	CLERK'S STAMP

COURT FILE NUMBER	2001-05630
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED** **AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, DOMINION FINCO INC., AND DOMINION DIAMOND MARKETING CORPORATION**
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS** **(Stay Extension)**
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PART I – OVERVIEW

1. This is an application by Dominion Diamond Mines ULC, Dominion Diamond Delaware Company, LLC, Dominion Diamond Canada ULC, Washington Diamond Investments, LLC, Dominion Diamond Holdings, LLC, Dominion Finco Inc., and Dominion Diamond Marketing Corporation (together, "**Dominion**" or the "**Applicants**") for an order extending the Stay Period (as defined in the Second Amended and Restated Initial Order of this Court dated June 19, 2019 (the "**SARIO**")) from November 7, 2020 until and including December 15, 2020.[1]

2. The Applicants' proposed extension to the Stay Period from November 7, 2020 (which date coincided with the Outside Date under the SISP approved by this Court on June 19, 2020) up to and including December 15, 2020 is required to provide Dominion with the necessary time to continue discussions with stakeholders on a restructuring path given the recent change in circumstances arising from the unavailability of the transaction contemplated by the APA (the "**Stalking Horse Transaction**") that was scheduled to be before this Court for approval on October 14, 2020.

3. The break-down in negotiations between the Stalking Horse Purchasers and the Surety Bond Issuers that led to the Stalking Horse Transaction no longer being available to Dominion had an obvious and significant impact on these CCAA proceedings.

4. Dominion had been working towards completing a going concern transaction since the commencement of these CCAA proceedings with a view to addressing Dominion's financial challenges in a manner that would save the Ekati Mine and its attendant jobs, contracts, impact benefit agreements, tax revenue, and satisfy the company's reclamation obligations, to the benefit of Dominion's stakeholders generally.

5. In furtherance of Dominion's restructuring objectives, this Court granted the SARIO on June 19, 2020 which, among other things, approved a SISP that included a Stalking Horse Bid that served as the basis for the Stalking Horse Transaction. For three months following the granting of the SARIO, the focus of Dominion's restructuring efforts was the implementation of the SISP and the closing of the transaction resulting therefrom.

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[1] Capitalized terms not otherwise defined in this Bench Brief have the meanings ascribed to them in the SARIO or in the Affidavit of Brendan Bell sworn October 23, 2020 (the "**October 23 Bell Affidavit**"), as applicable.

6. With the Stalking Horse Transaction (which was the only qualified bid resulting from the SISP) no longer an option, Dominion has been working diligently with the assistance of its legal counsel and Evercore, and in consultation with the Monitor and other stakeholders, to assess all of its available options at this time.

7. Having regard to the recent and unfortunate change in Dominion's circumstances, and the size, uniqueness, and complexity of its business, Dominion seeks a five (5) week stay extension. Certain Dominion stakeholders have expressed the view that a five (5) week extension is too short, and one creditor has suggested that it is too long. It is the view of Dominion that an appropriate balance is to be achieved and that a five (5) week extension is appropriate.

8. The proposed extension to the Stay Period sought by Dominion is currently expected to be long enough to permit reasonable progress to be made by the company in the assessment, consideration, and negotiation of available restructuring options, while being short enough to keep up the momentum of Dominion's efforts to advance available options.

9. The extension of the Stay Period sought by Dominion is supported by the basic purpose of the CCAA – to allow an insolvent company a reasonable period of time to consider its restructuring options in the interest of its stakeholders generally, to prevent manoeuvres for positioning among creditors in the interim, and to attempt to ultimately avoid the social and economic costs of the liquidation of the company.

PART II – LAW & ANALYSIS

I. LEGISLATION AND PRINCIPLES

10. Section 11.02(2) of the CCAA provides this Court with a broad jurisdiction to extend a stay of proceedings:

> **11.02 (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.

> **11.02 (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. The role of this Court on an application under section 11.02(2) was considered in *Re Canada North Group Inc.*:[2]

> [33] […] The role of this Court on a subsequent application under s. 11.02(2) is not to re-evaluate the initial decision [to grant a stay under s. 11.02(1)], but rather to consider whether the applicant has established that the current circumstances support an extension as being appropriate and that the applicant has acted, and is acting, in good faith and with due diligence, as required under s. 11.02(3).
>
> [34] The purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Appropriateness of an extension under the *CCAA* is assessed by inquiring into whether the order sought advances the policy objectives underlying the *CCAA*. A stay can be lifted if the reorganization is doomed to failure, but where the order sought realistically advances those objectives, a *CCAA* court has the discretion to grant it […].

12. Several decisions have considered the specific requirement in subsection 11.02(3)(a) of the CCAA of establishing that "circumstances exist that make the order [sought] appropriate".

13. Most notably, in *Century Services Inc. v. Canada (Attorney General)*,[3] the Supreme Court of Canada emphasized that the basic purpose of the CCAA must be considered when determining what relief authorized by the CCAA is "appropriate" in the circumstances:

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[2] *Re Canada North Group Inc.*, 2017 ABQB 508 at paras. 33-34 **[Tab 1]**. Citations omitted.

[3] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70 **[Tab 2]**, cited in *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376 [*Tungsten*] at para. 25 **[Tab 3]**.

> […] 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.

14. In *Tepper Holdings Inc., Re.*,[4] the court set out the following principles applicable to assessing the appropriateness of the length of a proposed stay extension:

> There is no standard length of time provided in the CCAA for an extension of the Stay Period, and therefore it depends on the facts of the case. David Baird, Q.C., in his text, Baird's Practical Guide to the Companies' Creditors Arrangement Act (Toronto: Thompson Reuters, 2009) at page 155 summarizes the factors to be considered as follows:
>
> a) The extension period should be long enough to permit reasonable progress to be made in the preparation and negotiation of the plan of arrangement.
>
> b) The extension period should be short enough to keep the pressure on the debtor company and prevent complacency.
>
> c) Each application for an extension involves the expenditure of significant time on the part of the debtor company's management and advisors, which might be spent more productively in developing the plan, particularly when the management team is small.
>
> d) With respect to industrial and commercial concerns as distinguished from "bricks and mortar" corporations, it is important to maintain the goodwill attributable to employee experience and customer and supplier loyalty, which may erode very quickly with uncertainty.

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[4] *Tepper Holdings Inc., Re.*, 2011 NBQB 211 [*Tepper Holdings*] at para. 54 [**Tab 4**].

e) […] While each business will have its own financing possibilities, generally large loans, significant equity injections or large sales required to rescue a corporation in debt for more than $5 million, will take time to develop to the point of agreement.

15. The requirement to consider expenditures of time and resources in connection with stay extensions has been noted as being of significance not only for the CCAA debtor but for its stakeholders generally. The costs of stay extension applications “redound to the prejudice of the overall stakeholder group given the significant costs that are involved.”[5]

16. In considering the length of a stay extension it is also relevant that the CCAA debtor remains under the oversight of the monitor. If anything untoward should happen during the extended stay period, or if the monitor realizes that there is no way to implement a viable restructuring, then the monitor is obligated to forthwith advise the parties and this Court accordingly.[6]

17. The comments of Madam Justice Romaine in extending a CCAA stay over the objections of a secured creditor illustrate how the principles set out above have been applied by this Court:[7]

> [32] As to whether circumstances exist that make the continuation of the stay appropriate, there are a number of factors that must be taken into account. The continuation of the stay in this case is supported by the basic purpose of the CCAA, to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court and to prevent manoeuvres for positioning among creditors in the interim […] Westcoast [i.e., the secured creditor] has not satisfied the court that an attempt at an acceptable compromise or arrangement is doomed to failure at this point in time. Negotiations for restructuring a sale or refinancing are ongoing, and there has been a strengthening of the management team. Rio Nevada [i.e., the CCAA debtor] continues in business, and plans are underway to remediate its two major wells, which will significantly increase the company's rate of production. A Monitor is in

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[5] *Sunrise/Saskatoon Apartments Limited Partnership (re)*, 2017 BCSC 808 [*Sunrise*] at para. 23 [**Tab 5**].

[6] *Tepper Holdings* at para. 56 [**Tab 4**]; *Sunrise* at para. 24 [**Tab 5**].

[7] *Rio Nevada Energy Inc. (Re)*, [2000] A.J. No. 1596 (Alta QB) at paras. 32 – 33 [**Tab 6**]; See also *Forest & Marine Financial Corp.*, 2009 BCCA 319 at para. 26 [**Tab 7**].

> place, which provides comfort to the creditors that assets are not being dissipated and current operations are being supervised. The extension sought is not unduly long, and is supported by the secured creditors other than Westcoast. The costs of the CCAA proceedings are likely no less onerous than the costs of a receivership in these circumstances, and the relief sought under the CCAA less drastic to all constituencies than the order that would likely have to be made in a receivership.
>
> [33] I find that Rio Nevada has established that continuation of the stay is appropriate, and that the conditions to granting such an order have been met.

18. With respect to section 11.02(3), the good faith and due diligence requirements provided for by that subsection include observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the CCAA process.[8]

II. THE PROPOSED STAY EXTENSION FURTHERS THE PURPOSE OF THE CCAA AND IS APPROPRIATE IN THE CIRCUMSTANCES

19. Extending the Stay Period to allow these CCAA proceedings to continue would further the basic purpose of the CCAA – to permit debtor companies to continue to carry on business and, where possible, to avoid the social and economic costs of liquidating their assets.

20. It is clear that a liquidation of Dominion's business would have the negative social and economic costs that the CCAA is intended to avoid.

21. In addition to being a significant taxpayer and the second largest non-governmental employer in the Northwest Territories (with over 40% of employees being Northern residents),[9] Dominion has a history of providing significant social and economic benefits to the North.

22. Dominion has over the years made substantial investments in the local communities that rely upon and are affected by the Ekati and Diavik Mines. In 2018 and 2019 combined, Dominion spent CDN $922 million of which amount CDN $524 million was spent with northern businesses and approximately CDN $319 million going to Indigenous businesses for goods and services.

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[8] *Tungsten* at para. 29 [**Tab 3**].

[9] Affidavit of Brendan Bell sworn October 4, 2020 (the "**October 4 Bell Affidavit**") at para. 15.

The total estimated spend with northern businesses by Dominion and its predecessor entities in connection with the Ekati and Diavik Mines since 1999 has been in excess of CDN$3 billion.[10]

23. Pursuant to a "Socio-Economic Agreement" that was concluded with the GNWT with respect to the Ekati Mine and has been in place since 1996, Dominion provides financial support for long-term sustainable community development projects. Dominion also works to incorporate traditional knowledge in environmental monitoring programs through discussions with communities and on-the-land initiatives which provide direct input into these programs. These programs contribute approximately CDN $5 million annually to local communities.[11]

24. Dominion also has private Impact Benefit Agreements ("**IBAs**") with four Indigenous groups: Tlicho, Akaitcho, North Slave Metis Alliance and the Kitikmeot Inuit Association. The IBAs operate under a policy based on mutual respect, active partnership, and long-term commitment. The IBAs extend over the life-of-mine of the Ekati Mine, and provide mine-related training, employment, business development, and capacity-building opportunities to members of the four Indigenous groups.[12]

25. Through IBA payments, scholarships, and donations, Dominion also contributed over $5 million in 2019 to communities in the Northwest Territories and Kugluktuk, Nunavut. An equivalent amount of payment was made by the company in 2018.[13]

26. As of the commencement of these CCAA proceedings in April 2020, Dominion also employed the services of 634 individuals in Canada (of whom 212 were actively employed in Canada). The company's employees and contractors come from eleven (11) provinces and territories with greatest representation in the Northwest Territories and Alberta.

27. The continuation of the Ekati Mine as a going concern is clearly critical to, among others, the Northwest Territories, Dominion's Northern-based employees and contractors, and Northern

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[10] October 23 Bell Affidavit at para. 6, referencing the Affidavit of Kristal Kaye sworn April 21, 2020 ("**Kaye Affidavit**") at para. 8.

[11] October 23 Bell Affidavit at para. 6, referencing Kaye Affidavit at para. 80.

[12] October 23 Bell Affidavit at para. 6, referencing Kaye Affidavit at para. 83.

[13] October 23 Bell Affidavit at para. 6, referencing Kaye Affidavit at para. 94.

communities generally. The importance of Dominion's business for these stakeholders cannot be overstated.[14]

28. While the Stalking Horse Transaction is no longer an option, Dominion and its Independent Director remain of the view that Dominion's business has value and is deserving of being restructured and saved.[15]

29. To avoid the social and economic costs associated with any liquidation of its assets, Dominion has been working diligently with the assistance of its legal counsel and Evercore, and in consultation with the Monitor, to assess all of its available options at this time. Dominion's efforts in this regard in the short two-week period of time since the Stalking Horse Transaction became unavailable have involved discussions with numerous stakeholders including the First Lien Lenders, the Ad Hoc Group, the GNWT, the Surety Bond Issuers, and others.[16]

30. Dominion's efforts to engage in discussions with stakeholders and to consider all available restructuring options are more than a "kernel of a plan". Dominion's current engagement with its key stakeholders to assess, consider, and plan around the recent unfortunate change in Dominion's circumstances are aimed at minimizing the potential social and economic losses associated with a potential liquidation of the company. They represent a strategy to move these CCAA proceedings forward in an orderly way with a view to benefitting Dominion's stakeholders generally.

31. The fundamental purpose of the CCAA – to preserve the *status quo* while a debtor prepares a restructuring plan that will enable it to remain in business to the benefit of all concerned – will be furthered by extending the Stay Period so that Dominion's ongoing discussions with stakeholders can continue and that available restructuring options can be assessed, considered, negotiated, and implemented.

32. A sale or refinancing of a business as unique and complex as Dominion's takes time to develop to the point of agreement. While Dominion was granted CCAA protection in April 2020, the unfortunate change in circumstances resulting from the Stalking Horse Transaction no longer

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[14] October 4 Bell Affidavit at paras. 15-16.

[15] October 23 Bell Affidavit at para. 11.

[16] October 23 Bell Affidavit at paras. 22 – 31.

being available is a very recent development. Some deference to Dominion's efforts to assess, consider, and plan around its changed circumstances is warranted.

33. There is no basis to conclude that a shorter extension to the Stay Period than is sought by the Applicants would further the objectives of the CCAA or be appropriate in the circumstances.

34. To the contrary, a shorter extension to the Stay Period would require Dominion's management and advisors to divert their attention and resources from discussions aimed at advancing restructuring options to a further stay extension hearing at a potentially critical point in Dominion's restructuring efforts. A shorter extension to the Stay Period would also create unnecessary urgency and short-term uncertainty for Dominion's stakeholders, including employees, contractors, trade suppliers, customers, Northern communities, Indigenous groups, and the GNWT, among others, at a time that preserving the *status quo* would further the purpose of the CCAA.

35. Dominion will have sufficient funds to continue its operations and to fund these CCAA proceedings until December 15, 2020. In preparing its cash flow for the proposed extended Stay Period, Dominion has worked with the Monitor to identify where Dominion may reduce its outgoing cash obligations and reduce expenditures during the extended Stay Period.[17]

36. Dominion is also aware that, absent either a purchaser for Dominion's assets or an investor prepared to make an equity injection coming forward in the near term, there is a real possibility that Dominion will not be able to avoid a liquidation.[18] Accordingly, out of prudence, Dominion has considered and shared with certain stakeholders scenarios that have involved the preparation of a number of confidential documents such as: (a) a cash flow analysis with a scaled back care and maintenance spend; (b) an updated and delayed restart plan contemplating restart scenarios in 2021; (c) recapitalization and going concern scenarios and modelling; and (d) a liquidation analysis.[19]

37. While Dominion is considering such scenarios, there is presently no evidence that alternate scenarios that would avoid the social and economic consequences of liquidation are

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[17] October 23 Bell Affidavit at para. 36.

[18] October 23 Bell Affidavit at para. 31.

[19] October 23 Bell Affidavit at para. 29.

doomed to failure. In contrast, it is certain that a liquidation of Dominion's assets will have drastic consequences for Dominion's stakeholders generally.

38. In the circumstances, Dominion submits that the granting of an extension of the Stay Period for an amount of time necessary to allow Dominion to continue to work with its stakeholders on pursuing available restructuring options would further the purpose of the CCAA. The continuation of these CCAA proceedings through the proposed Stay Period will not be more onerous than the sudden commencement of liquidation proceedings. On the other hand, the relief being sought by Dominion on this application is clearly less drastic for Dominion's stakeholders generally than a liquidation scenario.

III. THE APPLICANTS HAVE ACTED IN GOOD FAITH

39. The Monitor has confirmed that the Applicants have been acting in good faith and with due diligence throughout these CCAA proceedings.[20]

40. Dominion's efforts to assess, consider, and plan around the recent and unfortunate change in circumstances arising from the impasse between the Stalking Horse Purchasers and the Surety Bond Issuers, and to assess the company's restructuring options in consultation with its stakeholders, have continued to be carried out in good faith and with due diligence.[21]

PART III – CONCLUSION

41. The Applicants respectfully submit that the proposed extension to the Stay Period is appropriate and necessary in the circumstances.

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[20] See First Report of the Monitor dated April 29, 2020 at para. 14(d); Fourth Report of the Monitor dated May 26, 2020 at para. 51(d); Fifth Report of the Monitor dated June 18, 2020 at para. 49(d); Sixth Report of the Monitor dated September 22, 2020 at para. 40(d).

[21] October 23 Bell Affidavit at para. 37.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October 2020.

Peter L. Rubin/Peter Bychawski/Claire Hildebrand/Morgan Crilly
Counsel to the Applicants

TABLE OF AUTHORITIES

Tab	Description
1	*Re Canada North Group Inc.*, 2017 ABQB 508
2	*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
3	*North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376
4	*Tepper Holdings Inc., Re.*, 2011 NBQB 211
5	*Sunrise/Saskatoon Apartments Limited Partnership (re)*, 2017 BCSC 808
6	*Rio Nevada Energy Inc. (Re)*, [2000] A.J. No. 1596 (Alta QB)
7	*Forest & Marine Financial Corp.*, 2009 BCCA 319

TAB 1

2017 ABQB 508
Alberta Court of Queen's Bench

Re Canada North Group Inc

2017 CarswellAlta 1609, 2017 ABQB 508, [2017] A.W.L.D. 5084,
2017 D.T.C. 5110, 283 A.C.W.S. (3d) 255, 51 C.B.R. (6th) 282

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended

And In the Matter of a Plan of Arrangement of Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd.

