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SEP 18 2023
JUDICIAL CENTRE
OF CALGARY

COURT FILE NUMBER	25-2965622
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C C-8, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MANTLE MATERIALS GROUP, LTD.
DOCUMENT	BOOK OF AUTHORITIES
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GOWLING WLG (CANADA) LLP** Suite 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Telephone: 403-298-1938 / 403-298-1018 Fax: 403-263-9193 Email: tom.cumming@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A171561 **Attention: Tom Cumming / Sam Gabor / Stephen Kroeger**

APPLICATION BEFORE THE HONOURABLE JUSTICE LEMA
SEPTEMBER 22, 2023 AT 2:00 PM ON THE CALGARY COMMERCIAL LIST

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	*Bankruptcy and Insolvency Act,* RSC 1985, c B-3
2.	*Plancher Heritage Ltée / Heritage Flooring Ltd., Re 2004 NBBR*, 2004 NBQB 168
3.	*Scotian Distribution Services Limited (Re),* 2020 NSSC 131
4.	*T & C Steel Ltd. (Re),* 2022 SKKB 236
5.	*Nautican v. Dumont,* 2020 PESC 15
6.	*Baldwin Valley Investors Inc.,* Re, 1994 CarwswellOnt
7.	*Orphan Well Association v. Grant Thornton Ltd.,* 2019 SCC 5
8	*Orphan Well Association v Trident Exploration Corp,* 2022 ABKB 839
9.	*Colossus Minerals Inc. (Re),* 2014 ONSC 514

TAB 1

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4

50.4(1)Notice of intention

Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

50.4(2)Certain things to be filed

Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

50.4(3)Creditors may obtain statement

Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50.4(4)Exception

The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50.4(5)Trustee protected

If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50.4(6)Trustee to notify creditors
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

50.4(7)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

50.4(8)Where assignment deemed to have been made
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

50.4(9)Extension of time for filing proposal
The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

50.4(10)Court may not extend time
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

50.4(11)Court may terminate period for making proposal
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Currency
Federal English Statutes reflect amendments current to June 7, 2023
Federal English Regulations Current to Gazette Vol. 157:13 (June 21, 2023)

End of Document

TAB 2

2004 NBBR 168, 2004 NBQB 168
New Brunswick Court of Queen's Bench

Plancher Heritage Ltée / Heritage Flooring Ltd., Re

2004 CarswellNB 358, 2004 NBBR 168, 2004 NBQB 168, [2004]
N.B.J. No. 286, 279 N.B.R. (2d) 1, 3 C.B.R. (5th) 60, 732 A.P.R. 1

In the Matter of The Proposal of Plancher Heritage Ltée / Heritage Flooring Ltd.

Glennie J.

Judgment: July 20, 2004
Docket: 10543, Estate No. 51-114608

Counsel: G. Patrick Gorman, Q.C. for Heritage Flooring Ltd.
Stephen J. Hutchinson, Jeffrey R. Parker, Lee C. Bell-Smith for Royal Bank of Canada

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Headnote
Bankruptcy and insolvency --- Proposal — General principles
Test for whether insolvent company would be able to make viable proposal, if granted extension of stay, is whether it would likely, as opposed to certainly, be able to present viable proposal — Test is not whether or not specific creditor would be prepared to support proposal — Purpose of stay provisions under Bankruptcy and Insolvency Act is to preserve and protect status quo at moment when insolvent party files Notice of Intention to Make Proposal — Intention of stay provisions is to allow insolvent party to continue its business in accordance with its existing authorized credit agreements — Secured creditor cannot unilaterally amend loan or credit agreement relating to secured revolving line of credit by capping available line of credit.
Table of Authorities
Cases considered by *Glennie J.*:
Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219, 1994 CarswellOnt 253 (Ont. Gen. Div. [Commercial List]) — considered
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.) — referred to
Com/Mit Hitech Services Inc., Re (1997), 1997 CarswellOnt 2753, 47 C.B.R. (3d) 182 (Ont. Bktcy.) — considered
Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered
Gene Moses Construction Ltd., Re (1999), 1999 CarswellBC 149, 9 C.B.R. (4th) 275 (B.C. Master) — considered
National Bank of Canada v. Dutch Industries Ltd. (1996), 149 Sask. R. 317, 45 C.B.R. (3d) 103, 1996 CarswellSask 631 (Sask. Q.B.) — referred to
Scotia Rainbow Inc. v. Bank of Montreal (2000), 2000 CarswellNS 216, 18 C.B.R. (4th) 114, (sub nom. *Scotia Rainbow Inc. (Bankrupt) v. Bank of Montreal)* 186 N.S.R. (2d) 153, (sub nom. *Scotia Rainbow Inc. (Bankrupt) v. Bank of Montreal)* 581 A.P.R. 153 (N.S. S.C.) — referred to
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50(1.5) [en. 1992, c. 27, s. 18(1)] — considered

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(8) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — referred to

s. 65.1(1) [en. 1992, c. 27, s. 30] — considered

s. 65.1(4) [en. 1992, c. 27, s. 30] — considered

s. 65.1(4)(b) [en. 1992, c. 27, s. 30] — considered

s. 69 — referred to

ss. 69-69.3(1) — referred to

ss. 69-69.31 — referred to

s. 69(1) — referred to

s. 69(1)(a) — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 244 — referred to

MOTION by insolvent company for extension of stay under s.69 of *Bankruptcy and Insolvency Act* and for order that bank return to it all funds taken from its operating accounts.

