COURT FILE NUMBER	2001-05630
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
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 AND DOMINION FINCO INC.
DOCUMENT	**BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.**
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Clerk's Stamp

BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.

IN RESPONSE TO THE STAY EXTENSION APPLICATION
TO BE HEARD BY
THE HONOURABLE MADAM JUSTICE K.M. EIDSVIK

May 8, 2020 at 9:50 a.m.

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I. INTRODUCTION

1. This bench brief is submitted by Diavik Diamond Mines (2012) Inc. ("**DDMI**") in response to the stay extension application filed by Dominion Diamond Mines ULC ("**Dominion**") *et al.* (collectively, the "**Applicants**") in the within proceedings (the "**CCAA Proceedings**"), originally returnable May 1, 2020 (the "**Extension Application**"). All capitalized terms used herein and not otherwise defined have the meaning ascribed to such terms in the Affidavit of Thomas Croese, sworn on April 30, 2020 (the "**Croese Affidavit**"), and filed in the CCAA Proceedings.

2. The Applicants' application is *de novo*. DDMI's response to the Extension Application is necessitated by the fact that DDMI is providing post-filing goods and services to Dominion, for which Dominion has admitted it will not pay. Astonishingly, Dominion is paying other creditors and suppliers, on account of post-filing, and potentially even pre-filing, obligations associated with the Ekati Core Zone, but refuses to pay post-filing obligations on account of the supply of goods and services provided by DDMI. DDMI thus seeks provisions in the Initial Order[1] that will preserve DDMI's rights, protect the interests of the Joint Venture, and ensure the ongoing operations of the Diavik Mine, on an interim basis and until DDMI's claims are resolved or adjudicated. Specifically, DDMI currently only seeks:

(a) a modification of the stay of proceedings (the "**Stay**") contained in the Initial Order, issued on April 22, 2020, by the Honourable Madam Justice K.M. Eidsvik, in the within proceedings (the "**Initial Order**"), to permit DDMI to make Cover Payments, as defined in and contemplated under Section 9.4 of the JVA, on an ongoing basis and in accordance with the terms and conditions therein;

(b) authorization to allow DDMI to securely store a portion of Dominion's share of production from the Diavik Mine at the Diavik Product Splitting Facility in Yellowknife, Northwest Territories (the "**PSF**"), or the Rio Tinto group's cleaning and sorting facility in Antwerp, the whole in accordance with the JVA and associated agreements, until such time that Dominion pays the indebtedness owing on account of the Cover Payments made by DDMI; and,

[1] **DDMI's proposed amendments to the Initial Order are attached to this Bench Brief as Tab 1.**

(c) sealing Confidential Exhibit "1" to the Croese Affidavit along with any confidential exhibits or materials subsequently produced by DDMI (collectively referred to as, the "**Confidential Exhibits**") and filed in these CCAA Proceedings.

3. The effects of affirming the Initial Order would be to sanction Dominion receiving goods and services from DDMI without making immediate payment therefor, in contravention of Section 11.01 of the CCAA. Pursuant to the JVA, DDMI, as Manager, is responsible for all ongoing operations of the Joint Venture and Diavik Mine. Pursuant to the JVA, Dominion is required to pay its proportionate share of all Costs to DDMI. Dominion has admitted it cannot cover these post-filing obligations, as required under the JVA. Furthermore, Dominion's thirteen-week cash flows indicate that Dominion does not intend to pay any of its share of the post-filing Joint Venture Costs and expenses.

4. The CCAA Proceedings should not put Dominion in a better position *vis-a-vis* DDMI by allowing it to take a free ride on the back of DDMI. The CCAA does not permit Dominion to do what it is purporting to do. In these circumstances, the requested modifications to the Initial Order are necessary and appropriate.

5. DDMI's proposed amendments seek to preserve and protect DDMI's rights and interests until either: (i) Dominion pays its post-filing obligations; or, (ii) DDMI seeks further relief for Dominion's ongoing failure to comply with the CCAA and meet its post-filing obligations. In effect, DDMI is producing, providing, improving, and maintaining the Assets that will be subject to the Security, at its own risk and expense, which absent any further agreement will likely be the subject of a future application.