S.D. Hillier J.

Heard: July 27, 2017
Judgment: August 17, 2017
Docket: Edmonton 1703-12327

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T.M. Warner, for ECN Capital Corp.
M.J. McCabe, Q.C., for PricewaterhouseCoopers
R.J. Wasylyshyn, for Weslease Income Growth Fund LP
H.M.B. Ferris, for First Island Financial Services Ltd.
G.F. Body, for Canada Revenue Agency

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
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Alexis Paragon Limited Partnership, Re (2014), 2014 ABQB 65, 2014 CarswellAlta 165, 9 C.B.R. (6th) 43 (Alta. Q.B.) — referred to

Azure Dynamics Corp., Re (2012), 2012 BCSC 781, 2012 CarswellBC 1545, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — considered

GuestLogix Inc., Re (2016), 2016 ONSC 1348, 2016 CarswellOnt 3323 (Ont. S.C.J.) — considered

Hunters Trailer & Marine Ltd., Re (2001), 2001 ABQB 1094, 2001 CarswellAlta 1636, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — referred to

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Muscletech Research & Development Inc., Re (2006), 2006 CarswellOnt 720, 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — considered

North American Tungsten Corp., Re (2015), 2015 BCSC 1376, 2015 CarswellBC 2232 (B.C. S.C.) — referred to

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]) — referred to

San Francisco Gifts Ltd., Re (2005), 2005 ABQB 91, 2005 CarswellAlta 174, 10 C.B.R. (5th) 275, 42 Alta. L.R. (4th) 377, 378 A.R. 361 (Alta. Q.B.) — considered

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4519922 Canada Inc., Re (2015), 2015 ONSC 124, 2015 CarswellOnt 178, 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]) — referred to

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s. 47 — referred to

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Generally — referred to

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

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

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

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

s. 36.1(2) [en. 2007, c. 36, s. 78] — considered

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — referred to

Personal Property Security Act, R.S.A. 2000, c. P-7

s. 65(7) — referred to

APPLICATION by debtors for extension of stay under s. 11.02(2) of *Companies' Creditors Arrangement Act*, and for ancillary relief; CROSS-APPLICATION by creditor for order lifting stay and appointing either full or interim receiver.

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***S.D. Hillier J.*:**

I Introduction

1 Canada North Camps Inc. (CNC), Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd. (collectively, the Group) request extension of a Stay under s. 11.02(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*) until November 3, 2017 and ancillary orders.

2 The Canadian Western Bank (CWB) cross-applies for an order lifting the Stay and appointing either a full or interim Receiver pursuant to s. 243 (or ss. 47 and 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*)), s. 13(2) of the *Judicature Act*, RSA 2000, c J-2, s. 99(a) of the *Business Corporations Act*, RSA 2000, c B-9, and s. 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7.

II History

3 The Group operates or provides a number of services including work camps in the natural resource sector, modular construction manufacturing, camp land rentals as well as real estate holdings including a golf course. CWB has been the Group's major secured creditor for a significant period of time.

4 1919209 Alberta Ltd. (1919) is an insolvent affiliated debtor holding company of two of the companies in the Group. It was incorporated to lease camp equipment from Weslease Income Growth Fund LP (Weslease) and provide that camp equipment to Canada North Camps Inc. for its use. 1919's operations are integrated with those of the other applicants.

5 CNC entered into an agreement to construct a camp on Wandering River. 1371047, and Wandering River Properties Ltd. (owned 2/3 by 1371047) subsequently purchased a parcel for that purpose. CNC joined with the local Heart Lake First Nation and formed Heart Lake CNC LP, Heart Lake Canada North Group GP Ltd., Wandering River Properties Ltd., and Canada North Group LP Holdings Ltd.

6 An action by Max Fuel Distributors Ltd. as against Shayne McCracken arises from the operation of the camp business. The other creditors of the Group are stayed from enforcing collateral claims against Shayne McCracken.

7 The Group's operations and profitability have been significantly impacted since 2014 by the downturn in the economy. Earlier attempts by the Group and CWB to deal with the debt and cash flow issues proved to be unsuccessful.

8 In March 2017, the parties signed a Forbearance Agreement but problems continued. When they were unable to reach a new resolution in a full meeting on June 21, 2017, the Group issued Notices of Intention to make proposals under the *BIA* effective June 26, 2017.

9 On July 5, 2017, Nielsen J. granted an initial Stay under s. 11.02(1) of the *CCAA*. He imposed numerous terms, including that:

- Ernst & Young be appointed as Monitor;
- R. e. I. Group Inc. be appointed as Chief Restructuring Officer (CRO);
- the Stay continue until August 3, 2017, subject to review;
- Debtor in Possession (DIP) financing from the Business Development Bank of Canada (BDC) be made available, not to exceed $1M;
- Notice of Intention proceedings under the *BIA* be "taken up" and continued under the *CCAA*.

10 On July 27, 2017, the Group applied under s. 11.02(2) of the *CCAA* for an extension of the Stay to November 3, 2017. It also applied to add 1919 as an applicant in these proceedings.

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11 As well, it applied to expand the Stay to apply to proceedings against the entities involved in the Wandering River contract, and against Shayne McCracken.

12 Finally, the Group applied for an increase in the DIP financing to a maximum of $2,500,000 and an interim lender's charge up to the same amount due to elevated costs associated with a significant short-term increase in work under a camps contract with the British Columbia provincial government for workers on the wildfires.

13 The CWB cross-applied for an order lifting the Stay and appointing a full or interim Receiver.

14 The Monitor sought approval of his First Report and activities, a suspension of limitation periods on claims, and the power to examine the parties regarding questioned transactions on lot sales prior to the *CCAA* Order (preferences) under s. 36.2 of the *CCAA*. Other interested parties also made submissions as affecting their interests.

15 In an oral decision, this Court extended the Stay to September 29, 2017 with a review to be held on September 26, 2017. The cross-application was dismissed. The Court also issued a series of ancillary directions. The parties were advised that written reasons would be issued dealing with the main issue as to extension of the Stay or appointment of a Receiver. These are the written reasons.

III Affidavit Evidence

16 The Group's stated preliminary plan is to return operations to profitability as demand increases, consider sale of some of its assets, and seek new financing or equity investment as required in order to provide a viable Plan of Arrangement.

17 The Group has presented extensive affidavits from Ms. Shayne McCracken, Director and Secretary of the applicants, in support of the various applications, containing the following key assertions:

• the Group has acted in good faith and with due diligence, working closely with the CRO and cooperating with the Monitor as they gain an understanding of the business and structure;

• the Group has specifically worked with the CRO and Monitor to improve financial reporting and accounting processes;

• together they have taken initial steps to develop a Plan of Arrangement to present to creditors, including a detailed overview of assets and liabilities;

• the Group has been the subject of unsolicited investment and purchase interest, which the Group, Monitor and CRO are pursuing;

• meetings have taken place with interested parties as well as arrangements related to drawdowns on DIP financing;

• work has included contracts with the Province of British Columbia to address efforts in consequence of raging wildfires in that province.

18 Ms. McCracken's affidavits purport to meet head on the concerns of CWB with the accounting treatment of certain accounts receivable, particularly in relation to the Grand Rapids Pipeline Project and the margining of custom negotiated deferred revenue. In late 2016, cost estimates were prepared for demobilization of the Grand Rapids camp, including removal of the camp for just over $2M and reclamation work estimated at roughly $5.36M based on detailed costing. Ms. McCracken asserted that the practice of clients assuming the costs of setting up and removing camps by advance invoicing is used by others in the camp industry.

19 The margining of custom negotiated deferred revenue allows the Group access to necessary financing to commence work prior to being paid. Ms. McCracken found support for the accounting practice in question in the custom negotiated deferred revenue term of the margining requirement that was part of the credit agreement with CWB.

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20 Two significant receivables were placed on the books between March and May 2017 (it is unclear when they were actually posted and sent to the client) on Grand Rapids. This ostensibly led to a claim against the financing and increased CWB's exposure significantly at a time when the parties were trying to sort things out following the Forbearance Agreement in mid-March.

21 Ms. McCracken specifically denied CWB's allegation that these invoices were provided in bad faith to artificially inflate the amount available on the operating line. She deposed that the invoicing for this work was reviewed by the Group's corporate counsel. As well, it was part of the financial reporting to CWB and there were regular conversations with account managers at CWB who were aware of the origin and nature of all significant receivables, including the Grand Rapid receivables. Ms. McCracken maintained the view that the receivables were appropriately margined as deferred revenue.

22 Ms. McCracken noted that Grand Rapids has now raised issues with respect to payment of some of the invoices and a meeting is scheduled with it in Calgary in early August to discuss payment of those invoices.

23 Ms. Jessica Taha filed extensive material for CWB challenging the Stay, and supporting the appointment of a Receiver. The following assertions are germane, particularly as concerns margining of receivables:

• the Group had been margining receivables for which work had not yet been done (citing Grand Rapids);

• as a result, the operating line was overdrawn by over $3.8M for work not yet done which only came to light at the June 21, 2017 meeting; subsequent information reflects that it is overdrawn by $8M;

• the Group had only performed 10% of required work on one contract and only 40% for another, and none of this was consistent with the margining as represented by the Group, and arranged between the parties dating back to 2012;

• despite representations to the contrary before Nielsen J., CWB was not aware of this prior to the June 21, 2017 meeting.

24 Ms. Taha attested to her belief that as the level of work dropped dramatically in the economic downturn, the Group changed its approach without advising CWB, and started to render invoices for work which had not yet been done, categorizing those invoices as deferred revenue capable of margining.

25 In response, Ms. McCracken maintained her position that the Grand Rapids deferred revenue was properly included in the financial statements. She deposed that Ms. Taha's position that deferred revenue was only permitted to be used for margining based on the percentage of the work performed is inconsistent with the supporting material provided by Ms. Taha. The Group kept their branch representatives apprised of the status of the deferred revenue inclusions in the margining calculations and none raised a concern.

26 In counter response, CWB prepared three affidavits of senior officers at the Edmonton Main Branch deposing that they were unaware of the material amounts that were being margined without the work having been done, and each was unaware of anyone else at CWB having had such knowledge until the meeting on June 21, 2017.

27 Glenn MacDougall, Manager of ECN Capital Corp. (ECN), also filed an affidavit. ECN is an equipment lessor and creditor of the Group. In short, he opines that the work resulting from the BC wildfires is a temporary salve on the Group's financial circumstances, and it is unlikely that the Group will be able to make a viable Plan of Arrangement. He deposed that ECN would be materially prejudiced by the continuation of the Stay, as it will erode the value of ECN's security.

28 With respect to expanding the Stay, Ms. McCracken deposed that direct claims against affiliates have been reviewed. The Group now seeks to expand the stay to specific affiliates where those affiliates are facing claims directly connected to the overall camp operations, in order to preserve the *status quo*, prevent unnecessary expenditures of effort on litigation, maximize recovery for all parties, and allow for an orderly determination of priority and claims.

29 Regarding inclusion of 1919, Ms. McCracken deposed that 1919 has no revenue other than lease income from Canada North and is completely dependent on such payments to fulfill its obligations under the leases. It is included in the consolidated

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cash flow projections and financial statements for the Group, as it is treated as a flow through entity. The equipment it leases is essential to the uninterrupted operations of the Group.

30 Finally, Ms. McCracken explained that the increased work for the B.C. government, although welcome, creates a cash flow issue as the work is invoiced approximately a week after completion and receipt of payment typically takes approximately four weeks from invoicing. Consequently, the Group anticipates a cash flow shortage in August 2017 that will not be met by the present DIP facility. On July 21, 2017, the interim lender approved an increase to the DIP financing to a maximum of $2,500,000.

IV Monitor's First Report

31 The Monitor has provided a First Report, advising of various steps taken in conjunction with the CRO, highlights of which include:

General

• a new cash management procedure has been initiated to ensure efficient control of cash and cash reporting, with a review of cash flow projections;

• the Group's management and staff have been making significant efforts in all respects and are cooperating fully with the efforts of the CRO;

• based on the Monitor's own work with Group management, the Group appears to have acted in good faith and with due diligence;

• the actual end cash balance for the two weeks ending July 15, 2017 was higher than projected by over $400K and collections higher than projected by nearly $350K;

• while cash disbursements were lower, this was largely due to temporary deferrals;

• the contracts relating to the B.C. wildfires will have a significant positive impact on future cash inflows and receivables.

Accounts Receivable

• the Group has used atypical accounting practices as reflected in four areas;

• the steps being adopted in response to CWB's concerns include removing Grand Rapids and Heart Lake related receivables as a conservative strategy while quantum is reviewed;

• some but not all of the room guarantees or reservations have been reversed out.

Status of Restructuring Efforts and Related Plan

• the Group's business and operations are very complex;

• the CRO believes, based on preliminary work to date and co-operation of the management team, that there is certainly potential for a going concern plan that could provide significantly greater value to stakeholders as compared to a liquidation;

• the CRO is of the initial view that several profit and gross margin improvements have been realized by the Group due to changes to operations, staffing and other operational matters.

1919

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• the leasing arrangement with Weslease has been extended for use by the Group valued at approximately $6M and listed as: three Jack+Jill dorms, two power distribution centres and one waste water treatment plant;

• expansion of the Stay to include 1919 is reasonable.

32 As well, the Monitor and the Group have been in contact with various parties who have expressed interest in participating in a restructuring through refinancing, purchasing assets or investing in the Group.

V Law

33 An initial Stay under s. 11.02(1) of the *CCAA* may be imposed for a maximum period of 30 days. The role of this Court on a subsequent application under s. 11.02(2) is not to re-evaluate the initial decision, but rather to consider whether the applicant has established that the current circumstances support an extension as being appropriate and that the applicant has acted, and is acting, in good faith and with due diligence, as required under s. 11.02(3).

34 The purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Appropriateness of an extension under the *CCAA* is assessed by inquiring into whether the order sought advances the policy objectives underlying the *CCAA*. A stay can be lifted if the reorganization is doomed to failure, but where the order sought realistically advances those objectives, a *CCAA* court has the discretion to grant it: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at paras 15, 70, 71, [2010] 3 S.C.R. 379 (S.C.C.).

35 In applying for an extension, the applicant must provide evidence of at least "a kernel of a plan" which will advance the *CCAA* objectives: *North American Tungsten Corp., Re*, 2015 BCSC 1376, 2015 CarswellBC 2232 (B.C. S.C.) at para 26, citing *Azure Dynamics Corp., Re*, 2012 BCSC 781, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]).

36 Pursuant to s. 11.02(3), the applicant is required to demonstrate that it has acted, and continues to act, in good faith. Honesty is at the core of "good faith": *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.) at para16, (2005), 10 C.B.R. (5th) 275 (Alta. Q.B.).

37 Section 11.02(3) refers to consideration of good faith and due diligence in both the past and present tense. Romaine J. in *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) at para 13, (2013), 8 C.B.R. (6th) 161 (Alta. Q.B.) confirmed the language of s. 11.02(3), to the effect that the court needs to be satisfied that the applicant has acted in the past, and is acting, in good faith. See also *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) at para 16, (2014), 9 C.B.R. (6th) 43 (Alta. Q.B.).

38 By contrast, in *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 462 (Ont. S.C.J. [Commercial List]) at para 4, (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]), Farley J. held that the question of good faith relates to how the parties are conducting themselves in the context of the *CCAA* proceedings. Courts in subsequent cases adopted this view: *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]) at para 31-32, [2011] B.C.J. No. 2482 (B.C. S.C. [In Chambers]), and *4519922 Canada Inc., Re*, 2015 ONSC 124 (Ont. S.C.J. [Commercial List]) in paras 44-46, (2015), 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]).

39 In *GuestLogix Inc., Re*, 2016 ONSC 1348, [2016] O.J. No. 1129 (Ont. S.C.J.), the Court expanded the stay to proceedings against a guarantor, noting that it was insolvent and in default of its obligations, highly integrated with the debtor company, and the debtor company would be able to include all the assets of the guarantor in a potential transaction if the guarantor were added.

40 The Court has broad equitable jurisdiction to determine appropriate allocation among assets of administration, interim financing and directors' charges: *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 30 C.B.R. (4th) 206 (Alta. Q.B.). The Court in *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para 54, (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) set out factors to be considered in determining priority of charges under s. 11.52 of the *CCAA* which are critical to the successful restructuring of the business:

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(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.

41 Section 11.2(4) of the *CCAA* provides that in deciding whether to make an order allowing DIP financing, the Court must consider:

(a) the period during which the company is expected to be subject to *CCAA* proceedings;

(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.

42 In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.) at paras 12-18, (2014), 20 C.B.R. (6th) 116 (Ont. S.C.J.) the Court discussed the authority under s. 11.2 to grant priority to the DIP lender's charge to secure the DIP loan. In addition to the factors set out in s. 11.2(4), it considered the following in granting priority:

(a) notice had been given to all of the secured parties likely to be affected and broadly to all *PPSA* registrants, and other interested entities;

(b) the maximum amount of the DIP loan was appropriate based on the anticipated cash flow requirements of the applicant as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period;

(c) the cash flows were the subject of a favourable report of the Monitor in its First Report;

(d) the Applicant's business would continue to be managed by the applicant's management with the assistance of the CRO during the restructuring period;

(e) the existing operational relationships between the applicant and its largest creditor would continue; and

(f) the DIP loan would assist in, and enhance, the restructuring process.

VI Analysis

Extension of Order

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43 Various factors were profiled by Ms. Wanke before Nielsen J. to support the Group's position that a restructuring under the *CCAA* is possible; if the objective is liquidation, then appointment of a Receiver is appropriate. Nielsen J. recognized the possibility of a successful restructuring in rejecting the application to appoint a Receiver and granting the application to impose a Stay under the *CCAA* with a Monitor and CRO. In recognizing that a lot of work had been done, he found that those supporting the steps to restructure should be given that opportunity in the collective best interest despite the prejudice of deferral and risk as regards repayment of CWB and other creditors.