***Glennie J.*:**

1 On February 11, 2004, Plancher Heritage Ltee / Heritage Flooring Ltd. ("Heritage") filed a Notice of Intention To Make A Proposal (the "Notice of Intention") pursuant to Subsection 50.4(1) of the *Bankruptcy and Insolvency Act* (the "BIA"). A.C. Poirier & Associates Inc. (the "Trustee") consented to act as Trustee under the proposal. Section 69 of the BIA grants a stay (the "Stay") of all creditor actions and remedies against the insolvent person, which stay in this case was to expire on March 12, 2004. On March 12, 2004, I extended the Stay in this matter to Thursday, March 25, 2004 and advised that I would file written reasons for the granting of such an extension. These are those reasons.

2 There is also another issue, namely whether Heritage's banker, Royal Bank of Canada (the "Bank") operated contrary to the stay by sweeping Heritage's operating account and capping its available line of credit or whether the Bank is authorized to do so by virtue of Section 65.1(4)(b) of the BIA.

Background

3 Heritage manufactured hardwood flooring at its plant in Kedgwick, New Brunswick. It had annual gross sales in the range of five to six million dollars.

4 On January 30, 2001, Heritage accepted an offer from the Bank's Asset Based Finance Division to establish a revolving credit facility in favour of Heritage with a credit limit of two million dollars subject to the limitation that the aggregate amount

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

31 I am satisfied, on a balance of probabilities, that as of March 12, 2004 Heritage met the following criteria to grant an extension: a) It had acted, and continued to act, in good faith and with due diligence; b) It would likely be able to make a viable proposal if the extension were to be granted; and, c) no creditor of Heritage would be materially prejudiced if the extension were to be granted.

32 The test for whether Heritage would likely be able to make a viable proposal, if granted the extension, is whether it would likely, as opposed to certainly, be able to present a viable proposal. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]), Justice Farley was of the opinion that "viable" means "reasonable on its face" to a reasonable creditor and that "likely" did not require certainty but meant "might well happen", "probable" or "to be reasonably expected." See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S. S.C.).

33 In support of its motion, the Bank relied on Section 50.4(11)(c) of the BIA and argued that Heritage would not be able to make a proposal before the expiration of the 30-day period that would be accepted by the majority of its creditors. It relied upon *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]) in support of its argument. In *Cumberland Trading Inc.*, Skyview International Finance Corporation represented 95 percent of the value of the claims of secured creditors of Cumberland and 67 percent of all creditors' claims. Skyview therefore had a veto power on any vote on a proposal and it asserted that there was no proposal which Cumberland could make that it would approve. Justice Farley allowed Skyview's motion and declared terminated the 30-day period in which to file a proposal.

34 Similarly, in *Com/Mit Hitech Services Inc., Re*, [1997] O.J. No. 3360 (Ont. Bktcy.), Toronto Dominion Bank ("TD Bank") was owed more than 90 percent of the debtor's total indebtedness and brought a motion pursuant to Section 50.4(11) of the BIA requesting a declaration that the 30-day period provided in Section 50.4(8) be terminated. Justice Farley allowed TD Bank's application, recognizing that TD Bank was the overwhelming creditor and thus was in a veto position with respect to any proposal.

35 However, in the present case, the Trustee has advised that the Bank would be outside the terms of any proposal and would in fact be paid out. As well, Gilbert LeBlanc testified that Group Savoie, which has expressed an interest in acquiring all of the outstanding shares of Heritage, understands that the Bank would have to be paid out. Accordingly, the Bank's argument that it is in a position to veto any proposal put forth by Heritage must fail since the Trustee has advised that the Bank will not be in a position to veto any proposal since it will be outside the terms of any proposal and would not be included in any class of creditors of Heritage.

36 In granting an extension of the stay, I relied on the fact that Groupe Savoie Inc. expressed a desire to negotiate with the shareholders of Heritage for the purpose of structuring a transaction whereby it would acquire all of the outstanding shares of Heritage. It was anticipated that negotiations would take place from March 15th to March 17, 2004 "*with a formal letter of intent to be provided no later than Monday, March 22, 2004 and open for acceptance by the shareholders of the Company until 5:00 p.m. on Tuesday, March 23, 2004*." Groupe Savoie is an arms length corporation with substantial assets.

37 At the time of the hearing of Heritage's motion, I was satisfied that Heritage established on a balance of probabilities that an extension was justified. Accordingly, I allowed Heritage's application for an extension of the Stay to March 25, 2004.

The Availability of Credit

38 The next issue to be addressed is whether the Bank acted contrary to the Stay provisions of Section 69 of the BIA by sweeping Heritage's operating account and capping its operating facility subsequent to the date Heritage filed its Notice Of Intention. Heritage argues that by so doing the Bank in effect executed a remedy contrary to Section 69.(1) of the BIA.