II. STATEMENT OF FACTS

A. Procedural History

6. Dominion's application to extend the stay of proceedings to June 1, 2020 was heard by this Honourable Court on May 1, 2020. DDMI is a respondent to the *de novo* application and was prepared to make submissions on modifications that must be made to the Initial Order, to attenuate the extreme prejudice being suffered by DDMI. The Court adjourned the aspect of the application dealing with DDMI's submission on the basis that:

(a) Dominion will not call for delivery of any diamonds from the PSF until such time as DDMI's submissions relative to the Initial Order are heard and determined; and

(b) The parties will be in the same position at the return of the application on May 8, 2020 as they were on May 1, 2020.

7. Counsel for Dominion confirmed on the record at the May 1, 2020 application that Dominion does not object to the scope of the stay being circumscribed to permit DDMI to make Cover Payments. Dominion noted that there are significant mechanics to be worked out. As at the date of filing this brief, the mechanics have not yet been worked out.

B. The JVA and the Diavik Mine

8. Dominion and DDMI are successors in interest (in this capacity, each a "**Participant**") to the JVA.[2] The JVA governs operations between DDMI (a subsidiary of Rio Tinto plc) and Dominion in relation to the Diavik Diamond Mine and various surrounding exploration properties (collectively, the "**Diavik Mine**") in the North Slave Region.[3]

9. DDMI's material asset is its interest in the Diavik Mine and the Joint Venture.[4]

10. Pursuant to the JVA, DDMI is the manager of the Diavik Mine (the "**Manager**", when referred to in such capacity). The JVA grants DDMI, as Manager, a broad discretion in implementing Managing Committee decisions and the sole authority to oversee and implement operational decisions.[5] Furthermore, in its capacity as Manager, DDMI is responsible for payment of 100% of all "Costs",[6] defined as:

> 1.8 "Costs" means all items of outlay and expense whatsoever, direct or indirect, with respect to Operations including without limitation those detailed in Sections 2.1 to 2.14 inclusive of the Accounting Procedures.

[2] Affidavit of Thomas Croese, sworn on April 30, 2020 in the within proceedings, at para. 2 ["**Croese Affidavit**"].

[3] Croese Affidavit, *supra* note 2 at para. 13.

[4] Croese Affidavit, *supra* note 2 para. 5.

[5] Croese Affidavit, *supra* note 2, Confidential Exhibit 1, at Sections 6.5, 7.2, and 7.8 ["**JVA**"].

[6] Croese Affidavit, *supra* note 2 para. 14; JVA, *supra* note 5 at Sections 1.8, 7.2(b), 7.2(c), 7.2(e), 7.2(h), 7.2(i), 7.2(k)-(m), 8.2, 8.7, and 9.2.

11. DDMI therefore remits payment to all vendors, on behalf of the Joint Venture, and collects Dominion's 40% share of such obligations through bi-weekly invoices and cash calls.

12. Section 9.2 of the JVA addresses cash call timing and billing requirements and states:

> 9.2 Cash Calls
>
> Prior to the last day of each month the Manager shall submit to each Participant which has elected to contribute to the Program and Budget then in effect a billing for such Participant's share of estimated Costs for the next month. Within 20 days after receipt of each billing, each Participant shall advance to the Manager such estimated amount. Time is of the essence of payment of such billings. If the amount billed for the estimated Costs was less than the actual Costs incurred or charged during that month, the Manager may bill the Participants for the difference at any time, which the Participants will pay within ten days following receipt of billing. With the concurrence of the Management Committee, the Manager may establish more frequent billing cycles to minimize account balances.

13. The 2020-2025 Program and Budget was approved by both DDMI and Dominion, pursuant to the Management Committee Resolution, executed by Dominion on December 2, 2019.[7]

14. Additionally, the Management Committee also established a change in the billing cycle such that on, or about the beginning and middle of each calendar month the Manager would submit, to each Participant, a billing for such Participant's share of the estimated Costs under the Program and Budget, for the ensuing period of approximately two weeks. Each Participant is required to pay this amount within seven days.[8]

15. In the event a Participant defaults on their payment obligations, the JVA allows the non-defaulting Participant the right to make "Cover Payments". Specifically, Sections 9.4(a) and (b) of the JVA, as amended pursuant to Amending Agreement (NO.2), state:

> 9.4 Default in Making Contributions
>
> (a) If a Participant elects to contribute to an approved Program and Budget and then defaults in its obligation to pay a contribution or cash call hereunder, the [non-defaulting Participant], by notice to the defaulting Participant, may at any time, but shall not be obligated to, elect to make such contribution or meet such cash call on behalf of the defaulting Participant (a "Cover Payment").
>
> (b) Each Cover Payment shall constitute indebtedness due from the defaulting Participant to the [non-defaulting Participant], which indebtedness shall be payable

[7] Croese Affidavit, *supra* note 2 at para. 35.