44 I now have the responsibility to measure the progress in the period leading up to expiry of the initial Stay. Without second-guessing the initial decision, I must assess the current circumstances, including the good faith and due diligence of the parties in light of steps taken to date.

45 The legislative objective of a *CCAA* order is to provide the Court considerable scope to maintain the *status quo* for a company to make proposal arrangements to facilitate remaining in operation for a collective benefit. One may have preferred to see some further advancement on the "germ of a Plan" but I am satisfied that the CRO has begun consultations with unsolicited parties who have expressed an interest and that a structure for such a Plan is now an important priority.

46 I am mindful that the Monitor was obliged to report on just under three weeks of activity in rendering a First Report by July 24, 2017. Various factors have impacted the lack of concrete progress on a Plan at this point, including the value of the Group as a going concern estimated at $97M (equipment, manufacturing and real estate) with diverse activities, assets and work product, the complexity of restructuring, and the need to modernize the sophistication of a family operation that is unable to operate as it has done historically.

47 Professional advisors are now in place assisting in this required modernization. Potential investors have and continue to express interest in the Group. It appears that DIP funding has been used prudently to cover operational expenses including higher than expected professional expenses. Cash flows are quite healthy and the Group owns a number of assets of marketable value.

48 CWB notes that Nielsen J. indicated on the initial Stay application that the Group would have to show more than a germ of a plan at the next hearing. It is not entirely surprising that three weeks did not prove long enough to complete the steps necessary to create a Plan of Arrangement. There is no allegation of delay or inertia by the Monitor or the CRO in performance of significant responsibilities undertaken since confirmation of their appointment July 5, 2017. The Monitor reported that the Group has been working with due diligence and in full cooperation. A number of competing interests require the attention of the Monitor. Having considered all of the circumstances before the Court, I am satisfied that the Group has established due diligence.

49 It bears noting that CWB is not the only party who would be affected by receivership. Employees, other creditors, clients, and the public would also be affected. Changes have already been implemented by the CRO, as observed and reported by the Monitor.

50 The Group has had the recent opportunity to enter into contracts with the Province of B.C. in relation to the wildfires. It appears that despite the Group's liquidity crisis — impacted by various factors, including market conditions — the business of the Group may well be salvageable. This assessment appears to be supported by: the cash flow projections, recoveries on receivables, and changes begun by the CRO in consultation with the Monitor with particular regard to increased work potential and to increase the sophistication of accounting.

51 However, CWB takes the position that the Group has been in default of its obligations to CWB for many months. CWB extended time for the Group to find refinancing and continued to make available to the Group the operating line facility in the amount of $12,000,000, margined on accounts receivable of the Group. CWB asserts that the Group took advantage of CWB by falsely including one or more multi-million dollar accounts receivable for which the work had not yet been done.

52 The parties disagree as to whether the law supports serious consideration of past bad faith if it is relevant to the viability of the *CCAA* proposal or its continuation.

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53 The language of s. 11.02(3) of the *CCAA* does not temporally restrict the consideration of bad faith. The wording of that provision is captured broadly in *Tallgrass*. It would appear that *Muscletech* and the cases which followed it stand for the proposition that courts should look only to conduct in the context of the *CCAA* process. This represents a restrictive reading of s. 11.02(3) and the purpose of such a narrow interpretation is unclear.

54 It is logical that past due diligence will usually have minimal relevance as a factor. However, past bad faith illuminated after *CCAA* proceedings have been initiated may undermine the confidence of creditors and the Court in the viability of *CCAA* proceedings. In my view, past bad faith may well be a relevant factor in the Court's assessment under s. 11.02(3). This is in keeping with the approach taken in *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) at paras 37-38.

55 I note that the facts in this case are distinguishable from those in *San Francisco* where the alleged deception appeared to be aimed at deriving an advantage from customers through knock off products and counterfeit safety labels, rather than deriving an advantage from a financing secured creditor through accounting practices as alleged here by CWB.

56 Again, the major issue in this regard is, and has been profiled as, the status of accounts receivable in terms of the margining of contracts for work not yet performed or not fully performed.

57 CWB takes the position that, upon consultation with her client and corporate counsel, Ms. Wanke misrepresented the situation to Nielsen J. in her oral submissions on July 5, 2017. While this Court is not reviewing the basis for Nielsen J.'s order, the issue of margining was raised at that time and the allegation of bad faith remains a live issue. I understand the interpretation placed by CWB on the representations made in front of Nielsen J. both from Affidavits and then information provided to legal counsel. Ms. Wanke summarized her understanding as being that this was part of the camp business on the books of the Group and not a lack of good faith. I accept her expression on this review to the effect that she would have preferred to have been more familiar with the Grand Rapids contract at the time but that this issue only surfaced latterly. She said she would have stated the client's position somewhat differently, but that the net effect remains that the margining was consistent with the Group's understanding of its entitlement.

58 CWB's concerns regarding the margining are understandable. It takes the position that while margining on deferred revenue was permissible, the Grand Rapids contracts do not qualify for that treatment according to the terms as agreed to between the parties notwithstanding the assertions advanced by the Group. CWB says there was an understanding as relates to the formula to be applied to these receivables that was violated, especially as to the two major Grand Rapids accounts issued between the end of March 2017 and beginning of May 2017. Counsel for CWB took the Court through a number of documents relating to the credit agreement between CWB and the Group to explain what the Group's reasonable understanding should have been in relation to contracts qualifying for special treatment of the accounts receivable for margining purposes.

59 The Monitor has reviewed and discounted a number of entries as inappropriate; it will likely have to further endorse commitment to revise other receivables. The Court agrees that a commitment to revise other receivables may be appropriate. However, there are a number of priorities competing for the attention of the CRO. It is difficult to measure whether any breaches of the protocol were intentionally deceptive as distinct from aggressive and misguided. That distinction is harder to make based on duelling affidavits as distinct from oral testimony, questioning or at minimum some objective detailed analysis by the Monitor to assist the Court's interpretation of events.

60 I have struggled to understand the treatment of invoicing as to the records of accounts receivable, particularly as the idea of charging for work not done is rather foreign to my experience as to the entitlement to collect. So too, the deferral of the time for payment extending from 45 days to 120 days obfuscates the idea of entitlement. The matter is complicated by the risk and relative reliability of these receivables as assets, distinct from a bad or at least tainted debt that needs to be monitored for collection procedures. All of these aspects appear to arise in far greater sums for 2016 than in any previous year which, understandably, is further troubling to principals at CWB.

61 I endorse the concerns of CWB as legitimate. Even in the absence of a finding of bad faith, the practice employed as reflected in treatment of the Grand Rapids receivables raises legitimate concerns regarding the future viability of the Group. I

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accept that the practice in question has resulted in margining which has led to overall debt to CWB which is incongruent with the Group's receivables as they would be represented in the normal course, as confirmed in the Monitor's First Report.

62 I also note CWB's concern that the cash flow projection relied on by the Monitor did not take into account unpaid professional fees relating to the work toward reorganization, and the projected loss to the end of October 2017 is considerably offset only by the fortuitous and uncertain wildfire camp work. CWB's receivables, to the extent they are collectible, are being used up by payment of the professional fees and interim financing.

63 Nevertheless, I am not prepared to conclude on the basis of the material as presented to me that the Group has failed to act in good faith to the extent of disentitling the extension sought.

64 Clearly, the parties now disagree on the interpretation of the arrangement between them as regards margining based on deferred revenue. The issue before this Court is not the correct interpretation of the various document referred to by CWB's counsel, but rather whether the Group's reliance on its understanding amounted to bad faith. There has been no trial of the latter issue. While raising questions, the evidence adduced on this application falls short of supporting a finding of bad faith in the sense of knowing reliance on an unsupportable interpretation of the documents, or intentional concealing of the practice or any relevant financial information. This is particularly so in light of the evidence of the Group's understanding that the arrangement between CWB and the Group expressly contemplated that the Group was permitted to margin deferred revenue when no work had been done.

65 If the CWB was not aware of the effect or extent of this type of margining, it is not clear from the evidence that the Group understood it was acting other than consistently with the intention of the parties in this regard. This view of the matter is generally supported by the Monitor's information that the sophistication of all facets of the accounting system in place has not kept up with the sophistication of its business. The CRO is working to address accounting practices which require improvement.

66 There is undeniably a considerable difference in the parties' interpretations of the conduct and reporting. Obviously, a debtor may be motivated to maximize access to funding. The past practice here is somewhat unclear, but even if the Group exceeded the terms or protocol as generally agreed, I do not ascribe bad faith to its actions.

67 Overall, I find that extension of the Stay is in the best interest. However, a further vigorous review must take place within a reasonable period of time.

68 The November 3, 2017 date targeted by the Group is not reasonable in the circumstances.

69 As such, the next hearing is set for September 26, 2017. The Court will require a Report from the Monitor at least 7 business days prior to that date.

Increase in DIP Financing

70 Ms. McCracken suggests in her affidavit that they only need a small increase in the DIP loan to cover operations in light of healthy cash flows and significant assets.

71 While the creditors may rightly take issue with the characterization of the increase as "small", I approve the request to increase the DIP financing from $1M to $2.5M in the form of order proposed by counsel for the Group to address the anticipated cash flow shortage resulting from welcome work during what is typically a slower season for the Group. Counsel for CWB took no issue with the form of order.

72 At the close of submissions, counsel for CRA alerted the Court, as well as BDC in particular, that it took issue with the increase in DIP financing and that it would be applying for priority with respect to $1.14M owing to the Minister by the Group for unremitted source deductions and GST. It was seeking an order to vary so as to put the administrative charge, director's charge and interim lender charges in second place behind the CRA. In light of that information, BDC counsel indicated that the CRA's position would not impair BDC's ability to advance the DIP financing, noting that the matter would be argued at a later date.

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1919

73 The application to add 1919 was not opposed. As was the case in *Guestlogix*, the operations of 1919 are inextricably linked to those of the Group, as it leases important equipment and provides it Canada North.

74 I order that 1919 be added as a party included in the Group. Counsel for the Group agreed to include in the order a clause restating the allocation provision in the initial Stay Order to recognize that Welease has made this concern known at this point. Counsel for CWB did not take issue with such a provision in the order.

Approval of Monitor's First Report

75 And at the request of the Monitor, I approve:

• his First Report and activities;

• suspend the limitation periods on claims;

• confer power to examine parties on questioned transactions regarding lot sales prior to *CCAA*.

76 The further Report of the Monitor is required at least 7 days before the next hearing.

Expansion of Stay

77 The Stay is expanded to apply to proceedings against Heart Lake and associated parties involved in the Grand Rapids contracts, and proceedings by Max Fuel against Ms. McCracken. Counsel for CWB did not take issue with this. In the result, the applications for appointment of a Receiver, interim or otherwise, are dismissed.

Sealing of Confidential Information

78 I order that the confidential information identified as such on the Court file be sealed.

Service Protocol to Reduce Costs

79 The Monitor is to maintain a service list of parties who provide the Monitor with email addresses. Those parties may be served by email effective the date of the email. All others are to be served by the Monitor posting its and others' materials on its website, effective as at the date of posting.

VII Conclusion

80 I have determined that it is in the collective interest to extend the *CCAA* Stay to September 29, 2017. The Order will be subject to review by me on September 26, 2017 in usual consultation with the Court Coordinator.

Application granted; cross-application dismissed.

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TAB 2

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, [2010] S.C.J. No. 60, [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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Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Related Abridgment Classifications

Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax
III.14 Collection and remittance
III.14.b GST held in trust

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***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

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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

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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

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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).

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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.

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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 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). 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").

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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

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(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.

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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

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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:

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> 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.).

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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*.

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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

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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*.

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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.]

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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

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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.

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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
>
> > (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*").

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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*,

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> 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:

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> **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.

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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

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(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*,

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(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

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(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

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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,

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(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

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(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

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(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

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(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,

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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.

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TAB 3

2015 BCSC 1376
British Columbia Supreme Court

North American Tungsten Corp., Re

2015 CarswellBC 2232, 2015 BCSC 1376, [2015] B.C.W.L.D. 6686, [2015] B.C.W.L.D. 6687, 256 A.C.W.S. (3d) 767

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of North American Tungsten Corporation Ltd. Petitioner

Butler J., In Chambers

Heard: July 8, 2015
Judgment: July 9, 2015
Docket: Vancouver S154746

Counsel: John R. Sandrelli, Jordan D. Schultz, for Petitioner
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William E.J. Skelly, for Callidus Capital Corporation
Mary Buttery, H. Lance Williams, for Government of Northwest Territories
Jonathan McLean, Angela L. Crimeni, for Wolfram Bergbau and Hütten AG, Global Tungsten & Powders Corp.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Table of Authorities
Cases considered by *Butler J., In Chambers*:

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

Azure Dynamics Corp., Re (2012), 2012 BCSC 781, 2012 CarswellBC 1545, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — followed

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]) — referred to

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

Timminco Ltd., Re (2012), 2012 CarswellOnt 9633, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.) — followed

Statutes considered:

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

Generally — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — 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. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

APPLICATIONS by debtor company for extension of stay of proceedings, and for approval of interim financing.

***Butler J., In Chambers*:**

1

THE COURT: This is my ruling on the applications I heard yesterday. The petitioner, North American Tungsten Corporation Ltd. (the "Company"), applies for an extension of the stay of proceedings which was granted in the initial order in this matter on June 9, 2015 (the "Initial Order"), and seeks approval for interim financing pursuant to s. 11.2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

2 I will set out the background to this matter and the parties' positions. For the reasons that follow, I am approving the Company's application to extend the stay and approving the interim financing facility on the terms proposed as those were modified during the course of argument yesterday. As always, if a transcript of this ruling is ordered, I reserve the right to amend it, but only as to form, not substance.

Background

3 The Company is involved in the exploration, development, mining and processing of tungsten and other minerals. The main capital assets of the Company are the Cantung Mine located in the Northwest Territories and the Mactung property, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories. The Mactung

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property is one of the largest deposits of tungsten in the world. It has received approvals from the federal and Yukon governments to proceed to the next stage of development, but a very large capital investment will be required to construct a mine.

4 The Company sought protection under the *CCAA* as a result of circumstances mostly beyond its control, including a severely depressed world market for tungsten. At the reduced price the Company has been receiving for its tungsten, the Cantung Mine was generating sufficient cash flow to pay the majority of its operational and administrative costs but was unable to meet its financing costs. At the time of the Initial Order, the Company was experiencing significant cash flow problems.

5 Alvarez & Marsal Canada Inc. was appointed Monitor under the Initial Order. A summary of the amounts claimed as owing by secured creditors and their respective security interests as at July 7, 2015 is set out in the Monitor's Fourth report. I will refer to that summary because an understanding of the security interests held by the principal creditors is necessary to consider the issues raised on this application.

6 Callidus Capital Corporation is owed approximately $13.33 million. This is secured by all present and after-acquired property not related to Mactung. That includes more than 200 pieces of mining equipment used at the Cantung Mine. The Monitor has opined that there is sufficient value in the equipment to satisfy that debt.

7 The Government of Northwest Territories ("GNWT") is owed $24.67 million. This is secured by all present and after-acquired property related to Mactung. While there is some issue and ongoing negotiation about the actual amount of debt which arises from the Company's reclamation obligations, it is significant.

8 Global Tungsten & Powders Corp. ("GTP") and Wolfram Bergbau and Hütten AG ("WBH") are the Company's only two customers for all of the tungsten produced from the Cantung Mine. The total indebtedness to the customers is approximately $8.16 million. They also hold security over all present and after-acquired property related to Mactung.

9 Debenture holders are owed $13.58 million, which is secured by all present and after-acquired property of the Company.

10 Queenwood Capital Partners II LLC ("Queenwood II") is owed approximately $18.51 million, secured by all present and after-acquired property of the Company. The principals of Queenwood II are related to Company insiders.

11 The total amount of the secured debt is in the range of $80 million. There is also approximately $14 million in unsecured liabilities. The reported book value of the assets at the time of the Initial Order was approximately $64 million, which included a value of $20 million for the Mactung property. The fair market value or realizable value has not been determined by the Monitor.

12 The somewhat unique situation here is that Callidus does not have security over the Mactung property and the GNWT and the customers do not have security over the Cantung property.

13 The stay granted by the Initial Order expired yesterday, but I extended it until July 10, 2015 to allow me to consider the arguments advanced on this application. Since the Initial Order, management of the Company has been working in good faith to develop a plan of arrangement. Management has developed an operating plan to manage cash flow through the next several months. I will not refer to the projected cash flow except to say that it anticipates receipt of the interim financing and continued revenues of more than $22 million from operations.

14 The Company has been involved in extensive discussions with the Monitor and stakeholders to put in place a potential Sale and Investment Solicitation Process ("SISP"). To date the plan has involved re-focusing on surface mining and milling ore stockpiles rather than underground mining. Employees have been terminated. If the interim financing is obtained, the Company plans to continue operations at the mine until the end of October 2015, including management of environmental care. It plans to conduct an orderly wind down of underground mining activities, including a staged sale of equipment used in the underground work. It plans to reconfigure the mill facilities to facilitate tailings reprocessing so that it can use existing tailings stores as well as the surface extraction as a revenue source. It also plans to undertake limited expenditures on Cantung reclamation and Mactung environmental work with a view to increasing asset values. It hopes to seek court approval of a SISP in the next couple of weeks.

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15 As a result of difficulties arising from timing of receipt of payments from GTP, one of the customers, the cash flow problems for the Company became critical within the last ten days. The Company sought interim financing and received an offer from a third party. Callidus was opposed to that offer of financing and the Company eventually obtained a $500,000 loan from Callidus on June 29, 2015 on a short-term basis (the "Gap Advance"). They continued to negotiate and arrived at an agreement for interim financing (the "Interim Facility") and a forbearance agreement (the "Forbearance Agreement"). These form the basis for the application before this court. Terms of these agreements which are relevant to the application include:

a) the $500,000 Gap Advance would be deemed to be an advance under the Interim Facility;

b) Callidus will advance an additional $2.5 million, which along with the Gap Advance would be secured over all of the property of the Company and have priority over the secured creditors; and

c) the Company will have to make repayments to Callidus by certain dates and those payments include payments of interest and principal on the existing loan facility (the "Post-Filing Payments").