TAB 3

2020 NSSC 131
Nova Scotia Supreme Court

Scotian Distribution Services Limited (Re)

2020 CarswellNS 256, 2020 NSSC 131, 318 A.C.W.S. (3d) 12, 78 C.B.R. (6th) 258

In the Matter of: The Proposal of Scotian Distribution Services Limited

Reg. Raffi A. Balmanoukian

Heard: March 27, 2020
Judgment: April 6, 2020
Docket: 43999, Estate No. 51-2624515

Counsel: Tim Hill, Q.C., for Applicant

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Provincial court adopted essential services model in response to Covid-19 pandemic — Only matters deemed urgent or essential by presiding jurist would be heard and they would be heard by method of least direct personal interaction — Debtor had brought application for extension of time to file proposal, pursuant to s. 50.4(9) of Bankruptcy and Insolvency Act — Application granted — Time to file proposal was extended — Matter was heard by teleconference — Urgent or essential threshold was met — Limitation period in s. 50.4(8) of Act was nigh — Lack of extension would result in deemed assignment in bankruptcy — Deemed assignment would at least potentially have impacts that ran beyond solely individual interests of corporate debtor — Evidence of current status of process established good faith requirement — Debtor had employees and contracts and its operations included transportation which were important and perhaps essential on both micro and macroeconomic basis — No creditor objected and there was no evidence that extension would cause material prejudice to any creditor — Debtor had to demonstrate that it was likely to be able to make viable proposal with extension in place but in current context benefit of any doubt should be accorded to debtor — In current environment, creditor would be well advised to consider viability and desirability of proposal Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50.4(9).
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 50.4(8) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(c) [en. 1992, c. 27, s. 19] — considered

APPLICATION by debtor for extension of time to file proposal.

(c) no creditor would be materially prejudiced if the extension being applied for were granted. [emphasis added]

13 The present motion had been scheduled for March 27, 2020. The applicant's Notice of Intention had been filed on February 28, 2020, meaning that its expiration, 30 days thereafter, was at the end of March, 2020 (BIA s. 50.4(8)). The scheduled motion was therefore at the very end of this timeline, and the lack of an extension would result in a deemed assignment in bankruptcy (BIA s. 50.4(8)).

14 The applicant sought to have the matter heard by teleconference. After a review of the file material, I agreed. The Deputy Registrar, with my gratitude, arranged for recording facilities; this is still an open Court of record. Affected entities are still entitled to notice, and they are still entitled to be heard. As well, our open court principle remains and is at least as important as ever.

15 To that end, the applicant was directed to provide affected entities, including creditors, with particulars of the conference call, including time and call-in particulars. That was done, and a creditor (who did not object to the application) did indeed avail itself of this facility.

16 I note that the affidavit of service, and other material, was filed electronically. That is perfectly in order in accordance with the current directives in effect at present.

17 I have granted the order based on the following factors:

18 First, I am satisfied that the 'urgent or essential' threshold was met. The limitation period in BIA 50.4(8) was nigh. The deemed assignment would be automatic. As I will recount below, such an assignment would at least potentially have impacts that run beyond solely the individual interests of the corporate debtor.

19 Section 50.4(9) requires the Court to be satisfied that the applicant meets a three part test each time it is asked for an extension: that it has and continues to act with due diligence; that there is a likely prospect of a viable proposal; *and* that no creditor would be materially prejudiced by the extension. The burden is on the applicant each time, to meet each test.

20 The applicant's affidavit evidence is that the applicant continues in operation and is diligently pursuing the proposal process; the evidence of the current status of the process (ie the engagement of MNP Ltd., review of operations, and review of assets and liabilities) satisfies me, at present, of the good faith requirement.

21 It has employees and contracts. Its operations include transportation operations, which at least for the basis of the current application are important and perhaps essential on both a micro and macroeconomic basis. While "bigger picture" ramifications outside the particular debtor and creditors are not part of the Section 50.4(9) test, I believe I can take them into account when assessing and placing appropriate weight on the benefit/detriment elements which are the overall thrust of that tripartite standard.

22 No creditor objected, and there is no evidence that the extension would cause material prejudice to any creditor. Although this burden, too, is on the applicant, I can take judicial notice that proposals, if performed, generally result in a greater net recovery to creditors overall; while there is some indication that the applicant will seek to resile from certain obligations, the test is whether the *extension* would be prejudicial, not whether the proposal *itself* would be.

23 This would be the applicant's first extension under 50.4(9), which allows for a series of extensions of up to 45 days each, to a maximum of five months.

24 To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.

TAB 4

2022 SKKB 236
Saskatchewan Court of King's Bench

T & C Steel Ltd., Re

2022 CarswellSask 534, 2022 SKKB 236

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3, AS AMENDED, OF T & C STEEL LTD. AND T & C REINFORCING LTD.

T & C STEEL LTD. and T & C REINFORCING LTD. (Applicants)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3, ASAMENDED, OF UNDER THE SUN GROWERIES INC.

UNDER THE SUN GROWERIES INC. (Applicant)

Scherman J.

Judgment: October 28, 2022
Docket: BKY-RG-00228-2022

Counsel: Travis K. Kusch, David J. Smith, for Applicants
Kelsey J. Meyer, Andrew Basi, for Proposal Trustee

Subject: Insolvency
Headnote
Bankruptcy and insolvency
Table of Authorities
Cases considered by *Scherman J.*:
Cantrail Coach Lines Ltd., Re (2005), 2005 BCSC 351, 2005 CarswellBC 581, 10 C.B.R. (5th) 164 (B.C. S.C.) — considered
Enirgi Group Corp. v. Andover Mining Corp. (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — considered
Scotian Distribution Services Limited (Re) (2020), 2020 NSSC 131, 2020 CarswellNS 256, 78 C.B.R. (6th) 258 (N.S. S.C.) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — pursuant to

***Scherman J.*:**

1 Each of T & C Steel Ltd. [TCS], T & C Reinforcing Ltd. [TCR] and Under the Sun Groweries Inc. [UTSG] had given Notices of Intention to Make a Proposal [NOI] to their unsecured creditors. On the filing thereof, Grant Thornton was named as the Proposal Trustee for each. The applications did not include proposals to their secured creditors.

