasing (Europe) plc v. Shoa Leasing (Singapore) Pte Ltd.* (July 30, 1999), (Eng. Ch. Div.); and *Re Lewis's of Leicester Ltd. v. Kordengate*

document may be taken into account to resolve an ambiguity in the words[11] or where the extrinsic evidence clearly demonstrates that the words of the document do not reflect the intention of the parties.[12]

A recording or communication of a future intention to set up a trust is not enough, unless the statement of future intention was "bought" by another for valuable consideration. If the maker of the statement thus bound himself to set up a trust at a later date, that agreement or covenant is enforceable by the parties to it. But the statement of a would-be donor as to his intention for the future is not enough.[13] Nor is it enough to intend to transfer for another's benefit; the transferor must be shown

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Ltd. (1995), [1995] E.W.J. No. 206 (Eng. & Wales H.C.J., 13 January 1995); and *Kattler v. Kattler* (1995), 132 Sask. R. 92 (Sask. Q.B.), additional reasons at (June 22, 1995), Doc. Regina Q.B. 015726/94 (Sask. Q.B.). Other documents relating to the same transaction were considered in *Re Chemainus Team Development Training Trust (Trustee of)*, 2004 CarswellBC 2853, 13 E.T.R. (3d) 203 (B.C. S.C.). In order to determine whether there was certainty of intention, when there is an absence of formal trust documentation, the court will look at the surrounding circumstances and evidence, what was actually agreed, and how the parties conducted themselves. See, e.g., *Elliott (Litigation Guardian of) v. Elliott Estate*, 2008 CarswellOnt 7448, 45 E.T.R. (3d) 84 (Ont. S.C.J.); *Byers v. Foley*, 1993 CarswellOnt 558, 16 O.R. (3d) 641 (Ont. Gen. Div.); and *Langley v. Brownjohn*, 2007 CarswellBC 2165, 62 R.P.R. (4th) 139, 35 E.T.R. (3d) 38 (B.C. S.C.).

[11] In *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 CarswellBC 2476, 26 E.T.R. (3d) 197, 57 B.C.L.R. (4th) 212 (B.C. C.A.) Lowry J.A., writing for the court, discussed when a court will consider extrinsic evidence to resolve an ambiguity as to whether a trust was intended, though it was held that the words "remit" and "payable" were not ambiguous and did not indicate an intention to create a trust. The approach taken in the *Water Street Pictures* case was that, "[i]t is only when the intentions of the parties cannot be determined from the words they have chosen to employ, such that there is ambiguity, that the law permits consideration to be given to evidence of their conduct in making their agreement and in fulfilling their obligations. If it were otherwise, the certainty that is essential to documenting commercial transactions would be seriously undermined." On the use of extrinsic evidence in assessing whether there was an intention to create a trust see also, e.g., *Canada (Attorney General) v. Ristimaki*, 2000 CarswellOnt 30, 46 O.R. (3d) 721, 4 R.F.L. (5th) 167 (Ont. S.C.J.); and *Byers v. Foley*, 1993 CarswellOnt 558, 16 O.R. (3d) 641 (Ont. Gen. Div.) and *Giles v. Westminster Savings Credit Union*, 2006 CarswellBC 183, [2006] B.C.J. No. 159 (B.C. S.C.) at para. 203, affirmed 2007 CarswellBC 2071, [2007] 12 W.W.R. 579 (B.C. C.A.).

[12] In *Antle v. R.*, 2010 CarswellNat 3894, 2010 CarswellNat 4878, 61 E.T.R. (3d) 13 (F.C.A.), reconsideration refused 2012 CarswellNat 183, 2012 CarswellNat 184, [2010] S.C.C.A. No. 464 (S.C.C.), Noel J.A., writing for the court, said "it would be a surprising result if courts were bound by the formal expression of the parties and could not look to the surrounding circumstances, including the conduct of the parties, in assessing whether the intent to settle a trust is present."

[13] E.g., a father says to his son, "I intend next Monday to convey this house on trust for you, your wife, and your children." On Monday next the father has changed his mind. There is no trust. *Quaere* whether the result would be different if the son had in the interim relied on this statement of intention to his detriment.

A trust, the terms of which are only to come into effect at a future date, is perfectly valid. In such a case there is a present intention to set up a trust, the terms of the trust being that the interests under it shall take effect in the future, e.g., "$50,000 on trust for my daughter for her life to take effect on her marriage, remainder to her children equally."

In *Moropito v. Moropito Estate*, 2005 CarswellBC 2514, 20 E.T.R. (3d) 278 (B.C. S.C.), a statement by a testator that he would "remember the plaintiff in his will" or that he would buy the plaintiff a car was not considered sufficient to cause the beneficiary under the will to be considered a trustee of the estate for the plaintiff.

to have had in mind a transfer *on trust*. This means that the intention to make a gift by way of a handing over is not the intention to make a gift by way of a trust.[14]

The words employed to set up a trust, therefore, must show that the transferee is to take the property not beneficially, but for objects which the transferor describes. The words which nearly always reveal the intention are "in trust", or "as trustee for", but it is well established in common law courts, including those of Canada, that these words are neither conclusive nor indispensable.[15] On the other hand, in a series of Canadian cases, courts have made the point that there is no magic in the word "trust" and that other words may convey the same intention.[16]

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[14] Executory trusts created by the delivery of trust property to trustees can only exist if there is an intention at the moment of transfer to create a trust: *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, *supra*, note 6.