16 At the hearing of the application, one of the more contentious issues was the Company's request that the court make the order in relation to the Gap Advance *nunc pro tunc*. This term was sought because s. 11.2(1) of the *CCAA* allows a court to make an order for interim financing but "The security or charge may not secure an obligation that exists before the order is made."

17 Of course the Gap Advance was an obligation which existed before the making of any order for interim financing. During the course of argument yesterday, the Company withdrew the application for a *nunc pro tunc* order in relation to the Gap Advance. This occurred because Callidus agreed to modify the terms of the Interim Facility such that the Gap Advance will be treated as an advance under its existing facility. In other words, the proposed Interim Facility is now for a $2.5 million loan facility and not $3.0 million, as set out in the application.

Position of the Company

18 The Company says that in all of the circumstances, proceeding with the Forbearance Agreement and the Interim Facility is better for the petitioner's restructuring efforts and necessary given the urgent need for funding. It stresses that without access to the interim financing, it will be unable to meet its ongoing payroll obligations or its negotiated payment terms for the post-filing obligations. It will be unable to continue restructuring and will likely face liquidation by its secured creditors. It also says there is greater value for all stakeholders if the Company is permitted to continue operating as a going concern. It says there would likely be no recovery for creditors other than the senior secured creditors without access to the Interim Facility. The local community of Watson Lake and local businesses would suffer significantly, as 100 employees would be out of work. Further, the Company says there is little prejudice to the secured creditors. In addition, it says if the mine site is abandoned, there would be a larger reclamation obligation, which would be to the detriment of the GNWT and other creditors with claims against an interest in the Mactung property.

Position of the Customers

19 The customers oppose the Interim Facility and the extension of the stay. They argue that the financing of $2.5 million at interest rates of 21% will not help the Company emerge from this process with a workable plan. They argue that putting the Cantung Mine into care and maintenance as of November and hoping that tungsten prices rise in the future is not a workable plan.

20 The customers say the result of approval of the Interim Facility is that the security interests of WBH and GTP would be prejudiced because those interests would be subordinated to Callidus as well as the GNWT. Finally, they argue that the bankruptcy of the Company and sale of its assets is inevitable no matter what happens.

Position of the GNWT

21 The GNWT does not oppose the extension of the stay nor the granting of the Interim Facility. However, it opposes the Forbearance Agreement which would grant the Interim Facility priority over the GNWT Mactung security, which it holds to

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secure the environmental and reclamation obligations of the Company. It says that it would be prejudiced as a result of the granting of that priority and that in the circumstances here there is no reason to do so. It says that Callidus would effectively receive approximately $1.5 million in Post-Filing Payments in very short order, which essentially allows it an unfair priority.

The Monitor

22 The Monitor provided detailed comments supporting the Company's application for interim financing as well as the stay. In doing so it made the following observations:

- Without the interim financing, the Company would have no choice but to immediately cease operations. This would negatively impact the progress of reclamation of the mine and tailings ponds and may have a negative impact on the near term market value of the Mactung property.
- The key senior management of the Company remain in place and are committed to pursuing restructuring solutions or transactions that will see an orderly transition of ownership and stewardship of the assets.
- The Interim Facility is supported by Queenwood II and the debenture holders, the creditors who potentially have the most to lose.
- Based on the confidential appraisal, it appears that the equipment values in aggregate exceed the amounts due to Callidus, which may eliminate or at least mitigate the potential prejudice to creditors having security over Mactung.
- The terms of the Interim Facility including interest rates and fees are consistent with market terms for interim financings in the context of distressed companies and are commercially reasonable in these circumstances when compared to the terms of other court approved interim financing facilities.

23 The Monitor concludes its comments in its Fourth Report by stating that "the interim financing contemplated by the Interim Lending Facility and the Forbearance Agreement will enhance the prospects of a viable restructuring and/or a future SISP being undertaken by the Company. Overall... the Monitor is of the view that, balancing the relative prejudices to the stakeholders, the terms of the Forbearance Agreement and Interim Lending Facility are reasonable in the circumstances and the Monitor supports the Company's application..."

Extension of the Stay

24 I turn now to the reasons for granting the extension of the stay. Subsection 11.02(2) of the *CCAA* provides that the Company may apply for an extension of the stay of proceedings for a period that the court considers necessary on any terms that the court may impose. Subsection 11.02(3) provides:

> (3) The court shall not make the order unless
>
> > (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
> >
> > (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

25 A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the *CCAA*. Justice Deschamps stated at para. 70:

> ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

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26 When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]).

27 It is also appropriate for the company to use the *CCAA* to effect the sale of the company's business as a going concern. While the main focus of the legislation is the reorganization of insolvent companies, a sales and investment solicitation process (SISP) may be the most efficient way to maximize the value of stakeholders' interests and minimize the harm which stems from liquidation: *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]).

28 When *CCAA* proceedings are in their early stages, it is appropriate for courts to give deference when considering extensions of the stay, provided the requirements of s. 11.02(3) have been met. See, for example, *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]).

29 The good faith and due diligence requirement of s. 11.02(3) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process.

30 I am satisfied that it is appropriate to grant the extension of the stay as sought by the Company. I reject the position of the customers that the Company has failed to put forward any kind of plan. The operating plan which the Company has begun to put in place responds to the existing cash flow problems and is intended to put the Company in a position to enhance the prospects of a viable restructuring and/or a future SISP.

31 It is more than a kernel of a plan. It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the Company. None of the parties suggested that the Company is acting with an absence of either good faith or due diligence, and I am satisfied from the evidence of Mr. Lindahl and the comments of the Monitor that the Company is indeed proceeding in a fashion which fulfills its obligations of good faith and due diligence.

The Interim Facility

32 I turn to my reasons for approving the interim financing. Subsection 11.2(4) of the *CCAA* sets out factors which the court must consider in determining whether to grant a priority charge to an interim lender. The factors in that section which are most relevant to this application are:

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

33 While the factors listed in that section should be considered, the court may also consider additional factors, which may include the following as set out in *Timminco Ltd., Re*, 2012 ONCA 552 (Ont. C.A.) at para. 6, and I am paraphrasing:

a) without interim financing would the petitioner be forced to stop operating;

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b) whether bankruptcy would be in the interests of the stakeholders; and

c) would the interim lender have provided financing without a super priority charge...

34 In *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at paras. 58 and 59, the Court approved of the following factors which had been considered by the chambers judge:

a) the applicants needed additional financing to support operations during the period of the going concern restructuring;

b) there was no other alternative available and in particular no suggestion that the interim financing would have been available without the super priority charge;

c) the balancing of prejudice weighed in favour of approval of the interim loan facility.

35 When I consider all of these factors, I am satisfied that it is appropriate to approve the Interim Facility. My reasons for doing so include the following:

• The cash flow projections show that the $2.5 million from the Interim Facility will be sufficient to allow the Company to satisfy obligations along with its ongoing revenues from operations through to November 2015. By that time the SISP should be well underway and perhaps concluded.

• I accept the Monitor's comments regarding the Interim Facility and Forbearance Agreement. In other words, I accept that the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations.

• I further accept the Monitor's comment that cessation of the operations would negatively impact the reclamation of the Cantung Mine and tailings ponds and may have a negative impact on the market value of the Mactung property.

• The Interim Facility enhances the Company's prospects of carrying out a successful SISP and presenting a viable plan to its creditors. If it is forced to shut down its operations, the Company will likely not be able to continue these proceedings and could not continue with the SISP.

• Bankruptcy and a forced liquidation of the assets is not in the best interests of any stakeholder.

• It is unlikely that any creditor will be materially prejudiced by the priority financing. There are two significant reasons for this. First, I accept the Monitor's view that the equipment security is likely to be sufficient to satisfy the existing debt to Callidus. Second, to the extent that the payments to Callidus under the Interim Facility cover Post-Filing Payments, those will likely be offset by the fact that the ongoing operations will result in the conversion of substantial inventories of unprocessed ore. That ore is Cantung property and so it is currently subject to the existing Callidus security. Under the operating plan, revenue from that asset will be used for ongoing operations.

• I further accept the comments of the Monitor and the submissions of the Company that keeping the Cantung Mine operating will likely assist the Company in managing its environmental obligations and thus limit the risk that the GNWT will be faced with a significant reclamation project. As counsel for the Monitor indicated, abandonment of the mine is likely to result in greater costs. The situation would undoubtedly be somewhat chaotic.

• Finally, I conclude that the Interim Facility will further the policy objectives underlying the *CCAA* by mitigating the effects of an immediate cessation of the mining operations which would result in the loss of employment for the Cantung Mine workers and negatively impact the surrounding community.

36 Before concluding, I will make one final comment regarding the requirements of the Forbearance Agreement that the Company make the Post-Filing Payments to Callidus. The Initial Order permits such payments to Callidus. Further, there is nothing in the *CCAA* which prohibits these payments. In the circumstances I have already outlined above, the use of the

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inventories of unprocessed ore to fund ongoing operations would only be possible with the approval of the Interim Facility. In other words the Post-Filing Payments may be offset by the revenues earned from that asset, which would be a benefit to all creditors.

37 In summary, I am granting the extension of the stay. I believe the request was to July 17, 2015. I will hear from counsel on that issue if there is some other date that is preferred. Further, I approve the Forbearance Agreement and the Interim Facility in the amount of $2.5 million, and as previously indicated, the Gap Advance is not included in that.

38 What about the date for an extension of the stay?

39

MR. SCHULTZ: Yes, My Lord. So that'll turn a little bit on your availability actually, as was indicated by Mr. Sandrelli, the Company anticipates bringing an application to coincide with the end of the stay for a further extension and approval of a SISP. The Company is also hopeful that an application to approve as was alluded to some further financing from Callidus in respect to the GTP receivable. So I guess I am in your hands a little bit as to whether you might be available on the 17th for an hour to hear those.

40

THE COURT: I can be available, but it would have to be by telephone. I am in Williams Lake next week.

41

MR. SCHULTZ: Okay.

42

THE COURT: So I think that we should proceed with that because the next couple weeks after that I am probably not available.

43

MR. SCHULTZ: Okay. In that case then the 17th is probably the best day, and that would be the day we will be seeking the extension to for now.

44

THE COURT: All right. The stay is extended to July 17, 2015.

Applications granted.

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TAB 4

2011 NBQB 211
New Brunswick Court of Queen's Bench

Tepper Holdings Inc., Re

2011 CarswellNB 417, 2011 NBQB 211, 205 A.C.W.S. (3d)
624, 376 N.B.R. (2d) 64, 80 C.B.R. (5th) 339, 970 A.P.R. 64

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of the Applicants, Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd. and Agri-Tepper & Sons Ltd.

Lucie A. LaVigne J.

Heard: July 18, 2011
Oral reasons: July 18, 2011
Written reasons: July 22, 2011
Docket: E/M/4/2011

Counsel: R. Gary Faloon, Q.C., James L. Mockler for Applicants
Josh J.B. McElman, Rebecca M. Atkinson for Bank of Montreal
Stephen J. Hutchison for Monitor, Paul A. Stehelin of A.C. Poirier & Associates Inc.
Ronald J. LeBlanc, Q.C., Renée Cormier for National Bank of Canada

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.iv Length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Table of Authorities
Cases considered by *Lucie A. LaVigne J.*:

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — considered

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Ravelston Corp., Re (2005), 2005 CarswellOnt 1619 (Ont. S.C.J. [Commercial List]) — referred to

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

Statutes considered:

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

Generally — referred to

s. 11 — pursuant to

s. 11(6) — referred to

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

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

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

s. 11.51(3) [en. 2005, c. 47, s. 128] — considered

s. 13 — referred to

s. 14(2) — referred to

s. 36(3) — referred to

Farm Debt Mediation Act, S.C. 1997, c. 21

Generally — referred to

MOTION by applicant companies for extension of initial order staying creditors at comeback hearing; MOTION by creditor bank for termination of initial order, or for variation of initial order at comeback hearing.

***Lucie A. LaVigne J.*, (orally):**

I. Introduction

1 On June 27, 2011, this Court issued an *ex parte* Initial Order ("Initial Order") pursuant to section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*" or "*Act*") granting a Stay Period, until and including July 18, 2011, to the applicant companies, namely Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd., and Agri-Tepper & Sons Ltd. ("Companies"). Mr. Paul A. Stehelin of A.C. Poirier & Associates Inc. was appointed monitor ("Monitor"). The Initial Order provided that a comeback hearing would be held on July 18, 2011, to determine whether the Order should be supplemented or otherwise varied and the Stay Period extended or terminated.

2 The Companies filed a motion asking the Court to extend the Initial Order until October 18, 2011 ("Extension Motion").

3 The Bank of Montreal ("BMO") filed a motion seeking an order terminating the Initial Order. In the alternative, BMO suggests that the Stay Period not be extended beyond August 31, 2011, and it seeks a variation of several provisions of the Initial Order, namely the provisions dealing with the disposition of property by the Companies, the interim financing, the Administration Charge, the retainers, and the Director's Charge ("Variation Motion").

4 The Monitor filed with the Court his first report dated July 13, 2011 ("Report"). He recommends an extension of the Stay Period until September 30, 2011, but agrees that several provisions of the Initial Order should be varied.

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5 All creditors were notified of these proceedings and other than the BMO, the only creditor who attended the hearing of the motions was the National Bank of Canada and it supports the position of BMO.

6 Pursuant to the July 18 th hearing, the Court reserved its decision on the Extension Motion and the Variation Motion, but granted an Order extending the Stay Period until July 29, 2011, and varying other provisions of the Initial Order while considering these motions.

II. Background

7 The Companies are closely held companies engaged in the business of farming in northwestern New Brunswick in a small rural community called Drummond. The Companies are controlled by Hendrik Tepper and his father Berend Tepper. The Tepper family is from the Netherlands and the Teppers have been farming since the 1960's. In 1980, Berend Tepper relocated his family to Drummond and joined other Dutch farmers in northwestern New Brunswick. The Companies have grown an average of 1,400 acres of potatoes and 2,000 acres of grain per year. They own approximately 1,700 cleared acres of land, 400 to 500 acres of woodlot and pasture land, as well as machinery, equipment, and inventory. They have developed a good relationship with McCain Foods Limited. and have multiple contracts with them. They also sell to foreign markets such as Cuba, Lebanon, Turkey, and Russia.

8 From May 2010 to May 2011, the Companies employed 18 persons on average, reaching a maximum of 40 employees during harvesting season in the fall of 2010. The total salaries paid to the employees by the Companies during this period was approximately $495,000.

9 Berend Tepper had retired from managing the operations of the Companies approximately five years ago, and since then, his son Hendrik had been responsible for all aspects of the day-to-day management of the Companies and for resolving the problems of the Companies. The Companies are involved in proceedings, some provincial, some foreign, concerning, amongst others, the collection of receivables, the pursuance of insurance claims, and the enforcement of contracts. Hendrik Tepper was the person who handled these matters and therefore he has the personal knowledge needed to resolve a number of these disputes. He was the chief operations officer and primary salesman for the Companies. Without him it is very difficult to settle or otherwise resolve the outstanding litigation.

10 Unfortunately, Hendrik Tepper has been incarcerated in Lebanon since March 23, 2011 as a result of being arrested while attempting to clear Lebanese customs, under an Interpol warrant on behalf of the government of Algeria in relation to potatoes shipped to Algeria by one of the Companies in 2007. Algerian officials allege that Mr. Tepper was part of a scheme to falsify documents concerning the quality of the potatoes arriving in Algeria and they want him extradited to Algeria. This, of course, has caused a crisis in the Tepper family and has put tremendous pressure on the Companies. Efforts are continuing on a daily basis to return Hendrik Tepper home soon.

11 Berend Tepper has come out of retirement and is back to managing the Companies. The 2011 crop is in the ground, it is healthy and the Companies estimate that the realization at harvest will be about $2.2 million.

III. The Companies' Financial Situation

12 The Monitor, with the assistance of the Companies and their external accountants, has prepared an unaudited balance sheet of the Companies on a consolidated basis. The balance sheet gives us an overall view of the potential assets and potential liabilities of the Companies on an accounting basis. It shows assets of $7.7 million and liabilities of $11.2 million. It is not an estimate of realizable or fair market values for the assets. The Monitor has received preliminary estimates of values for the land, the equipment, and the machinery. These have not been placed in the public domain but they have been shared with BMO and the Monitor states that the values are significantly greater than the book value.

13 The Companies' largest creditor is BMO who is owed in excess of $8 million. It seems that discussions between BMO and the Companies had been open and frequent in the period leading up to the filing of the *CCAA* proceedings. Berend Tepper

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and BMO have been working together closely since Hendrik Tepper's incarceration. BMO encouraged the Companies to plant potatoes this year even if Hendrik Tepper was absent.

14 On July 11, 2011, BMO and its advisor PriceWaterhouseCoopers, the Monitor, Berend Tepper, and the Companies' external accountant, Denis Ouellette, met to discuss various issues and share information. I was not left with the impression that BMO has lost confidence in the Companies' management.

15 BMO informed the Court that they have no immediate plan to enforce its security. They are understanding of the predicament that the Tepper family and the Companies are in. It supported the Companies' efforts thus far and was optimistic that they could get through these difficult times. It is now worried that if the *CCAA* process burdens the Companies with the extra debts and charges as requested by the Companies and provided for in the Initial Order, it will cause the demise of the Companies.

16 BMO alleges that the Companies cannot continue to operate in the long term because they have insufficient revenue to meet their obligations. It submits that if the relief sought is granted, BMO's security will be eroded and its ability to recover its losses will be further jeopardized.