2 On September 13, 2022, Gabrielson J. made an order consolidating the proceedings in BKY-RG-00228-2022 and BKY-RG-00229-2022 respecting TCS and TCR into the court file BKY-RG-00228-2022 and granted, pursuant to s. 50.4(9) of the

(a) the Probable and Hypothetical Assumptions are not consistent with the purpose of the Second Cash Flow Statement;

(b) as at the date of the Second Cash Flow Statement, the Probable and Hypothetical Assumptions developed by management were not suitably supported and consistent with the Companies' plans or do not provide a reasonable basis for the Second Cash Flow Statement, given the Probable and Hypothetical Assumptions; or

(c) the Second Cash Flow Statement does not reflect the Probable and Hypothetical Assumptions.

19 The Proposal Trustee then end their Second Reports with the following conclusion:

28. The Proposal Trustee believes that granting an extension of time to file a proposal and the continuation of these proceedings is in the best interests of the stakeholders, and preferable to a liquidation in a bankruptcy and/or receivership.

and recommend the Court approve the stay extensions sought.

20 I find the evidentiary and informational basis provided to the Court in support of the extension application to barely meet the test of a likelihood of being able to make a viable proposal. As stated in *Scotian Distribution*, on a first extension, the test "will likely not be a difficult standard to meet". But this is not a first extension.

21 It is only by giving regard to:

a. the statement in *Enirgi Group* to the effect that "'likely' means 'such as might well happen'";

b. the direction in *Cantrail* quoted above to the effect that is important for the Court to take a broad approach and look at a number of interested and potentially affected parties, including employees and unsecured creditor;

c. recognizing that Grant Thornton is, in providing to the Court their reports, effectively an officer of the court in respect of the conclusions and recommendations they provide, notwithstanding my concerns about the limitations inherent in their reports; and

d. my opinion that the creditors should, where a reasonable possibility of acceptance of a proposal exists, be given the opportunity to decide, since they are the ones who will be primarily affected;

that I am able to conclude that I am satisfied that the applicants "would likely be able to make a viable proposal" if given additional time. I recognize that creditors might view what I might perceive as unviable as to them being viable and acceptable.

22 Accordingly, I am granting the extensions sought and direct that orders shall issue in the form of the draft orders filed on October 21, 2022, on each of the files.

23 In granting the requested second extensions, I wish to make it clear that should the applicants fail to complete their proposals within the time limits set forth in the orders I have made and come to the Court seeking a further extension, they should expect the Court will be requiring better and focused evidence and information on the likelihood of a viable proposal, given the problematic cash flow projections in turn based on unknown "probable and hypothetical assumptions".

24 Because of the attention I have given to these matters and the concerns expressed herein, and in the interests of judicial efficiency, I will remain seized of any future application for a further extension of time.

End of Document

TAB 5

2020 PESC 15
Prince Edward Island Supreme Court

Nautican v. Dumont

2020 CarswellPEI 30, 2020 PESC 15, 319 A.C.W.S. (3d) 18, 79 C.B.R. (6th) 243

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by NAUTICAN RESEARCH AND DEVELOPMENT LTD. Pursuant to Section 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by CARELI MARINE CORPORATION LIMITED pursuant to Section 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

IN THE MATTER OF: a Motion by NAUTICAN RESEARCH AND DEVELOPMENT LTD. and by CARELI MARINE CORPORATION LIMITED for Orders pursuant to Sections 50.4(9), 64.2(1), 64.2(2), 50.6(1) and 50.6(3) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

James W. Gormley J.

Heard: October 31, 2019
Judgment: May 8, 2020
Docket: S1-GS-28836

Counsel: Michael G. Drake, Sean Corcoran, for Nautican Research and Development Ltd. and Careli Marine Corporation Ltd.
David W. Hooley, Q.C., Melanie McKenna, for David Dumont and Outboard Engineering Group LLC

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Bankruptcy and insolvency
VII Consolidation orders and orderly payment of debts
Headnote
Bankruptcy and insolvency --- Consolidation orders and orderly payment of debts
Creditor brought action against debtor corporations — Debtor corporations entered proceedings under Bankruptcy and Insolvency Act, and trustee was appointed — Debtors brought application for consolidation of bankruptcy proceedings and other relief — Application granted in part — Consolidation of bankruptcy proceedings ordered — Consolidation would avoid multiplicity of proceedings thereby providing most just, expeditious and least expensive determination of issues — Debtors were closely aligned, as one was holding company that held all issued shares in other and had no employees, no bank account, and no active business activities — Managing director for both debtors was same and both companies shared same major secured creditor — No prejudice in granting consolidation — Creditor agreed to consolidation.
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Creditor brought action against debtor corporations — Debtor corporations entered proceedings under Bankruptcy and Insolvency Act, and trustee was appointed — Debtors brought application for consolidation of bankruptcy proceedings and other relief — Application granted in part — Consolidation of bankruptcy proceedings ordered — Extension of time to file proposal granted — Not shown that debtors were acting in bad faith and it was not shown that funds were being diverted to other entity — There was evidence that viable proposal could be filed — No prejudice to creditor from extension — Tangible

assets were subject to seizure order, and intangible assets would be diminished if bankruptcy declared — Administrative charge approved — Debtor in possession loan not authorized — Loan was offered by sole shareholder of debtors and terms requested included super priority over interest of all creditors — Loan was not offered by creditor or non-arm's length party.