[15] See, e.g., *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Bullock v. Key Property Management Ltd.* (1992), 46 E.T.R. 275 (Ont. Gen. Div.), varied (1997), 33 O.R. (3d) 1 (Ont. C.A.); *McEachren v. Royal Bank* (1990), 78 Alta. L.R. (2d) 158, [1991] 2 W.W.R. 702 (Alta. Q.B.); *Mohr v. C.J.A.* (1991), 40 E.T.R. 12 (B.C. C.A.); affirming (1989), 36 E.T.R. 246 (B.C. S.C.); *Byers v. Foley*, 1993 CarswellOnt 558, 16 O.R. (3d) 641 (Ont. Gen. Div.); *Luscar Ltd. v. Pembina Resources Ltd.* (1995), 165 A.R. 104 (Alta. C.A.), leave to appeal to S.C.C. refused (1995), 31 Alta. L.R. (3d) xli (S.C.C.); *Mohr v. C.J.A.*, 1991 CarswellBC 638, 40 E.T.R. 12 (B.C. C.A.) at 13 [E.T.R.]; and *Mansell Capital Partners LLC v. Kerr*, 2005 CarswellOnt 909, 14 E.T.R. (3d) 198 (Ont. S.C.J.). In a unanimous Federal Court of Appeal decision in *Antle v. R.*, 2010 CarswellNat 4878, 61 E.T.R. (3d) 13 (F.C.A.), it was held that the court could look to extrinsic evidence to determine the true intention of the parties and accepted the trial judge's finding in the circumstances of the case that a trust was not intended even though the trust document was "clear and unambiguous" in expressing an intent to create a trust. Noel J.A. cited *Mohr v. C.J.A.*, 1991 CarswellBC 638, 40 E.T.R. 12 (B.C. C.A.) for the proposition that "while the words 'trust', 'trustees' and 'trust deed'" appeared in the agreement in question those words were not determinative of the issue since "The task of the Court is to construe the agreement against the background facts to determine 'objectively the 'aim' of the transaction'". Noel J. also noted the decision of Iacobucci J. in *Air Canada v. M & L Travel Ltd.*, 1993 CarswellOnt 568, [1993] 3 S.C.R. 787 (S.C.C.) (at para. 30) where the use of the words "in trust" in a document was referred to as "evidence of intention". See also *Fraser v. Minister of National Revenue*, 1991 CarswellNat 385, (sub nom. *Fraser v. R.*) 91 D.T.C. 5123 (Fed. T.D.).

"In trust" are words commonly found written after the name of the payee of guaranteed investment certificates, and term deposit instruments. Such an act creates an inherent ambiguity as to the intent of the investor or depositor, when no trust objects are mentioned. Did he intend the payee to be the trust beneficiary for his personal benefit, to hold on trust for implied third parties or purposes, or to hold on resulting trust for the investor or depositor (i.e., himself)?

[16] *Mulholland v. Merriam* (1873), 20 Gr. 152 (U.C. C.A.); *Cameron v. Campbell* (1882), 7 O.A.R. 361; *Kendrick v. Barkey* (1907), 9 O.W.R. 356 (Ont. H.C.); *Elgin Loan & Savings Co. v. National Trust Co.* (1903), 7 O.L.R. 1 (Ont. H.C.), affirmed (1905), 10 O.L.R. 41 (Ont. C.A.); *Re Garden*, [1931] 2 W.W.R. 849, [1931] 4 D.L.R. 791 (Alta. C.A.); *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.). In the context of all the language of a bequest, Garrow J.A. came to the conclusion in *Canada Trust Co. v. Davis*, 1912 CarswellOnt 872, 2 D.L.R. 644, 25 O.L.R. 633 (Ont. C.A.), affirmed 1912 CarswellOnt 754, 46 S.C.R. 649, 8 D.L.R. 756 (S.C.C.) that the words "in trust", though used, did not have controlling importance, and that no trust had been created. See also *Re Dickin*, 1975 CarswellOnt 363, 7 O.R. (2d) 472, 55 D.L.R. (3d) 504 (Ont. S.C.); and *Willis (Litigation Guardian of) v. Willis Estate*, 2006 CarswellOnt 1757, 23 E.T.R. (3d) 292 (Ont. S.C.J.), affirmed 2007 CarswellOnt 4843, 33 E.T.R. (3d) 187 (Ont. C.A.).

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 Cash Store Financial Services Inc., The Cash Store Inc., TCS Cash Store Inc., Instaloans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., and 1693926 Alberta Ltd Doing Business as "The Title Store"

Court File No:

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SUPERIOR COURT OF JUSTICE
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Proceeding commenced at Toronto

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