17 Since the Initial Order, part of the 2010 crop has been sold for a total of $446,400. The cash flow statements show a cash requirement of approximately $166,000 by the end of July with a cash surplus of approximately $267,000 by the end of September 2011. This included estimates for administrative expenses of $260,000 to the end of September, but does not include interest on DIP financing.

18 The $2 million operating line of credit with BMO is fully advanced. BMO has offered to advance the DIP financing should this Court extend the Initial Order and provide for DIP financing.

19 Section 6 of the *CCAA* requires that for a plan to be successful, it must be approved by a majority in number representing two thirds in value of the creditors, or the class of creditors. BMO holds approximately 82 % of the secured claims and therefore the Companies cannot present a successful plan without BMO's support.

20 BMO has made it very clear that the possibility that they will approve any Plan of Compromise and Arrangement is close to nil unless such plan provides for the complete payment of BMO's advances.

IV. The Monitor

21 A Monitor is in place, which, as noted in *Rio Nevada Energy Inc., Re* (Alta. Q.B.), should provide comfort to the creditors that assets are not being dissipated and current operations are being supervised.

22 The Monitor in the present case recommends the extension of the stay until September 30, 2011 and is of the opinion that the Companies have been acting in good faith and with due diligence, and that an extension of the stay is appropriate.

23 At page 4 of his report, the Monitor states that: "...the Companies, their accountant, and counsel have provided the Monitor with their full cooperation and unrestricted access to the Companies' books and records and other information to permit the Monitor to fulfill its responsibilities".

24 At page 9, he adds:

> a) The companies have and continue to act in good faith and have been forthcoming with information, books, and records, and unrestricted access to their premises.
>
> b) The monitor is satisfied that the companies will be forthcoming to both the monitor and the companies' major creditor with respect to any significant events which might adversely affect the various stakeholders in the these proceedings.

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c) Time is needed for the companies with the assistance of the monitor, their counsel, and the Court to try to deal with the foreign issues and contingent liabilities and to permit a plan to be presented which maximizes the recovery to all stakeholders.

d) An extension will permit an orderly sale of the existing inventory and the harvesting of the 2011 crops.

e) The cash flow statement reflects that the companies will be able to finance operations from cash flow with a requirement for debtor and possession financing in the approximate amount of $210,000 before servicing existing debt. The projections indicate that the DIP financing will be repaid by the end of September 2011.

V. First Issue: Should the Court Grant an Extension Order?

(1) Burden of Proof

25 The onus is on the Companies to justify the continued existence of the provisions of the Initial Order. The Initial Order was granted without notice to persons who may be affected and without any proper debate, therefore the Court will always be willing to adjust, amend, vary, or delete any term or terminate such an order if that is the appropriate thing to do: see *Ravelston Corp., Re*, 2005 CarswellOnt 1619 (Ont. S.C.J. [Commercial List]).

(2) Purpose of the CCAA

26 When determining whether a stay ought to be extended it is important to consider the overall purpose of the *CCAA*.

27 As was stated by Professor Janis Sarra in the first paragraph of her book entitled *Rescue! The Companies' Creditors Arrangement Act* (2007):

> [...] The statute's full title, *An Act to Facilitate Compromises and Arrangements between Companies and Their Creditors*, precisely describes its purpose; providing a court-supervised process to facilitate the negotiation of compromises and arrangements where companies are experiencing financial distress, in order to allow them to devise a survival strategy that is acceptable to their creditors.

28 Justice Blair of the Ontario Court of Appeal discussed the purpose of the *CCAA* in *Stelco Inc., Re* (Ont. C.A.), at paragraph 36, where he states:

> 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 creditor, shareholders, employees and other stakeholders.

29 In *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]), McFarlane J. at paragraph 27, quoted with approval the following statements made by the trial judge, Justice Brenner:

(1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.

(2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency, which includes the shareholders and the employees.

(3) During the stay period the Act is intended to prevent maneuvers for positioning amongst the creditors of the company.

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(4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The Court has a broad discretion to apply these principles to the facts of a particular case.

30 In my view, the above quoted statement sums up the principles to consider in applications under the *CCAA*.

(3) Applicable Sections of the CCAA

31 Subsection 11.02(2) of the *CCAA* provides as follows:

(2) A court may, on an application in respect of a 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.

32 As stated, the burden of proof on an application to extend a stay rests on the debtor company.

33 To have a stay extended past the period of the initial stay, the company must meet the test set out in subsection 11.02(3) of the *CCAA*. It states that:

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.

34 When deciding whether to terminate or extend a stay, a court must balance the interests of all affected parties, including secured and unsecured creditors, preferred creditors, contractors and suppliers, employees, shareholders, and the public generally. I must consider the Companies and all the interests its demise would affect. I must consider the interests of the shareholders who risk losing their investments and the employees of this small community who risk losing their jobs.

(4) Farm Debt Mediation Program

35 BMO has stated that it will not support a plan under the *CCAA* proceedings. It doubts that the *CCAA* approach to the insolvency is the appropriate one in the circumstances. It has suggested and will support a restructuring of the Companies under the *Farm Debt Mediation Act*, S.C. 1997, c. 21 ("*FDMA*"), which provides free mediation services by the Federal Department of Agriculture and Agri-Food Canada, while the Companies can still have the benefit of a stay of proceedings and save on professional fees.

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36 The Monitor feels that the *FDMA* process does not have all of the necessary tools. The Companies allege that the *FDMA* process does not lend itself to the present circumstances. It is argued that although a mediator is involved in this process with the objective of arriving at a settlement, there is no one to provide the type of professional service that the Monitor provides in guiding the debtor company through the *CCAA* process. The Companies chose to apply for a stay period under the *CCAA* hoping to gain the benefit of professional advice on how best to restructure this business. This professional advice is made possible under the *CCAA* with the interim financing and the Administrator's Charge in aid.

37 I have no evidence that the relief sought under the *CCAA* is more drastic to all constituencies than a process under the *FDMA* would be or that it is less beneficial.

(5) Ending the Protection for Two of the Companies

38 BMO has expressed concern as to whether the purpose of the *CCAA* in this matter is to fund litigation against some of the Companies. BMO suggests that the Court should at the very least consider terminating *CCAA* protection for two of the Companies that do not own any assets and are potential liabilities as there are lawsuits or claims pending against them. BMO argues that these companies will drag the others down because of the costs associated with the litigation. The Monitor is alive to these issues but is concerned that such a move at this time may be premature; he needs more time to investigate before deciding whether these companies should be allowed to continue. It should be easier to assure that undue time and costs are not spent on these litigations if those companies are left under the protection of the *CCAA* while the Monitor obtains the information to make a proper decision.

(6) Conclusion Concerning the Extension Order

39 The extension sought is not unduly long. As with the Initial Order, the extension of the stay would only be a temporary suspension of creditors' rights. There is no evidence that the assets are being liquidated. The Companies have continued their farming business and are continuing as going concerns.

40 There is no indication that the secured creditors' security is being dissipated. Notwithstanding BMO's assertion that it will not support a plan under the *CCAA* proceedings, there is hope that the Companies can restructure and refinance and come up with a plan that could eventually be accepted by BMO. They have been working closely thus far.

41 The extension is supported by the independent Monitor and the shareholders. I cannot conclude at this point in time, that the plan is doomed to fail or that the *CCAA* proceeding is being used to delay inevitable liquidation. I am satisfied that progress is being made, however on the evidence, I find that the Companies require additional time to compile information, assess their situation, and file their Plan of Arrangement.

42 The Companies made an application under the *CCAA* for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the *CCAA*. The legislative remedies within the *CCAA* for a stay must be understood to acknowledge the hope that the eventual, successful reorganization of a debtor company will benefit the different stakeholders and society in general: see *Stelco Inc., Re*.

43 The assets of the Companies have a greater value as part of an integrated system than individually.

44 The extension of the stay and the granting of certain charges will allow the Companies to continue operations and harvest its potato crops and fulfill their obligation to customers.

45 The Companies directly employ from seven to 40 people at different times throughout the year and thereby make a significant contribution to the local and regional economy.

46 The Companies have to find a way to restructure their indebtedness and the *CCAA* can be used to do this practically and effectively. The Companies need to be able to focus and concentrate its efforts on negotiating a compromise or arrangement.

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47 It is essential that the Companies be afforded a respite from its creditors. The creditors must be held at bay while the Companies attempt to carry on as a going concern and to negotiate an acceptable restructuring arrangement with the creditors.

48 I do not share BMO's position that the Companies are doomed. I feel that there is a real prospect of a successful restructuring under the *CCAA*. This is an attempt at a legitimate reorganization. I do not feel that the continuance of the *CCAA* proceedings is simply delaying the inevitable.

49 I do not find that the position of the objecting creditors will be unduly prejudiced by the stay. The value of the harvest and therefore the Companies' overall value increases the closer we get to harvest time.

50 The Court finds that the requirements of subsection 11(6) of the *CCAA* have been satisfied. The extension of the stay is supported by the overriding purpose of the *CCAA*, which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent maneuvers for positioning among creditors in the interim.

51 The Court is satisfied that the circumstances are such that an extension order is appropriate. I am satisfied that the Companies have acted and continue to act in good faith and that they have acted and continue to act with due diligence.

52 I conclude that this is a proper case to exercise the Court's discretion to grant an extension order.

(7) Length of the Extension

53 BMO argues that given the nature of the operations, a stay until the end of August should be sufficient to allow the Companies to reorganize and come up with a viable plan, if possible. The Companies argue that the stay should be long enough to allow the Companies to go through the harvesting season without having to come back to Court. They are suggesting October 18 th . The Monitor recommends September 30 th .

54 There is no standard length of time provided in the *CCAA* for an extension of the Stay Period, and therefore it depends on the facts of the case. David Baird, Q.C., in his text, Baird's Practical Guide to the Companies' Creditors Arrangement Act (Toronto: Thompson Reuters, 2009) at page 155 summarizes the factors to be considered as follows:

> a) The extension period should be long enough to permit reasonable progress to be made in the preparation and negotiation of the plan of arrangement.
>
> b) The extension period should be short enough to keep the pressure on the debtor company and prevent complacency.
>
> c) Each application for an extension involves the expenditure of significant time on the part of the debtor company's management and advisors, which might be spent more productively in developing the plan, particularly when the management team is small.
>
> d) With respect to industrial and commercial concerns as distinguished from "bricks and mortar" corporations, it is important to maintain the goodwill attributable to employee experience and customer and supplier loyalty, which may erode very quickly with uncertainty.
>
> e) In British Columbia, the standard extension order is for something considerably longer than 30 to 60 days. While each business will have its own financing possibilities, generally large loans, significant equity injections or large sales required to rescue a corporation in debt for more than $5 million, will take time to develop to the point of agreement.

55 The Companies need to continue farming and bring their crops to harvest in the fall for the benefit of all the stakeholders. The purpose of the stay is to give them time to reorganize and do what needs to be done. They need to come up with a plan and try to sell it to their creditors. This takes time. I feel that August 31 st is not realistic, and to require the Companies to come up with an acceptable plan by that date would be setting them up for failure.

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56 The Monitor is an officer of the Court. He is to remain neutral in this process and if in a month's time he realizes that there is no way to put a viable plan together, then I expect him to forthwith advise the parties and the Court accordingly. In the circumstances, I am satisfied that it is appropriate to extend the Stay Period to September 30, 2011 at 11:59 p.m.

57 Hopefully, this is long enough to allow the parties to find a solution but short enough to prevent complacency so that the various creditors rights and remedies not be sacrificed any longer than necessary.

VI. Second Issue: Should any Other Provision of the Initial Order be Amended or Varied?

(1) The Administration Charge

58 The Court may order an Administration Charge for fees and expenses related to the *CCAA* process pursuant to section 11.52.

59 The appointment of a monitor is mandatory when the courts grant *CCAA* relief. If this *Act* is to have any effect, then there has to be some assurance and money available to pay the professionals that will be working on the restructuring, that is the Monitor, his counsel as well as the Companies' counsel. The *CCAA* proceeding is for the benefit of all stakeholders, including all creditors.

60 The goal of a *CCAA* Stay Period is to provide the Companies with access to the time and expertise needed to develop both a plan of arrangement and to restructure its businesses. This is not possible if those professionals, including the Monitor, are not paid proper fees.

61 The Initial Order provided for an Administration Charge not to exceed $500,000. The Companies are suggesting that it continues at that amount. BMO is suggesting $150,000 while the Monitor in his report felt that it could be reduced somewhere between $200,000 and $300,000. The original projections included payments of $130,000 for legal fees, $85,000 for the Monitor's fees, and $45,000 for accounting fees to the end of September. The Monitor has now had an opportunity to assess the time required and feels that the Monitor's fees and the accounting fees should be no more than $90,000 to the end of September provided no additional proceedings are initiated.

62 I find that an amount not exceeding $250,000 would be appropriate, fair, and reasonable for the Administration Charge.

(2) The Retainer

63 The Initial Order provided retainers for the Monitor, counsel to the Monitor, and counsel to the Companies of $200,000 collectively. These professionals are already protected under the Administration Charge. BMO suggests $30,000 each as a retainer for a total amount of $90,000. The Monitor agrees with this suggestion and would make accounts payable within 15 days instead of 30 days as it now stands.

64 On the evidence now before the Court, I find the $200,000 unreasonable and unnecessary. I find that a retainer of $30,000 each for a total amount of $90,000 is warranted and I so order with accounts made payable within 15 days.

(3) The DIP Lender's Charge

65 Subsection 11.2(1) of the *Act* deals with interim financing. DIP financing, as we know, alters the existing priorities in the sense of placing encumbrances ahead of those presently in existence, and it may therefore prejudice BMO's security. It follows that the DIP Lender's Charge should be fair, reasonable, and appropriate in the circumstances.

66 The Companies' expected cash flows without an order being made exceed existing credit facilities and presently available funds. If an order is not made, the Companies' viability as a going concern is doubtful.

67 The Initial Order provided for DIP financing to a maximum of $1 million. In retrospect, based on the Companies' cash flow statements, there was no need for such a large DIP financing. No creditor was prejudiced as no DIP financing is yet in

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place. The Monitor recommends DIP financing to a maximum of $300,000 and sees no reason why BMO could not be the DIP Lender for this amount if it is so inclined.

68 It is understandable that BMO is not prepared to have their position affected by DIP financing. It suggests that the maximum amount needed is no more than $150,000. However, if the Court provides for a maximum amount of $300,000 in DIP financing, BMO is ready to advance this amount to the Companies. The Companies have obtained a proposal from another lender but is not opposed to BMO being the DIP Lender as long as the terms of the financing are comparable to what they have been able to secure elsewhere.

69 I am satisfied that the Companies need the special remedy of DIP financing, however I conclude that the amount presently provided for in the Initial Order is greater than what is required by the Companies having regard to their cash flow statements. The Companies' request is therefore excessive and inappropriate in the circumstances. I must balance the benefit of such financing with the potential prejudice to the existing secured creditors whose security is being eroded.

70 I am satisfied that the DIP financing is necessary to assist the Companies in restructuring their operations and coming up with a plan of arrangement during the stay. I am satisfied on the evidence before me that the Companies have a reasonable prospect of a plan of arrangement and a viable basis for restructuring, and an urgent need for some interim financing; however I will restrict the amount to what is necessary to meet the short-term needs until harvest, at which time revenues will be realized. I therefore authorize a DIP Lender's Charge in an amount not to exceed $300,000 with BMO as the DIP Lender.

71 I am satisfied that the quantum of the Administration Charge and the DIP Lender's Charge fall well within the range of what is usually ordered considering the magnitude and complexity of the Companies' operations, and the debts to be incorporated into a plan of arrangement.

(4) The Director's Charge

72 Section 11.51 of the *CCAA* deals with the indemnification of Directors and the Director's Charge. The Initial Order provided a Director's Charge not to exceed $500,000 and stipulated that this Charge would only apply if the Directors' did not have the benefit of coverage pursuant to an insurance policy. Subsection 11.52(3) of the *CCAA* prohibits the Court from making such an order if it is convinced that the Companies could obtain adequate indemnification insurance.

73 The Directors of the Companies are Berend and Hendrik Tepper. I realize that certain liabilities may be imposed upon the directors during the stay. The Companies are closely held family entities and BMO submits that the directors should be required to accept the risks that come with the position because they are the main decision makers. The directors have not applied for insurance coverage. There is no evidence to show that the companies cannot obtain adequate indemnification insurance for their directors or officers at a reasonable cost.

74 The Director's Charge will not be granted at this time. The Directors are to explore the possibility of getting insurance coverage and may reapply to the Court at a later time for this charge if absolutely necessary.

(5) The Disposition of Property

75 If the Companies want to sell or otherwise dispose of assets outside of the ordinary course of business, they must obtain authorization from the Court. The Initial Order provided that the Companies could dispose of redundant or non-material assets not exceeding $150,000 in any one transaction or $500,000 in the aggregate. They presently have two pieces of equipment that they would like to sell, namely a bailer and a combine. It is estimated that each is worth approximately $50,000. It would seem that there is a buyer for the bailer which has become redundant. It is expected that this sale could generate revenues of $50,000 and the Companies are suggesting that these proceeds be deposited in the general accounts and it would therefore increase the cash flow of that amount. BMO does not agree; it argues that the sale of these equipments will erode their security. The Monitor suggests that if a buyer is found for one or the other piece of equipment before the end of September, the Companies should be allowed to sell this equipment for which they no longer have any utility, subject to the consent of BMO and provided that the funds be kept in trust.

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76 In deciding whether to grant an authorization to dispose of an asset, the Court must consider the factors set out in subsection 36(3) of the *CCAA*. It must consider:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

77 The Companies have not presented evidence of an actual "proposed sale or disposition" or evidence in relation to the factors including the "process", the "effects of the proposed sale or disposition on the creditors", the "market value" of the assets to be disposed, or "the extent to which the creditors were consulted".

78 In the circumstances, due to this lack of evidence, I will not authorize the disposition of assets during the stay.

(6) Variance and Allocation

79 BMO suggests that variances of more than 5 % in the cash flow not be permitted without further court approval. As we all know, any motion to the court is expensive and time consuming. One of the main objectives of the stay is to allow the Companies respite to focus their time, money and efforts on their reorganization.