Table of Authorities

Cases considered by *James W. Gormley J.*:

Colossus Minerals Inc., Re (2014), 2014 ONSC 514, 2014 CarswellOnt 1517, 14 C.B.R. (6th) 261 (Ont. S.C.J.) — distinguished

Convergix Inc., Re (2006), 2006 NBQB 288, 2006 CarswellNB 460, 24 C.B.R. (5th) 289, 307 N.B.R. (2d) 259, 795 A.P.R. 259, 2006 NBBR 288, 2006 CarswellNB 863 (N.B. Q.B.) — considered

H & H Fisheries Ltd., Re (2005), 2005 NSSC 346, 2005 CarswellNS 541, 239 N.S.R. (2d) 229, 760 A.P.R. 229, 18 C.B.R. (5th) 293 (N.S. S.C.) — considered

Mustang GP Ltd., Re (2015), 2015 ONSC 6562, 2015 CarswellOnt 16398, 31 C.B.R. (6th) 130 (Ont. S.C.J.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.6 [en. 2005, c. 47, s. 36] — considered

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5)(c) [en. 2007, c. 36, s. 18] — considered

s. 64.2 [en. 2005, c. 47, s. 42] — considered

s. 64.2(1) [en. 2005, c. 47, s. 42] — considered

s. 64.2(1)(c) [en. 2005, c. 47, s. 42] — considered

s. 64.2(2) [en. 2005, c. 47, s. 42] — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 3 — considered

Rules of Civil Procedure, P.E.I. Rules

Generally — referred to

R. 1.04 — considered

APPLICATION by debtors for relief in proceedings under *Bankruptcy and Insolvency Act*.

***James W. Gormley J.*:**

Introduction

1 Nautican Research and Development Ltd. (hereinafter "Nautican") and Careli Marine Corporation Limited (hereinafter "Careli") seek the following relief:

iii) since the stay commenced, they are addressing current lease requirements, assessing current employee levels and reviewing client contracts. They have also reduced operating costs and worked with PWC to assess options and formulate viable proposals to creditors.

14 I also note that the proposal trustee states that the debtors have been acting in good faith and have prepared projected statements of cash flow, which have been provided to their creditors.

15 Outbound and Mr. Dumont have raised their concerns of the "possibility" that Nautican may have or is attempting to divert contracts to its US subsidiary to avoid its creditors. Mr. Dumont also has a "feeling" that he was not receiving the same good faith bargaining from Nautican and Careli that he was offering. Although the creditors have concerns, which may or may not be based in fact, they have not produced sufficient evidence to overcome the evidence provided by Nautican and Careli that their activities have been demonstrative of acting in a good faith manner and with due diligence with respect to the preparation of a viable proposal. I find Nautican and Careli have met the first prong of the three part test.

Sub-issue B - Will Nautican and Careli likely be able to make a viable proposal if the extension is granted?

16 I refer again to *Convergix Inc., Re* wherein Glennie J. states as follows:

> [40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well happen" and "probable" "to be reasonably expected". See also ***Scotia Rainbow Inc. v. Bank of Montreal*** (2000), 18 C.B.R. (4th) 114 (N.S.S.C.).

17 Clearly, this creates an objective standard for the court to consider, which is not tied to a specific creditor and particularly in this case, the creditor opposing the request for an extension.

18 The test requires me to consider what a reasonable creditor might expect to happen or what might reasonably be expected to occur. This test requires a dispassionate evaluation, not the position of an advocate of a specific creditor. Nautican and Careli are seeking 45 days to allow the process a chance at success. They have retained consultants, one of which has expressed his opinion that the debtors will likely be able to make a viable proposal if the extension is granted. Nautican and Careli have made efforts in the first 30 days of the stay. This is not a situation of inactivity by the debtors. Although the evidence is not overwhelming on this aspect of the test, it is sufficient to meet the legislative requirement on a balance of probabilities.

19 Although it is clear that Nautican, Careli and Outbound have been involved in lengthy, contentious negotiations and that Outbound believes no viable proposal will be made during the term of the extension, the test is not a subjective one and I find that the evidentiary record provided by Nautican and Careli is sufficient to meet this aspect of the test.

Sub-issue C - If the extension is granted, will any creditors be materially prejudiced?

20 It is clear from the affidavit of Dumont that the major creditors of Nautican and the major creditor of Careli vehemently oppose the motion and argue their position will be materially prejudiced if I order an extension.

21 I note the decision of *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.) wherein Goodfellow J. stated as follows:

> [37] This section of the *Act* contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

TAB 6

1994 CarswellOnt 253
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 253, [1994] O.J. No. 271, 23 C.B.R. (3d) 219

Re proposal of BALDWIN VALLEY INVESTORS INC. and of VARION INCORPORATED

Farley J.

Judgment: February 3, 1994 *
Docket: Doc. 32-65038

Counsel: *Frank Bennett* , for debtor companies.
Larry Crozier , for secured creditor, Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Headnote
Bankruptcy --- Proposal — General
Proposals — Notice of intention — Extension of time — Debtor companies applying for extension of time to file proposal and failing to file within extended time — Companies again applying for extension — Registrar dismissing application upon finding that companies would not be able to make viable proposal — Companies' appeal from registrar's decision dismissed.
Two related debtor companies defaulted on their obligations to their bank. The bank demanded payment from the companies and served notice of intention to enforce its security. The companies filed a notice of intention to file proposals, and each subsequently received an extension to file a proposal. When they failed to file a proposal by the extended time, the companies again applied for an extension of time to file.
The Registrar in Bankruptcy dismissed the applications, upon a finding that the bank, which held about 92 per cent of one company's debt and almost 100 per cent of the other, had lost all confidence in the companies and wanted only to enforce its security. As a result, a viable proposal was not possible. The companies were, therefore, unable to satisfy the statutory burden imposed upon them by s. 50.4(9) of the *Bankruptcy and Insolvency Act* .
The companies appealed.
Held:
The appeal was dismissed.
The registrar did not err in finding that the companies had not satisfied the onus imposed on them by s. 50.4(9).
Table of Authorities
Cases considered:
Cumberland Trading Inc., Re (1994), 23 C.B.R. (2d) 225 (Ont. Gen. Div. [Commercial List]) — *referred to*
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 50.4(9)

s. 50.4(11)

Appeal from decision of Registrar in Bankruptcy [reported at 23 C.B.R. (3d) 219 at 223] dismissing second application for extension of time to file proposal under *Bankruptcy and Insolvency Act* .

***Farley J.*:**

1 Baldwin Valley Investors Inc. ("Baldwin") and Varion Incorporated ("Varion"), the debtor companies appealed the dismissal of their extension of time to file proposals requests heard January 27, 1994 by Registrar Ferron. The Registrar indicated that he had refused extensions that day with reasons to follow shortly [reported at 23 C.B.R. (3d) 219 at 223]. The matter came before me on January 28th and on consent was adjourned to be heard today when it was expected that reasons would be available, as they in fact were. The Registrar was of the view that the debtor companies had failed to meet all three tests under s. 50.4(9) of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 as amended ("BIA"). That section provides that:

> (9) The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (*a*) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (*b*) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (*c*) no creditor would be materially prejudiced if the extension being applied for were granted.

This should be contrasted with the termination provisions of s. 50.4(11) which provide that:

> (11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (*b*) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question.
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period expired.

2 The facts are as set out in the Registrar's reasons released today. Counsel were agreed that the standard of review was that I had to be satisfied that the Registrar either erred in law or in principle.

3 Let me deal with the middle test of s. 50.4(9)(*b*) that the debtor companies must show that they "would likely be able to make a viable proposal if the extension being applied for were granted". The Registrar appeared to focus on the fact that the Bank, as the 92% creditor of Baldwin and almost 100% creditor of Varion, had lost all confidence in the debtor companies and would not vote for any proposal put forth. However, in my view this is not the test of s. 50.4(9)(*b*). This becomes clear when one examines s. 50.4(11)(*b*) and (*c*); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(*b*) and (11)(*b*)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(*c*) but with no corresponding clause in s. 50.4(9)).

4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10-11 in *Re Cumberland Trading Inc.* released January 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. "Likely" as defined in *The Concise Oxford Dictionary of Current English* , 7th ed. (1987; Oxford, The Claredon Press) means:

> *likely* 1. such as *might well happen* , or turn out to be the thing specified; *probable* . 2. to be *reasonably expected* . [emphasis added]

I do not see the conjecture of the debtor companies' rough submission as being "*likely* ".

5 While one may well fault the Bank for its approach to this situation, one has to recognize that the onus is on the debtor companies to show that they have acted in good faith and with due diligence. I am satisfied that the Registrar correctly assessed the situation in that regard that the debtor companies could have and should have proceeded with laying the foundation for their proposal and in fact building on that foundation rather than relying on anything that may be forthcoming from the Bank. In particular, see Cohn, *Good Faith and the Single Asset Debtor* (1988) 62 Am. Bankr. L.J. 131 on which it appears the Registrar relied. However, it is noted that there was no examination of the jurisprudential principles therein.

6 I discussed the question of material prejudice in *Cumberland, supra* , at pp. 11-13 [pp. 231-232]. The debtor companies have provided no information in that regard for the 45 day extension period from February 28, 1994. The only information close to this is the cash-flow statement of the previous extension granted December 16, 1993. However, for this extension there was no information. It appears therefore, that the debtor companies did not even attempt to meet this condition.

7 I am therefore, of the view that on all three tests (one failure of a test being sufficient to disqualify a debtor company from being able to ask for an extension) the debtor companies have failed to overcome the onus on them. The Registrar was correct in the result on all counts, although I feel that he inadvertently used the wrong test in s. 50.4(9)(*b*), a quite understandable situation given the terminology used in the legislation.

8 I would also point out that it was clear that if the debtor companies had won a victory in this appeal, it would have been a Pyhrric victory. The Bank would have been able to come right back in with a motion based on s. 50.4(11)(*c*).

9 The appeal is dismissed. Costs were agreed at $2,500 and are payable by the debtor companies jointly and severally to the Bank forthwith.

Appeal dismissed.

Footnotes

* This judgment is an appeal from the decision reported at 23 C.B.R. (3d) 219 at 223 .

TAB 7

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 SCC 5, 2019 CSC 5, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown JJ.