80 BMO also requests that all fees, costs and expenses, at least those related to the Administration Charge, be allocated as per the different companies or tracked separately. Having heard the parties and the Monitor on this issue, I am satisfied that the better option is to leave the Monitor deal with these two issues.

VII. Conclusions and Disposition

81 The Stay Period is extended until September 30, 2011, at 11:59 p.m. or such other date or time as this Court may order.

82 The Initial Order is hereby varied and amended as follows:

• Subparagraph 9(a) of the Initial Order is amended by the deletion of the words "and to dispose of redundant or non-material assets not exceeding $150,000 in any one transaction or $500,000 in the aggregate".

• Paragraphs 16, 17 and 18 of the Initial Order are deleted in their entirety and all references to the "Director's Charge", as defined in paragraph 17 of the Initial Order, are deleted throughout the Initial Order.

• Retainers are reduced from $200,000 collectively to $90,000 collectively, being $30,000 each for the Monitor, the Monitor's counsel, and the Companies' counsel. Paragraph 25 will have to be amended to reflect this and the accounts are to be paid within fifteen (15) days of receipt.

• Paragraph 27 of the Initial Order is to be amended to reduce the Administration Charge from a maximum of $500,000 to a maximum of $250,000.

• Paragraphs 28 to 32 are to be amended to reduce the DIP Lender's Charge from a maximum of $1 million to a maximum of $300,000 and BMO will be the DIP Lender.

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83 The Initial Order remains unamended other than as set out herein or as may be necessary to give effect to the terms of this Order.

84 The time period of 21 days provided in subsection 14(2) of the *CCAA* is hereby extended in relation to any appeal proceedings initiated by BMO of the Initial Order, pursuant to section 13 of the *CCAA* until July 27, 2011.

85 This order takes effect immediately and replaces the Interim Order issued in this matter on July 18, 2011.

86 With more time, new money and professional guidance the Companies have a reasonable prospect of a plan of arrangement and a viable basis for restructuring. The stay will facilitate the ongoing operation. The extension will give the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation.

87 The Companies need to continue farming and bring their crops to harvest for the benefit of all their stakeholders. The Companies' creditors will receive greater benefit from a plan of arrangement made at the end of the extended Stay Period than at this time.

88 The evidence before me is that Hendrik Tepper is the directing mind of the Companies' farming operations and brings considerable value to the Companies' operations. Hopefully, the ongoing efforts to return Mr. Tepper home will bear fruit soon.

Motions granted.

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TAB 5

2017 BCSC 808
British Columbia Supreme Court

Sunrise/Saskatoon Apartments Limited Partnership, Re

2017 CarswellBC 1275, 2017 BCSC 808, [2017] B.C.W.L.D. 3765, [2017] B.C.W.L.D. 3766, 279 A.C.W.S. (3d) 464

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, as amended

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of the Plan of Compromise and Arrangement of Sunrise/Saskatoon Apartments Limited Partnership and Those Parties Listed on Schedule "A"

Fitzpatrick J., In Chambers

Heard: April 21, 2017
Judgment: April 21, 2017
Docket: Vancouver S1611657

Counsel: C.J. Ramsay, K.G. Mak, for Petitioners
P. Bychawski, for KingSett Mortgage Corporation
M. Buttery, for Community Trust
J.R. Sandrelli, for Monitor, PricewaterhouseCoopers LLP
G.G. Plottel, for MCAP Financial Corp.
M.C. Verbrugge, for GMI Servicing Inc.
C.D. Brousson, for Timbercreek Mortgage Servicing Inc.
R.P. Wu, for Steering Committee of Limited Partners (M. Rauch, C. Duidre, C. Cumming, F. Banducci and R. Gritten)
B.R. Bennett, for New Summit Partners Corp., Oledale Management Services Inc. and H.C. Apartments LP
G.H. Dabbs, for Van Maren Group
M. Russell, for Superior Millwork Ltd., Durabuilt Windows & Doors Inc. and Adler Firestopping Ltd.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Table of Authorities
Statutes considered:
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

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APPLICATION by petitioners to extend stay of proceeding; APPLICATION by mortgagee for order approving various loans.

***Fitzpatrick J., In Chambers*:**

1 This is a *Companies' Creditors Arrangement Act* proceeding. The petitioners are in the business of acquiring and developing various rental buildings in Regina and Saskatoon, Saskatchewan. The matter began with the granting of an initial order on December 19, 2016.

2 At the outset, this restructuring proceeding had all the hallmarks of being a very contested matter. This arose largely from the concerns of the extensive secured creditor group, who hold different levels of security on the various projects or buildings.

3 Fortunately, much of the stakeholders' differences were subsequently put aside as a result of extensive negotiations. Those negotiations led to the granting of the amended and restated initial order (the "ARIO") on February 3, 2017.

4 The ARIO provides a general framework for dealing with the various properties. In broad terms, the ARIO provided for various properties to be immediately put up for sale. In addition, the ARIO allowed for the petitioners to continue with their construction activities towards completing certain buildings and finalizing the leasing of the various units in those buildings. The general idea is that, once the construction was finished, those buildings would similarly be put up for sale.

5 Another circumstance which the petitioners had in mind leading up to the granting of the ARIO was that, with the exception of the phase 1 properties, which were to be put up for sale, there remained the possibility of a restructuring with respect to some or all of the other buildings.

6 A fundamental aspect of the stakeholder's intentions regarding the ARIO was to recognize and respect the various interests that applied to each individual property, which have different encumbrances (what the Monitor describes as the "capital stack"). Generally speaking, each property or building has different and different levels of lenders, beginning with the first secured creditor and continuing down to the limited partners or equity interests that apply to each of the properties. Accordingly, from the outset of these proceedings, the stakeholders have agreed to a concept of "ring fencing", which preserves the cash flows and costs associated with each of the individual properties and allows an orderly assessment of the viability of the properties on that basis.

7 Since the ARIO was granted, there have been substantial continuing efforts by all of the stakeholders toward finalizing the "go forward" path, all with the involvement of the Monitor. Those efforts are principally outlined in the Monitor's Fourth Report dated April 13, 2017, and in particular at paragraph 8 and following. The Monitor reports that five properties were put up for sale and agreements are anticipated in early May. The sixth property, being CILO, has now been added to that sales process, and definitive agreements on that property are expected on May 23, 2017.

8 In addition, substantial work has been completed on the construction front, with various budgets being prepared. Arbutus has been retained to take that process forward. The necessary financing for that construction has been secured with KingSett Mortgage Corporation through a syndicated process. Therefore, the funding is in place with respect to the construction which is anticipated to take between six to eight months, or to the end of 2017.

9 The Monitor outlines that there have been extensive discussions between the various stakeholders. Stakeholders participating in the discussions concerning the need for construction financing have included the limited partners. Even so, it appears that they have declined to provide that financing, leading to KingSett agreeing to do so.

10 I have also been assisted on this application by the Monitor's Supplemental Report dated April 19, 2017, on one particular issue, which I will address in these reasons.

11 The two applications before me today are as follows: firstly, the petitioners apply to extend the stay to August 31, 2017; secondly, KingSett applies for an order approving various loans. These loans include an initial loan of $50,000 in respect of the CILO project. That loan was superseded by a second loan of $502,000, which paid out the $50,000 loan. Finally, KingSett

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applies for approval of a $17.5 million loan with respect to the construction on the various Sunrise projects. To some extent, KingSett's application is brought *nunc pro tunc* because, working within the general framework under the ARIO, the petitioners have already received initial draws under that financing.

12 There is no opposition to the application by KingSett to approve the loans. In fact, the Monitor supports the order being granted, as do the petitioners. I have no hesitation in concluding that the order should be granted. I find that the evidence establishes that the relevant test under the *CCAA* is met in the circumstances.

13 Accordingly, the order as sought by KingSett in its notice of application dated April 18, 2017, is granted, with the minor amendment addressed by KingSett's counsel during submissions.

14 The petitioners' application to extend the stay of proceeding to August 31 has invited some opposition. Counsel for the petitioners has made submissions as to their reasoning for the August 31 date. In broad terms, those reasons relate to both the sales process and the construction process which are underway. It is anticipated that the sales process will bring forward applications either in June or possibly early July. In addition, the construction schedule anticipates a process of six to eight months from today, which leads us into the December 2017 time frame. Counsel also point out that there is a cost of coming back to court for further extension. Given the number of faces that I see in this courtroom, it cannot be doubted that that is a significant cost arising from every court appearance.

15 The proposed extension date of August 31 is not opposed by many of the secured creditors. These secured creditors take no position on that issue, although they all indicated that they reserved their rights in the sense that they will see how the process plays out. If matters do not proceed to their liking, they all indicate that they may apply to the Court to propose another course of action.

16 The proposed extension date is opposed by two secured creditors: Community Trust, a senior secured creditor on the Nutana property with debt of approximately $15 million; and, the Van Maren Group, a junior secured creditor (mostly in third position) on the Sunset properties. Both creditors seek an extension date earlier than August 31.

17 Community Trust submits that the more appropriate date is the end of June. Its opposition is advanced on the basis that in the normal course a *CCAA* extension date is tied to what is called a threshold date. Further, Community Trust submits that since it is somewhat unclear in terms of how the sales and construction process will unfold, an earlier date is appropriate. Counsel for Community Trust also suggests that by granting the extension date to August, it will effectively reverse the onus by requiring any secured creditor who opposes the continuation of the proceeding to bring its own application to set a different course.

18 The Monitor has expressly addressed the issue as to extension date in its Supplemental Report at paragraph 3.3. Essentially, the Monitor says that there has been positive momentum to these proceedings and that much has been accomplished in terms of achieving consensus between the various stakeholders as to a process going forward. The Monitor also notes that the agreed upon process not only involves the sales, but also a construction process that requires some stability in terms of retaining trades without the sword of Damocles being held over people's heads and worrying about having to justify further extensions.

19 Finally, the Monitor concludes that, given the CILO sales process, which is somewhat further delayed, that sales process might well only result in a sale to be addressed in early July.

20 Accordingly, the Monitor concludes that the August 31 extension date provides a reasonable date given the overall circumstances.

21 The decision as to what an appropriate extension date is requires that the Court allow some flexibility to the parties. It remains a matter of exercising my discretion in terms of what I think is the most appropriate in the circumstances.

22 In my view, there is no doubt that there will be further court attendances between now and August, particularly given the sales process that is underway. In my view, those applications will provide more than ample opportunity for any secured creditor, including Community Trust and Van Maren, to voice any concerns or disagreement about the process going forward.

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23 I agree that I see no need to put the petitioners to the extra cost of making further applications for extensions of the stay. The costs of doing so will, of course, redound to the prejudice of the overall stakeholder group given the significant costs that are involved.

24 I have in mind too that there will be ongoing oversight by the Monitor. If anything untoward should happen, I would expect that the Monitor would file a report to that effect and alert the stakeholders so that the matter can be brought back before the court to be addressed in the usual fashion.

25 Overall, I am satisfied that the Monitor has appropriately analyzed the various moving parts that are in play in this proceeding at this time. Accordingly, I grant the order allowing the extension date to August 11, 2017. I have chosen this date because it accords with my rota when I will be sitting in Vancouver and the calendars of counsel.

Applications granted.

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TAB 6

2000 CarswellAlta 1584
Alberta Court of Queen's Bench

Rio Nevada Energy Inc., Re

2000 CarswellAlta 1584, [2000] A.J. No. 1596, 102 A.C.W.S. (3d) 18, 283 A.R. 146

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, As Amended

In the Matter of Rio Nevada Energy Inc.

Romaine J.

Judgment: December 18, 2000
Docket: Calgary 0001-17463

Counsel: *Brian P. O'Leary*, *Alison Z.A. Campbell*, for Westcoast Capital Corporation
Peter Pastewka, *James Eamon*, for Rio Nevada Energy Inc.
Larry Boyd Robinson, for Joseph Dow and Ronald Antonio

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.ii Stay
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First Treasury Financial Inc. v. Cango Petroleums Inc. (1991), 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585, [1991] O.J. No. 429 (Ont. Gen. Div.) — distinguished
Meridian Development Inc. v. Toronto Dominion Bank, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Alta. Q.B.) — considered
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 (Ont. C.A.) — considered
Pacific National Lease Holding Corp., Re (August 17, 1992), Doc. A922870 (B.C. S.C.) — considered
Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142 (B.C. C.A.) — applied
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Starcom International Optics Corp., Re (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) — considered
Statutes considered:
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Generally — considered

s. 11(3) — considered

s. 11(6) — considered

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APPLICATION by creditor for order terminating stay of proceedings; CROSS-APPLICATION by debtor for order extending stay of proceedings.

***Romaine J.*:**

Introduction

1 Rio Nevada Energy Inc. sought, and obtained, protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 on October 31, 2000. Rio Nevada's principal creditor, Westcoast Capital Corporation, declared its intention at that time to bring an application for an order terminating the stay of proceedings granted under the CCAA order on the basis that any plan of arrangement proposed by Rio Nevada would be "doomed to failure". The stay of proceedings under the order was initially extended to November 17, 2000. On that date, Westcoast applied for an order terminating the stay and appointing a receiver-manager of the assets of Rio Nevada pursuant to Westcoast's security. Rio Nevada applied for an order extending the stay to December 17, 2000, and amending certain provisions of the initial order. I dismissed Westcoast's application and extended the stay under the initial order to December 15, 2000. These are the reasons for my decision.

Facts

2 Rio Nevada is a publicly listed oil and gas company incorporated under the laws of Canada. In September, 1999, Rio Nevada entered into a prepaid gas purchase contract with Westcoast pursuant to which Rio Nevada was to deliver certain daily volumes of natural gas commencing in September, 1999 and ending on October 31, 2004. Westcoast prepaid $3,118,000 plus GST to Rio Nevada in accordance with the terms of the gas purchase contract.

3 As security under the gas purchase contract, Rio Nevada granted Westcoast a first ranking security interest and charge over all its assets. Upon default by Rio Nevada, Westcoast becomes able to appoint, or apply to the court to appoint, a receiver.

4 Rio Nevada had some difficulty with two new wells drilled to meet the gas production requirements of the gas purchase contract in that it has not been able to complete remedial work that would put these wells into production. Currently, the completion of remedial work on these wells awaits sufficient cold weather to allow access to them.

5 Rio Nevada had gas production shortfalls from time to time during the term of the gas purchase contract, which it cured by purchasing gas from a gas marketer and delivering it to Westcoast to satisfy its contractual obligations. Rio Nevada also acquired the shares of a manufacturing and research and development firm, Concorde Technologies Inc. (which included the acquisition of the shares of Tierra Industries Ltd.) and granted security on its assets as part of the financing of this acquisition. Westcoast considers this acquisition without its consent to be a breach of its security interest over the assets of Rio Nevada. On October 23, 2000, Westcoast terminated the gas purchase contract and claimed liquidated damages. Westcoast indicated its intention to take steps to appoint a receiver of the assets of Rio Nevada in the event payment was not received within 10 days.

6 Westcoast claims approximately $5,530,832 in liquidated damages under the gas purchase contract against Rio Nevada. Rio Nevada's liabilities to Westcoast and other secured, unsecured and statutory creditors aggregate approximately $10.6 million.

7 Outtrim Szaba Associates Ltd., a petroleum engineering evaluations firm, has estimated the fair market value of Rio Nevada's oil and natural gas assets at $9,427,000 as at November 13, 2000. This estimate is based on an evaluation of Rio Nevada's reserves and cash flow as of the same date.

8 Rio Nevada's aggregate liabilities of $10.6 million include debt from its acquisition of the shares of Concorde and Tierra. No evidence of the value of these shares is before the Court, but their purchase price in August, 2000 was approximately $5.25 million. Rio Nevada has additional miscellaneous assets worth approximately $250,000.

Issues

9

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1) Should the stay of proceedings granted in the initial order be terminated because any plan of arrangement put forward by Rio Nevada is "deemed to failure"?

2) Should the stay granted under the initial order be extended?

Analysis

10 There is some disagreement between the parties as to the appropriate process to be followed in deciding these issues. Rio Nevada takes the position that the appropriate test is set out in Section 11(6) of the CCAA [1] , and that the case law relating to the appropriate test in a "doomed to failure" application is merely a factor in applying Section 11(6): *Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) at paragraph 22. Westcoast submits that, while Section 11(6) sets out the correct test for Rio Nevada's application to extend the stay, the correct test for deciding whether its application to terminate the stay should succeed is the test set out in the case law.

11 The problem arises in part because much of the case law relating to applications to set aside a stay pre-dates the addition of Section 11(6) to the CCAA in 1997. However, although Section 11(6) applications to implement or extend a stay may often be met with opposition asserting that such a stay is doomed to failure, it is not necessary for these cross-applications to co-exist in every case. It is preferable to consider these issues separately in order to ensure the burden of proof on each applicant is applied appropriately, and the "doomed to failure" application should be considered first.

12 The burden of proof in setting aside a CCAA stay by establishing that any plan of arrangement is "doomed to failure" rests on the applicant wishing to have CCAA proceedings terminated, in this case, Westcoast: *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* [2] ; *Philip's Manufacturing Ltd., Re* [3]

13 Rio Nevada does not have the burden of proving that a plan of arrangement put forward by it is not "doomed to failure". As commented by Doherty, J.A. in *Nova Metal Products Inc. v. Comiskey (Trustee of)* [4] , the nature of CCAA proceedings is such that many plans of arrangement will involve "variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made". As a result, the debtor company does not bear the burden of establishing the likelihood of success from the outset. Although this is not Rio Nevada's initial application, it is only seventeen days into CCAA proceedings, and Rio Nevada has not yet proposed any firm or specific plan of arrangement.

14 To meet the test set out in Section 11(6) for extension of a stay, Rio Nevada has the onus of proof and must satisfy the Court that circumstances exist that make such an order appropriate and that it has acted in good faith and diligently.

15 *Should the stay of proceedings granted in the initial order be terminated because any plan of arrangement put forward by Rio Nevada is* "*doomed to failure*"?