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

Counsel: Ken Lenz, Q.C., Patricia Johnston, Q.C., Keely R. Cameron, Brad Gilmour, Michael W. Selnes, for Appellants
Kelly J. Bourassa, Jeffrey Oliver, Tom Cumming, Ryan Zahara, Danielle Maréchal, Brendan MacArthur-Stevens, Chris Nyberg, for Respondents
Josh Hunter, Hayley Pitcher, for Intervener the Attorney General of Ontario
Gareth Morley, Aaron Welch, Barbara Thomson, for Intervener, Attorney General of British Columbia
Richard James Fyfe, for Intervener, Attorney General of Saskatchewan
Robert Normey, Vivienne Ball, for Intervener, Attorney General of Alberta
Adrian Scotchmer, for Intervener, Ecojustice Canada Society
Lewis Manning, Toby Kruger, for Intervener, Canadian Association of Petroleum Producers
Nader R. Hasan, Lindsay Board, for Intervener, Greenpeace Canada
Christine Laing, Shaun Fluker, for Intervener, Action Surface Rights Association
Caireen E. Hanert, Adam Maerov, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.7 Unsecured claims
X.7.b Priority with respect to secured creditors
Bankruptcy and insolvency

received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. R.*, 2013 SCC 29, [2013] 2 S.C.R. 336 (S.C.C.) , which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

158 The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the Abitibi test

159 Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (BIA, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot

TAB 8

2022 ABKB 839
Alberta Court of King's Bench

Orphan Well Association v. Trident Exploration Corp

2022 CarswellAlta 3672, 2022 ABKB 839, [2023] A.W.L.D. 259,
[2023] A.W.L.D. 260, 2022 A.C.W.S. 4922, 4 C.B.R. (7th) 258

Orphan Well Association (Applicant) and Trident Exploration Corp., Trident Exploration (WX) Corp., Trident Exploration (Alberta) Corp., Trident Limited Partnership, Trident Exploration (Aurora) Limited Partnership I, Trident Exploration (2006) Limited Partnership I, and Fenergy Corp. (Respondents)

R.A. Neufeld J.

Heard: September 20, 2022
Judgment: December 13, 2022
Docket: Calgary 1901-06244

Counsel: Kelsey J. Meyer, Adam Williams, for Pricewater House Coopers Licence Insolvency Trustee, court appointed receiver and manager of Trident Exploration Corp. and other Trident entities
Kelly J. Bourassa, for ATB Financial
Gregory Plester, Curtis J. Auch, for Woodlands County and Stettler County
Shauna N. Finlay, Moira Lavoie, for Kneehill County
Robyn Gurofsky, Jessica Cameron, Garrett Finegan, for Orphan Well Association
Candice A. Ross, for Alberta Energy Regulator

Subject: Insolvency; Natural Resources; Property; Municipal
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.1 Provable debts
IX.1.a General principles
Bankruptcy and insolvency
X Priorities of claims
X.3 Claims for municipal taxes and public utilities rates
X.3.a Secured claims
X.3.a.i Taxes
Headnote
Bankruptcy and insolvency --- Proving claim — Provable debts — General principles
Post-receivership taxes — Respondents, collectively bankrupt, were group of privately-owned oil and gas exploration and production companies and partnerships — After bankrupt ceased operations and terminated all employees and contractors, its licences were turned back to Alberta Energy Regulator (AER), and its abandonment and reclamation obligations would be assumed by applicant Orphan Well Association (OWA) — OWA applied for order appointing receiver — Receiver made request for advice and directions regarding whether AER or OWA was entitled to call on proceeds of sale of all of bankrupt's assets, including realty, and whether such entitlement took precedence over municipal tax obligations that were incurred post-receivership — AER or OWA was entitled to call on proceeds of sale from all of bankrupt's assets and their entitlement took precedence over municipal tax obligations because of AER or OWA super priority over funds in question — OWA's entitlement was addressed outside of insolvency regime because it was non-monetary obligation which could not be reduced to provable claim through test in Abitibi, not because it was non-provable — Municipal taxes, on other hand, were neither non-monetary

obligation nor incompatible with Abitibi test — Essence of AER super priority was that it was not subject to prioritization because obligation must have been met before distribution could be made to anyone else — Assets subject to AER super priority were not limited to licenced oil and gas wells, pipelines and production facilities — It made no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in Manitok to carve out economic licensed assets from uneconomic ones.

Bankruptcy and insolvency --- Priorities of claims — Claims for municipal taxes and public utilities rates — Secured claims — Taxes

Post-insolvency taxes — Respondents, collectively bankrupt, were group of privately-owned oil and gas exploration and production companies and partnerships — After bankrupt ceased operations and terminated all employees and contractors, its licences were turned back to Alberta Energy Regulator (AER), and its abandonment and reclamation obligations would be assumed by applicant OWA — OWA applied for order appointing receiver — Receiver made request for advice and directions regarding whether AER or OWA was entitled to call on proceeds of sale of all of bankrupt's assets, including realty, and whether such entitlement took precedence over municipal tax obligations that were incurred post-receivership — AER or OWA was entitled to call on proceeds of sale from all of bankrupt's assets and their entitlement took precedence over municipal tax obligations because of AER or OWA super priority over funds in question — Treatment of municipal taxes was part of sales process presented to and approved by court — Sale of marketable assets without adjustment for municipal taxes, pre- or post-insolvency, was also approved by court as insolvency progressed, with notice to affected municipalities — Municipalities did not oppose sales process application, nor any subsequent application for approval of specific assets sales — It followed that payment of post-insolvency municipal taxes was not necessary to preserve bankrupt's exploration and production assets.