16 There appear to be at least two standards applied by courts in previous cases in deciding whether a stay under the CCAA should be set aside on a "doomed to failure" basis.

17 One standard, adopted by the courts in British Columbia, requires the applicant creditor to lead evidence to establish that a debtor company's attempt at a plan of arrangement is indeed doomed to failure: *Philip's Manufacturing Ltd., Re* (*supra*) at page 28; *Sharp-Rite Technologies Ltd., Re* [5] . As pointed out by Douglas Knowles and Alec Zimmerman in "*Further Developments and Trends in the Companies' Creditors Arrangement Act*: 1992" (Insolvency Institute of Canada), this standard is extremely difficult for a creditor to satisfy, particularly in the early stages of CCAA proceedings. I prefer, and adopt, the test that appears to have been applied by Austin, J. in *Bargain Harold's Discount Ltd.* (*supra*), that to succeed, the applicant creditor must show that there is no reasonable chance that any plan would be accepted.

18 In this case, there is no issue that Westcoast is a secured creditor of Rio Nevada. Although there is some dispute over the amount of liquidated damages owing under the gas purchase contract, this amounts to a difference of about $125,000. There is an issue of whether GST can be claimed as part of contractual damages that may affect the amount of the claim. However,

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it appears from the evidence that Westcoast's claim is at least $4,922,936, plus a September gas payment of $113,069.59 plus GST and an October gas payment for the period to termination of the contract in an approximate amount of $63,000 plus GST.

19 Even taking into account the disputed amount of liquidated damages and the GST issue, Westcoast's claim is approximately $5,043,000, and accrues interest at between $55 - 57,000 per month.

20 Westcoast submits that the market value of $9.4 million assigned to Rio Nevada's oil and gas assets by Outtrim Szabo is too high, and questions the qualifications of Outtrim Szabo to give this valuation opinion. Westcoast estimates the value of Rio Nevada's assets at $5,667,000, which it apparently arrived at by adding the value of Rio Nevada's Proved Developed Producing and Proved Developed Non-Producing reserves as set out in Outtrim Szabo's report and discounting at 15%. Westcoast ascribes no value to Rio Nevada's Proved Undeveloped or Probable Additional reserves, nor any value to the Concorde and Tierra shares or Rio Nevada's other miscellaneous assets. There is no independent evidence before me that this is an appropriate evaluation methodology for this company or that Outtrim Szabo's opinion is not appropriate in the circumstances.

21 In support of its application to terminate the stay, Westcoast submits that its security position is being eroded on a daily basis, as Rio Nevada's reserves are being developed at a value of between $7,000 and $10,000 a day. Westcoast submits that this is a situation of depleting resources, that interest is accruing and that professional fees will be incurred as part of the CCAA proceedings. If there is a real risk that a creditor's loan will become unsecured during the stay period, this is a factor to be taken into account in determining whether there should be a termination of the stay: *Nova Metal Products Inc.* (*supra*). In this case, however, I am not satisfied on the valuation evidence that is before me that there is a substantial risk of encroachment on Westcoast's security. I am not satisfied that Westcoast's estimate of the value of Rio Nevada's assets should be preferred over the Outtrim Szabo opinion, nor that I should conclude at this point that no value should be ascribed to Rio Nevada's other assets. Assuming the market value of Rio Nevada's assets to be somewhere in a range between $5.6 million and $9.5 million, there is sufficient value and more to cover Westcoast's claim for the relatively brief period of the stay requested by Rio Nevada.

22 Westcoast also submits that Rio Nevada has had more than enough time to attempt a sale of assets or a restructuring, as it has been making efforts to resolve its financial problems since mid-August, 2000. However, Rio Nevada has had only seventeen days of protection under the CCAA, and the Monitor reports that Rio Nevada has had extensive discussions with potential purchasers and merger partners and is investigating the possibility of a re-financing. There is no suggestion of lack of diligence by Rio Nevada in attempting to formulate a reasonable reorganization plan.

23 The actual market value of Rio Nevada will be determined by its ability to restructure and to sell assets. Given the report of the Monitor, some potential exists for a plan of arrangement to be proposed that will cover the Westcoast debt and other creditors, or perhaps even leave an operating company with value to cover other secured and unsecured debt and preserve the interests of non-creditor constituencies.

24 Westcoast submits that the value of Rio Nevada's reserves has deteriorated significantly from the date of its previous reserve report, May, 2000. However, given the relatively short stay period that is currently being requested, there is no evidence that the value of the reserves will continue to deteriorate to any great extent.

25 Finally, Westcoast says that it has lost confidence in the management of Rio Nevada and would be unable to support a plan of arrangement put forward by it. There is, however, some evidence that Westcoast will not act against its commercial interest and that it will act reasonably in considering proposals put to it by Rio Nevada. As pointed out by Holmes, J. in *Sharp-Rite Technologies, Re* (*supra*), this type of submission by a creditor during a "doomed to failure" application must be viewed with some skepticism, since commercial reality may dictate a change of position when the details of a plan of arrangement have been presented. This is not a case such as *First Treasury Financial Inc. v. Cango Petroleums Inc.* [6], where all the creditors, secured and unsecured, have lost confidence in current management, or where it is highly probably than any plan put forward would be defeated by all the creditors.

26 It is appropriate to consider all affected parties in an application of this kind, including other secured and unsecured creditors: *Bargain Harold's* (*supra*) at paragraph 35. Here, the remaining two secured creditors support the application for a

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stay, on the basis that if there is value in Rio Nevada, the CCAA proceedings are most likely to allow all creditors to realize on their positions.

27 Taking into account all of the submissions and evidence, I am not satisfied that there is no reasonable chance that a plan of arrangement would be accepted.

28 *Has Rio Nevada met the requirements of Section 11(6) of the CCAA such that the stay granted under Section 11(3) should be continued*?

29 Section 11(6) requires Rio Nevada to establish three conditions prior to obtaining an order continuing the stay. They are:

a) that circumstances exist that make the order appropriate;

b) that Rio Nevada has acted, and is acting, in good faith; and

c) that Rio Nevada has acted, and is acting, with due diligence.

30 The evidence of Rio Nevada's efforts to refinance the Westcoast debt has not been contested, and I have already stated that, given the relatively short period of the stay under the CCAA to the date of these applications, there has been no lack of due diligence in that regard.

31 The only evidence that may suggest lack of good faith by Rio Nevada is Westcoast's complaint that it was misled by Rio Nevada's management with respect to the status of well remediation, and also misled with respect to the acquisition of the shares of Concorde and Tierra. These are issues that relate more to Westcoast's decision to terminate the gas purchase contract than to Rio Nevada's conduct under CCAA proceedings, and are, at any event, in dispute between the parties. I am satisfied by the evidence put forward by Rio Nevada and by the Monitor that Rio Nevada has acted and is acting in good faith with respect to these proceedings.

32 As to whether circumstances exist that make the continuation of the stay appropriate, there are a number of factors that must be taken into account. The continuation of the stay in this case is supported by the basic purpose of the CCAA, to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court and to prevent manoeuvres for positioning among creditors in the interim; *Pacific National Lease Holding Corp., Re*[7]; *Meridian Development Inc. v. Toronto Dominion Bank*[8]. Westcoast has not satisfied the Court that an attempt at an acceptable compromise or arrangement is doomed to failure at this point in time. Negotiations for restructuring a sale or refinancing are ongoing, and there has been a strengthening of the management team. Rio Nevada continues in business, and plans are underway to remediate its two major wells, which will significantly increase the company's rate of production. A Monitor is in place, which provides comfort to the creditors that assets are not being dissipated and current operations are being supervised. The extension sought is not unduly long, and is supported by the secured creditors other than Westcoast. The costs of the CCAA proceedings are likely no less onerous than the costs of a receivership in these circumstances, and the relief sought under the CCAA less drastic to all constituencies than the order that would likely have to be made in a receivership.

33 I find that Rio Nevada has established that continuation of the stay is appropriate, and that the conditions to granting such an order have been met.

Application dismissed; cross-application granted.

Footnotes

1 11(6) *Burden of proof on application* - The court shall not make an order under subsection ... (4) [to extend a stay] 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.

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2 (1992), 10 C.B.R. (3d) 23 (Ont. Gen. Div.) at page 30.

3 (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at page 28.

4 (1990), 1 C.B.R. (3d) 101, 41 O.A.C. 282 (Ont. C.A.), (sub nom. *Elan Corp. v. Comiskey*) , at page 316.

5 [2000] B.C.J. No. 135 (B.C. S.C.) at paragraph 25

6 [1991] O.J. No. 429 (Ont. Gen. Div.)

7 (August 17, 1992), Doc. A922870 (B.C. S.C.)

8 [1984] 5 W.W.R. 215, 53 A.R. 39 (Alta. Q.B.)

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TAB 7

2009 BCCA 319
British Columbia Court of Appeal

Forest & Marine Financial Corp., Re

2009 CarswellBC 1738, 2009 BCCA 319, [2009] 9 W.W.R. 567, [2009] B.C.W.L.D. 5281, [2009] B.C.W.L.D. 5284, [2009] B.C.J. No. 1355, 179 A.C.W.S. (3d) 602, 273 B.C.A.C. 271, 461 W.A.C. 271, 54 C.B.R. (5th) 201, 96 B.C.L.R. (4th) 77

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

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, S.B.C. 2002, c. 57

AND IN THE MATTER OF FOREST & MARINE FINANCIAL CORPORATION (in its own capacity, in its capacity as general partner of FOREST & MARINE FINANCIAL LIMITED PARTNERSHIP and its capacity as manager of FOREST & MARINE INVESTMENT TRUST), FOREST & MARINE INVESTMENTS LTD., FOREST & MARINE CAPITAL LTD., FOREST & MARINE INSURANCE SERVICES LTD. and TREESEA HOLDINGS INC.

Asset Engineering LP (Appellant / Plaintiff) And Forest & Marine Financial Limited Partnership, Forest & Marine Financial Corporation, Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd., Treesea Holdings Inc. (Respondents / Defendants)

Forest & Marine Financial Corporation (in its own capacity, in its capacity as general partner of Forest & Marine Financial Limited Partnership and in its capacity as manager of Forest & Marine Investment Trust), Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd. and Treesea Holdings Inc. (Respondents / Petitioners) And Asset Engineering LP (Appellant / Respondent) And Wolrige Mahon Limited, Ad Hoc Committee of Investment Receipt Holders, Barry Kenna, Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Financial Institutions Commission and Superintendent of Financial Institutions, Her Majesty the Queen in Right of the Province of British Columbia (Respondents / Respondents)

Donald, Newbury, Chiasson JJ.A.

Heard: June 8, 2009
Judgment: July 7, 2009
Docket: Vancouver CA037097, CA037098

Proceedings: affirming *Forest & Marine Financial Corp., Re* (2009), 2009 CarswellBC 2361 ((B.C. S.C. [In Chambers]))

Counsel: R.A. Millar for Appellant, Asset Engineering LLP
A.H. Brown for Respondents, Forest & Marine Financial Limited Partnership, Forest & Marine Financial Corporation, Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd., Treesea Holdings Inc.

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.4 Persons subject to bankruptcy law
I.4.c Partnerships
Bankruptcy and insolvency

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XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.viii Miscellaneous

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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.) — considered

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s. 62 — referred to

s. 64 — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 7 — considered

R. 7(6) — considered

R. 7(7) — considered

APPEAL by creditor from stay order under *Companies' Creditors Arrangement Act.*

***Newbury J.A.*:**

1 We heard this appeal on June 8, 2009 and advised counsel that it was dismissed, with reasons to follow.

2 The appeal was taken by Asset Engineering LP ("AE"), a secured creditor of Forest & Marine Financial Limited Partnership, a limited partnership under the laws of British Columbia. Its general partner is Forest & Marine Financial Corp. (the "General Partner"). The Partnership is in the business of providing financing and investment services to companies engaged in the forest and marine industries in British Columbia and is part of a group of related investors and corporations referred to informally as the "F & M Group". The Partnership is the main operating entity of the Group, and (according to the petition) owns the operating assets of the Group, which consist largely of a loan portfolio and an office building in Nanaimo. The Partnership's main liabilities are the debt owing to AE - in the amount of some $13 million - and a series of "investment receipts" held by public investors in the total amount of some $10 million.

3 The order appealed from was granted by Mr. Justice Masuhara on May 1, 2009. This was a "comeback" order that extended his initial order, made March 26, granting a stay of proceedings to the petitioners pursuant to s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") and to the Partnership pursuant to the court's inherent jurisdiction. (It will be noted that the petitioners include the General Partner but not the Partnership *per se*.) The initial order appointed Wolrige

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Mahon Ltd. as the monitor of the petitioners' property and the conduct of their business, and ordered that AE's consultant, Ernst & Young Inc., be given access to their property, books and records. The comeback order extended the initial order to July 31, 2009.

4 AE acquired its loan position from the original lender, "CIT", which had entered into an agreement with the Partnership, represented by the General Partner, to provide up to $50 million in financing in 2004. The agreement established a revolving loan facility that was subject to margin requirements dependant on the value of unimpaired loans owing to the Partnership. The obligation to repay was secured by a general security agreement ("GSA") over the Partnership's loans and accounts receivable, and a second mortgage on the Nanaimo building, and was guaranteed by other members of the Group, who granted collateral security for their guarantees.

5 Evidently, the Partnership soon went into default under some of the financial covenants in the financing agreement, and CIT and the Partnership entered into a series of forbearance agreements which were renewed, at considerable cost to the borrower, from time to time until September 2008. The final agreement expired on March 15, 2009. One of the terms of the agreements was that upon its expiration, CIT would be entitled to enforce its security immediately, without any further demand or notice, and that the Group would not oppose the appointment of a receiver. On the other hand, according to the affidavit of Mr. Hitchock, the president of the General Partner, CIT had assured the Group that once the loan was paid down to below $20 million, the lender would reduce the covenants to ones the Group "could live with." Mr. Hitchcock deposes that the Partnership paid the loan down from $35 million to $13 million by early 2009 and paid AE approximately $2.8 million between the initial hearing and the comeback order.

6 Notwithstanding that the Partnership was in default in 2008, AE had begun to acquire "participation interests" in the credit facility from March of that year onwards. In March 2009, it acquired all of CIT's interest in the facility. A few days later, it demanded payment in full of the Partnership's indebtedness in the amount of $13,257,123.31 and delivered notices of its intention to enforce security as required under the *Bankruptcy and Insolvency Act*. When the General Partner advised AE that it would not adhere to a "blocked account" agreement, the lender advised that it intended to apply for the appointment of an interim receiver over the Partnership and the related guarantors - hence Supreme Court Docket S092160. The Group told AE that they opposed the liquidation of the Partnership's portfolio and that they would apply for *CCAA* protection - hence Supreme Court Docket S092244. The two proceedings were heard together, and although no order has been filed in the receivership action, counsel agreed in this court that we may assume the chambers judge intended to dismiss AE's application for the appointment of a receiver.

7 In his reasons of May 1, Matsuhara J. noted that a report prepared by Ernst & Young indicated a "net equity deficiency in its high and low case of $7.7 million and $16.6 million, respectively, indicating the difficult circumstances in which the Group finds itself." Ernst & Young estimated the net realizable value of the Group's assets at between $13.2 million and $22 million, while the monitor estimated net realizable values to be between $22 million and $28.5 million respectively, on a going concern basis. Thus as the chambers judge noted, even on the low estimate suggested by Ernst & Young, AE's loan position was fully secured. (Counsel for AE told this court that his client disputes the assumptions underlying Ernst & Young's report.) The chambers judge also noted that the monitor's cash-flow analysis anticipated AE would receive payments totalling $5.5 million towards its loan by the end of August, with $2.56 million of that amount being paid in May. Ernst & Young estimated that AE would receive $3.3 million, and both consultants projected that AE would continue to receive its "significant charges under the facility in excess of $21,000 per month." (Para. 18.)

8 The Court below had affidavit evidence of a "concerted effort" on the part of the Group to find refinancing to replace AE's position. Mr. Hitchcock deposed that an unnamed financial institution had carried out its due diligence in connection with a possible refinancing that would discharge AE's debt position completely. From what was said by counsel on the appeal hearing, the Group is still focussing on a possible refinancing that would either precede or take place at the same time as a simplification of the cumbersome corporate structure now in place. One suggestion was that the members of the Partnership would receive shares in the General Partner in return for their partnership interests, such that the Partnership would cease to exist. However, no specific "plan" in this regard was in evidence. One of the central arguments raised by counsel for AE in opposition to the stay is that the *CCAA* cannot be used simply to "buy time" for refinancing that will not involve a compromise or arrangement that

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would have to be voted on by creditors. In any case, AE says it would not vote in favour of any compromise or arrangement, so that any such plan would be doomed to fail.

9 The first issue confronting the chambers judge, however, was the "jurisdictional" one of whether, in his words, a limited partnership qualifies for protection under the *CCAA*. The Act applies generally to debtor *companies*. In particular, s. 11 provides in material part:

> 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.
>
> 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
> >
> > . [Emphasis added.]

The Act defines "company" as "... any company, corporation or legal person incorporated by or under an Act of Parliament or the legislature of a province, and any incorporated company having assets or doing business in Canada wherever incorporated ...".

10 The chambers judge agreed with the holding of Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) that a limited partnership is not a "qualifying entity" under the statute; *but* that it lay within the inherent jurisdiction of the court to 'sweep in' a partnership where the business of the corporate petitioners was closely connected to and intertwined with that of the partnership. On this point, Matsuhara J. stated:

> ... in the absence of a jurisdiction under the *CCAA*, it is agreed by counsel that the court can exercise its inherent jurisdiction. The question that arises is then under what circumstances and to what extent can it do so. The limits have been reviewed, particularly where a *CCAA* proceeding is in effect. In cases such as *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344and *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 C.A. which circumscribe the court's ability to rely upon inherent jurisdiction, it is obvious that these limits are even greater when a focus is on a non-qualifying party. However, nonetheless, the courts have exercised that inherent jurisdiction in a *CCAA* setting, dealing with non-qualifying entities, and have imposed stays of proceedings against related non-qualifying entities. In *Calpine Canada Energy Ltd. (Re)*, 2006 ABQB 153 the court stated that it had inherent jurisdiction against a non-corporate entity where it was just and convenient to do so. This case relied upon an earlier case of *Lehndorff*, which I have already mentioned. The court, in extending the stay, stated that:
>
> > It is clear that Calpine has a more than arguable case that a stay involving the Partnerships is necessary and appropriate. It is also likely, given the extremely complex corporate and debt structure of the Calpine group, the cross-border nature of these proceedings, and the evidence I have heard so far in the proceedings of the value of partnership assets, that irreparable harm may accrue to the Calpine group if the stay is not granted. The balance of convenience certainly favours a stay. I find that it is just, reasonable and appropriate in this case to exercise this court's inherent jurisdiction to stay proceedings against the Calpine partnerships. [At para. 12.]

11 The chambers judge then turned to consider the various factors relating to the exercise of his discretion in this case, concluding that:

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> In terms of refinancing, though Asset Engineering points out the lack of production of specifics indicating the potential for this occurring, there is evidence of a concerted effort to find refinancing in the materials. As well, Mr. Hitchcock, on the last day, in an affidavit, identified a recognized financial institution that has performed its due diligence over the course of two days over the FM group in furtherance of a potential financing, which Mr. Hitchcock says would satisfy the debt to Asset Engineering completely. He attached an email that supports a serious initiative by that institution to examine Forest & Marine. Moreover, it is now clear from the commentary from counsel that refinancing is the primary focus of the FM group.
>
> Given that there is a broad constituency of interest at play; that at this point the financial analysis supports the view that Asset Engineering's position is secured; that further payments to reduce the outstanding indebtedness to Asset Engineering are projected - and in this regard I would note that there appears to be government interest in FM's continued operation; that continued payments to Asset Engineering's significant monthly fees are projected to continue; that though Asset Engineering has forcefully argued its right for the appointment of a receiver based on contractual and equitable considerations, there has been some indications of some flexibility, but not much, with respect to timing; that this would also equally be contained within the comments of the investment receipt holders; that there is also sufficient reality of the potential for refinancing from a recognized institution; that refinancing is a primary focus for the FM group; and that the imposition of a receiver would impair the ability of the *CCAA* eligible entities from restricting; in assessing the competing interests relative to the prejudice to each, I conclude that an extension of the stay of proceedings is in order. [At paras. 21-2.]

As I have already mentioned, the stay was extended by the comeback order to July 31, and it is from that second order that AE appeals.

On Appeal

12 AE's grounds of appeal as stated in its factum are as follows:

> 1) "inherent jurisdiction" was not a proper basis upon which to found a stay of proceedings brought by AE against the [Partnership];
>
> 2) a stay of proceedings brought by AE against the [Partnership] is contrary to the principles set forth in this Court's judgment in *Cliffs*; and
>
> 3) a stay ought not to have been granted before permitting a vote by creditors on a process that would suspend AE's rights pending refinancing and where critical prerequisites to the formulation of a plan had to be fulfilled by the debtor companies.

The Inclusion of the Partnership in the Stay

13 I must confess that I found counsel's submissions on the first ground difficult to follow. Mr. Millar submitted that the Partnership itself, rather than the General Partner, is the "primary business actor" and was the borrower from CIT. In his analysis, the assets which secure AE's position are assets of the Partnership and since the Partnership is not entitled to invoke the *CCAA*, it was an improper use of the court's inherent jurisdiction to grant a stay in the Partnership's favour. When we pressed counsel as to why it would be necessary to refer to the Partnership at all in the order, he responded that limited partners themselves do not own partnership assets directly, since they are not entitled to the return of their capital contributions unless all the liabilities of the partnership have been paid: see s. 62 of the *Partnership Act*, R.S.B.C. 1996, c. 348. If the partners do not own the assets (at least directly), he suggested, then it is the Partnership itself that owns them. Underlying his submission was the proposition that a limited partnership is a legal entity - as shown, for example, by the fact that it was the Partnership that issued a prospectus in connection with investment receipts "of the Partnership" in May 2008. But although it is, in counsel's view, an entity, it is not an entity entitled to invoke the *CCAA*. Instead, Mr. Millar said, a partnership must seek an "insolvency remedy" in the *Bankruptcy & Insolvency Act*, s. 85(1) of which states that when a general partner becomes bankrupt, the property of the partnership vests in the trustee.

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14 Mr. Brown, counsel for the petitioners, did not take issue with the fact that a limited partnership does not *per se* come within the definition of "company" in the *CCAA*. He argued, however, that the Partnership is *not* a legal entity, and that "its" assets are in fact the assets of the partners themselves, although usually they are held in the name of the General Partner, which must manage the Partnership's business, and the partnership's debts must be paid before partners may share in its assets on a termination. He noted that the General Partner in this case executed the finance agreement with CIT and the forbearance and related agreements that are in evidence, on behalf of the Partnership. As well, he noted that the stay granted by Masuhara J. on March 26, 2009 prohibited the commencement or continuation of any action or proceeding against the petitioners or any of them, or affecting the Business or Property. The order defined "Property" to include all current and future assets, undertakings and properties of any kind in the possession and control of the petitioners, and "Business" to mean the business of the petitioners. The General Partner was one of the petitioners and thus, one assumes, the order applies to any assets it holds on behalf of the partners (or if Mr. Millar is correct, on behalf of the Partnership).

15 Counsel for AE was not able to refer us to any authority for the proposition that a limited partnership is a legal entity, as opposed to "the relationship which subsists between persons carrying on business", as stated at s. 2 of the *Partnership Act*. The authorities I have located clearly point away from the notion that a limited partnership is a legal entity. *Halsbury's Laws of England* (4th ed., 1994), for example, states that "A limited partnership, like an ordinary partnership, is not a legal entity." (Vol. 35, at 136). In R.C. Banks, *Lindley & Banks on Partnership* (18th ed., 2002), the author states that "A limited partnership is not a legal entity like a limited company or a limited liability partnership but a form of partnership with a number of special characteristics introduced by the Limited Partnerships Act, 1907." (At 847.) 'Non-personhood' is the reason why partnerships are useful for tax and corporate reasons: they permit investors, as partners, to claim losses, depreciation and other expenses of the partnership business without risking unlimited liability for partnership debts: see Lyle R. Hepburn, *Limited Partnerships* (2002) at 1-12 to 1-12.1; James P. Thomas and Elizabeth J. Johnson, *Understanding the Taxation of Partnerships* (5th ed., 2002) at para. 405.

16 In *Lehndorff General Partner Ltd., Re*, *supra*, Farley J. observed that the "case law supports the conclusion that a partnership, including a limited partnership, is not a separate legal entity." He quoted a passage suggesting that if the legislature had intended to create a new legal entity, it would have done so in the *Limited Partnerships Act* of Ontario, as Parliament had in s. 15 of the *Canada Business Corporations Act*. The latter statute provides that a corporation has the capacity and rights, powers and privileges of a natural person. (Para. 27.)

17 The question of whether a limited partnership is a legal entity was considered at length by the Ontario Court of Appeal in *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.* (1998), 167 D.L.R. (4th) 272 (Ont. C.A.), where a limited partnership sought to rely on a statutory right of prepayment under a mortgage purported to have been granted by the partnership. The trial judge held that since the partnership was not a legal entity capable of holding title to real property or transferring title under a mortgage, it was incapable of granting a mortgage. He interpreted the mortgage document in question, which had been entered into by the general partner on behalf of the limited partners, and concluded that since the general partner was a corporation, it was precluded by s. 18(2) of the *Mortgages Act*, R.S.O. 1990, c. M. 40, from prepaying under s. 18(1). (Section 18(2) denied the special right of prepayment under s. 18(1) to any mortgage "given by a joint stock company or other corporation".) The Court of Appeal agreed in the result, concluding in part that:

> (1) A limited partnership, because it is not a legal entity, carries on its business through a general partner which has the power to hold and convey title to real property on behalf of the members of the limited partnership.
>
> (2) A general partner which is a corporation and which gives a mortgage is precluded by s. 18(2) from the operation of s. 18(1) and, therefore, cannot prepay a long-term closed mortgage.
>
> (3) A general partner which is an individual and which gives a mortgage is not subject to the s. 18(2) exemption, and, therefore, is entitled to prepay the mortgage. ... [At para. 49; emphasis added.]

18 In the course of reaching these conclusions, Borins J.A. for the Court observed that:

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> Well respected authorities are uniform in the view that a limited partnership is not a legal entity. ... The concept that neither a general, nor a limited partnership, is a legal entity has been long accepted by Canadian and English law and, no doubt, is why a limited partnership is required by law to have a general partner through which it normally acts: *Limited Partnerships Act*, ss. 2(2), 8 and 13. As for a general partnership, s. 6 of the *Partnerships Act* describes through whom it may act. [At para. 26; emphasis added.]

He also quoted with approval the following passage from *Lehndorff*, *supra*, in which Farley J. had explained the features of a limited partnership and how its business is generally conducted:

> A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12 ... A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: See Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.
>
> . . . . .
>
> It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle) ... The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process ... [At paras. 17, 20; emphasis added.]

19 Finally, the Court of Appeal noted at para. 33 of *Kucor* that title to real property owned by the partnership is generally registered in the name of the general partner rather than in the names of the partners themselves, who would thereby risk exposing themselves to unlimited liability. (See s. 64 of the *Partnership Act* of British Columbia.) Whether the general partner holds such property as a true "trustee" or in some lesser fiduciary capacity is another question: see, however, *Molchan v. Omega Oil & Gas Ltd.*, [1988] 1 S.C.R. 348 (S.C.C.), at 368, and *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 67 B.C.L.R. (2d) 1 (B.C. C.A.), a decision of this court, at para. 77, *per* Southin J.A.; cf. in *King v. On-Stream Natural Gas Management Inc.*, [1993] B.C.J. No. 1302 (B.C. S.C.), at para. 32, *per* Shaw J. That question need not be answered here, and I would expect that in most cases, it is addressed expressly in the partnership agreement. (The agreement in the case at bar was not in evidence.)

20 If (as I believe) Farley J. was correct in *Lehndorff* that the "process of debtor and creditor relationships" associated with the business of a limited partnership is between the general partner and the creditors, it was unnecessary in my view in *substantive* terms for the Partnership or the limited partners in this case to be included in the *CCAA* order in order to stay proceedings affecting the Partnership assets or business. A valid charge had been granted on those assets by the General Partner. It was unnecessary for AE to proceed against the limited partners. Had it done so, it would have been met with the fact that under s.

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57 of the *Partnership Act*, they are not liable for the obligations of the Partnership above and beyond their capital contributions unless they have participated in the management of the business. (There was no suggestion this has occurred in this case.) It would also have been unnecessary to proceed against the Partnership *per se*, since it is not a legal entity, and the partners are bound by the General Partner's actions on behalf of the Partnership (i.e., all the partners) in carrying on the business. Thus if the *CCAA* process had continued without the Partnership being named in the order, the effect would have been no different, in substantive terms, from what it is now.

21 But there is a *procedural* difficulty: as Mr. Brown notes, R. 7 of the *Supreme Court Rules* allows a partnership or "firm" to be sued in its own name. Rule 7(6) provides that where an order is made against a firm, "execution to enforce the order may issue against the property of the firm", and R. 7(7) provides that execution to enforce the order may issue against any person who admitted in a pleading or affidavit that he or she was a partner or who was adjudged to be a partner. Rule 7 is *procedural* (see *Surrey Credit Union v. Willson* (1989), 41 B.C.L.R. (2d) 43 (B.C. S.C. [In Chambers])), but the potential for a multiplicity of proceedings in apparent conflict with the *CCAA* order is obvious. Accordingly, to control *its own process*, the court below had an inherent discretion, confirmed by s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, to grant a stay in respect of proceedings against the Partnership. This is not the granting of a "freestanding remedy" under the *CCAA* (see *Lehndorff*, discussed below), nor an exercise of discretion under that Act to supplement perceived shortcomings in its application. Rather it is a purely procedural step to forestall a purely procedural problem.

22 Thus, for different reasons than those of the chambers judge, I concluded the first ground of appeal should be dismissed.

Should a Stay Have Been Granted?

23 I turn next to AE's second ground of appeal - that no order should have been made in this case, whether under the *CCAA* or otherwise, because the intention of the Group is to refinance AE's loan rather than propose a compromise or arrangement, and in any event, AE "has unequivocally declared that it will oppose any arrangement. There is no utility in a stay where compromise is either futile or doomed to failure." (See also *Marine Drive Properties Ltd., Re*, 2009 BCSC 145 (B.C. S.C.).) Mr. Millar relies strongly on this court's decision in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.), which he says signals a 'retrenchment' from past authorities that have taken a large and liberal view of the scope of the Act: 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 92-3; *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.), at paras. 17-22; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at para. 7; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.); and most recently, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.) at para. 43, (lve. to app. refused (S.C.C.)).

24 In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for *CCAA* protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to 'secure sufficient funds' to complete the stalled project. (Para. 34.) This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fairly straightforward and there will be little incentive for senior secured creditors to compromise their interests. (Para. 36.) Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a 'restructuring'. ... Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA's* fundamental purpose." That purpose had been described in *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the *status quo* for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [At 580.]

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25 The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged. Similarly in this case, Mr. Millar submits that no compromise or arrangement is being proposed, and any compromise the Partnership might propose would be "doomed to failure."

26 In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The *CCAA* is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the *means* contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

27 As for AE's insistence that it will refuse to vote in favour of any plan brought to a meeting of creditors under s. 6 of the *CCAA*, I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner. When the Act is invoked, the court properly considers the interests of many stakeholders, not simply those of the creditor and debtor: see, e.g., *ATB Financial* , *supra*, at paras. 51-2; *Skeena Cellulose Inc., Re*, 2003 BCCA 344 (B.C. C.A.) at para. 39, quoting with approval from *Canadian Airlines Corp., Re*, [2000] 10 W.W.R. 269 (Alta. Q.B.); *Marine Drive Properties Ltd., Re* , *supra*, at para. 14. In this case, there are many customers of the Partnership in the coastal marine and forest industries who would be affected if the Group were put into liquidation. The chambers judge noted that the provincial government has expressed interest. Mr. Hitchcock deposes that the employees of various borrowers from the Group, investment receiptholders, unitholders of the investment trust and customers stand to lose a great deal. He acknowledges that refinancing is the "focus" of the Group's efforts and continues:

> The Petitioners have acted diligently and in good faith to put the Petitioners in a position where they can prepare a plan of arrangement for presentation to their creditors. I believe that, given an extension to July 31, 2009 F&M will be able to formulate and prepare a plan of arrangement. During this time F&M intends to:
>
> a) make payments to reduce its indebtedness to Asset Engineering;
>
> b) receive the most recent assessments of the value of its loan portfolio so it can consider presenting some of its loan portfolio to possible purchasers or lenders;
>
> c) receive the expected appraisal on the building so it can consider which alternative(s) outlined above can be implemented;
>
> d) evaluate the current corporate/administrative structure to determine the most efficient structure going forward; and
>
> e) refinance the remaining balance of its loan owed to Asset Engineering.

Mr. Hitchcock also deposes in his March 25 affidavit that the petitioners intend to "prepare a plan of arrangement or compromise and present the same to the creditors".

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28 The chambers judge considered all the evidence before him, noting that there was a "broad constituency of interests at play", that the financial analysis supported the view that AE's position was secured, and that further payments in reduction of the indebtedness to AE were projected. In his words:

> ... I would note that there appears to be government interest in FM's continued operation; that continued payments to Asset Engineering's significant monthly fees are projected to continue; that though Asset Engineering has forcefully argued its right for the appointment of a receiver based on contractual and equitable considerations, there has been some indications of some flexibility, but not much, with respect to timing; that this would also equally be contained within the comments of the investment receipt holders, that there is also sufficient reality of the potential for refinancing from a recognized institution; that refinancing is a primary focus for the FM group; and that the imposition of a receiver would impair the ability of the *CCAA* eligible entities from restructuring; in assessing the competing interests relative to the prejudice to each, I conclude that an extension of the stay of proceedings is in order. [At para. 22.]

29 I am not persuaded that he erred in law or applied a wrong principle in reaching this conclusion. Nor am I persuaded that as a matter of law, the chambers judge should not have granted a stay "without the immediate entitlement of a vote of creditors where the proposed plan involves the refinancing of a major secured creditor and where there is a critical and central, unfulfilled prerequisite to the proposed plan", as AE suggests in support of its third ground of appeal. As I understand AE's argument, the "prerequisite" being referred to is the alteration or simplification of the Group's corporate structure which the monitor suggested would be necessary before a plan of arrangement could be presented. Paraphrasing *Cliffs Over Maple Bay*, AE submits that its enforcement proceedings should not be stayed "so as to compel AE to await the outcome of an unduly complex and expensive procedure .... [t]his is a key 'element of the debtor company's overall plan of arrangement' and creditors should be entitled to vote in the circumstances."

30 I have already explained above that this case is very different from *Cliffs Over Maple Bay*. The Partnership is carrying on its business and hopes to simplify its corporate structure as part of or as a recondition to a refinancing. I know of no authority that suggests that such a restructuring cannot qualify as a "plan of arrangement" under the *CCAA*, or that a refinancing by itself cannot qualify - provided in each case a compromise or arrangement between debtor and creditors is contemplated. Masuhara J. was aware of the monitor's advice and concluded that it was appropriate to extend the stay. Although AE objects to the prospect that its "rights would be frozen for such an indeterminate proposition", the chambers judge was not obliged to put the prospect of a refinancing to a vote at a creditors' meeting at this early stage. As the petitioners noted in their factum, if such a vote were insisted upon at this time, it would defeat the purpose of the legislation - "to facilitate the making of a compromise or arrangement between an insolvent company and its creditors to the end that the company is able to continue in business, with regard to the interest of a broad constituency extending beyond any single creditor or class of creditors". The Group now has until July 31 to put forward a workable plan.

31 For these reasons, I joined in the dismissal of the appeal.

***Donald J.A.*:**

I agree.

***Chiasson J.A.*:**

I agree.

Appeal dismissed.

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