Table of Authorities

Cases considered by *R.A. Neufeld J.*:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — followed

Alberta Treasury Branches v. Invictus Financial Corp. (1986), 42 Alta. L.R. (2d) 181, 68 A.R. 207, 61 C.B.R. (N.S.) 238, 1986 CarswellAlta 434 (Alta. Q.B.) — considered

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd. (1995), 28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, (sub nom. *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.)* 23 O.R. (3d) 781, 1995 CarswellOnt 374 (Ont. Gen. Div. [Commercial List]) — referred to

Manitok Energy Inc (Re) (2022), 2022 ABCA 117, 2022 CarswellAlta 806, [2022] 6 W.W.R. 1, 98 C.B.R. (6th) 1, 468 D.L.R. (4th) 434 (Alta. C.A.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.) — referred to

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — referred to

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315, 1991 ABCA 181 (Alta. C.A.) — considered

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — considered

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, [2001] 10 W.W.R. 204, 205 D.L.R. (4th) 94, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — considered

Toronto Dominion Bank v. Usarco Ltd. (1997), 1997 CarswellOnt 1958, 40 M.P.L.R. (2d) 293, 50 C.B.R. (3d) 127, 31 O.T.C. 81 (Ont. Gen. Div.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 14.06(4)(a)(ii) [en. 1997, c. 12, s. 15] — referred to

Manitok insolvency as an example of such payments being made pursuant to the sales process presented to and approved by the court.

60 There is no doubt that municipal governments provide necessary and valuable services to their communities. Many would argue that municipal government is the most efficient and valuable level of all. All community members bear responsibility to support their municipal government by paying property taxes, service levies and the like. But it is not as clear that the payment of municipal property taxes has any higher public interest component than obligations such as paying a farmer surface lease rentals for an expropriated wellsite or pipeline right-or-way post-insolvency, paying trade creditors for pre-insolvency debts, or even paying municipalities for outstanding pre-insolvency municipal taxes.

61 I agree with the OWA that the assertion of a parallel priority based on the public interest as between two holders of non-provable claims is based on a flawed interpretation of *Redwater*, which makes it clear that the OWA's entitlement to the proceeds of sale is not a claim on the estate that is subject to a determination of priorities. That is the essence of a "super priority" as that term has evolved.

62 The OWA's entitlement is addressed outside of the insolvency regime because it is a non-monetary obligation which cannot be not reduced to a provable claim through the test in *Abitibi*, not because it is non-provable. Producers, like Trident, have a legal obligation to ensure their wells are safely abandoned and reclaimed. The OWA acts as a safety net to ensure that those obligations are satisfied by ensuring that reclamation work is ultimately performed. Of course, a dollar figure can be put on end-of-life obligations, but that cost is what is necessary to satisfy the obligations of producers and ensure that wells are safely abandoned and reclaimed. The cost is not levied to generate revenue for the program. That is why the OWA entitlements "define the contours of the bankrupt estate available for distribution": *Redwater* at para 160.

63 Municipal taxes, on the other hand, are neither a non-monetary obligation nor incompatible with the *Abitibi* test. The purpose of municipal taxes is to generate revenue for the municipality: Smoky River Coal Ltd, Re, 2001 ABCA 209 at para 32. The only obligation on the taxpayer is to pay tax. There is no other corresponding regulatory obligation. And, indeed, the *MGA* makes clear that taxes "are recoverable as a debt due to the municipality" and that a taxpayer is a debtor: s. 348, s. 348.1. Taxes are evidently a monetary obligation.

64 Even if I accepted that this case described a competition between claims, the legislation provides instruction about the order in which claims are to be paid. The Municipalities' claims "take priority over the claims of every person except the Crown": *MGA*, s. 348(c). On a plain reading of the *MGA*, the legislature has contemplated where the claims of the Municipalities rank in the priority scheme. And that is second to the Crown.

65 There are those who might characterize the outcome of *Redwater* as shifting liability for environmental remediation in the oil and gas industry from "polluter-pay" to "lender-pay." I disagree.

66 In my view, *Redwater* shifts liability from "polluter-pay" to "everyone pays," starting with all of those who have suffered financial losses in dealing with the insolvent company, and ending with the OWA, which spreads remaining losses between the Province of Alberta and industry. This includes secured creditors who have lent money to the insolvent entity in good faith, trade creditors who have provided goods or services and remain unpaid, landowners who have hosted the wells, pipelines and production facilities, and municipal governments who are owed taxes dating back to pre-insolvency, among many others. The essence of the AER super priority is that it is not subject to prioritization because the obligation must be met before a distribution can be made to anyone else. It defines the contours of the funds that may be available for distribution.

67 I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had certain real estate assets that were used for office or equipment storage and the like. However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in *Manitok* to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based.

B. Are Post Insolvency Municipal Taxes a Necessary Cost of Preservation of Assets?

TAB 9

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XX Miscellaneous
Headnote
Bankruptcy and insolvency --- Miscellaneous
Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant`s property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant`s directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 50.4(8) [en. 1992, c. 27, s. 19] — considered

35 Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

36 Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

37 The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

38 The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

39 First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

40 Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

41 Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

42 Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.

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