[8] Croese Affidavit, *supra* note 2 at para. 17.

upon demand and shall bear interest from the date incurred to the date of payment at the rate specified in Section 9.3.

16. Upon making the Cover Payment, the non-defaulting Participant, DDMI, acquires a first-lien security interest (the "**Security**") pursuant to Section 9.4(c) of the JVA, which states:

> (c) Each Participant hereby grants to the other, as security for repayment of the indebtedness referred to in Section 9.4 (b) above together with interest thereon, reasonable legal fees and all other reasonable costs and expenses incurred in collecting payment of such indebtedness and enforcing such security interest, a mortgage of and security interest in such Participant's right, title and interest in, to and under, whenever acquired or arising, its Participating Interest and the Assets. Each Participant hereby represents and warrants to the other that such mortgage and security interest ranks and will rank at all times prior to any and all other mortgages and security interests granted by or charging the property of such Participant. Each Participant hereby agrees to take all action necessary to perfect such mortgage and security interest and irrevocably appoints the other Participant as its attorney-in-fact to execute, file and record all financing statements and any other documents necessary to perfect or maintain such mortgage and security interest or otherwise give effect to the provisions hereof. Upon default being made in the payment of the indebtedness referred to in Section 9.4 (b) when due the non-defaulting Participant may on 30 days' notice to the defaulting Participant exercise any or all of the rights and remedies available to it as a secured party at common law, by statute or hereunder including the right to sell the property subject to a mortgage and charge hereunder. …[9]

17. The JVA defines "Assets" as:

> 1.5 "Assets" means the Properties, Products and all other personal property (which for greater certainty shall include all goods, intangibles, securities, money, documents of title, instruments and chattel paper together with all proceeds of and accessions to the foregoing) now or hereafter held by the Manager for the benefit of the Participants including without limitation all monies advanced from time to time by the Participants to the Manager pursuant to Section 9.2 hereof.[10]

18. "Products" and "Properties" are defined as follows:

> 1.26 "Products" means all ores, minerals and mineral resources produced from the Properties under this Agreement including, without limitation, diamonds.
>
> …
>
> 1.28 "Properties" means those mining claims described in Part 1 of Schedule A and all mining leases which may replace the same and all other interests in real

[9] JVA, *supra* note 5 at Section 9.4(c).

[10] JVA, *supra* note 5 at Section 1.5.

property which are acquired and held subject to this Agreement, including without limitation the interests in, under and by virtue of the Underlying Agreements.[11]

19. The definition of Assets clearly includes all diamonds produced by the Joint Venture.

C. Intercreditor Arrangements and DDMI's Priority Over the Assets

20. DDMI's Security ranks in priority to the claims of both the Credit Agreement Lenders and the Trustee. Specifically, the Agent (on behalf of the Credit Agreement Lenders) and the Trustee (on behalf of the Trust Indenture noteholders) have subordinated their security interests in the Assets to and in favour of DDMI's Security pursuant to: (i) the Diavik Credit Agreement Subordination Agreement; and, (ii) the Diavik Trust Indenture Subordination Agreement, respectively.[12]

D. Initial Application, Default, and Failure to Account for Requirement to Pay Post-Filing Costs

21. On April 9, 2020, DDMI issued a cash call invoice for $16.0 million (the "**$16M Cash Call**").

22. On April 13, 2020, Dominion requested that the payment schedule be altered, such that the payment of the $16M Cash Call would be deferred from April 15, 2020 to April 22, 2020. In its request, Dominion did not: (i) mention any inability to make the $16M Cash Call; or, (ii) provide any indication that it would commence these CCAA Proceedings. As a result, DDMI agreed to Dominion's request.[13]

23. DDMI and Dominion have regularly scheduled Joint Venture meetings; the last of which was held on April 20, 2020. Dominion, once again, did not advise DDMI of its intention to seek the Initial Order at the April 20, 2020 meeting.[14]

[11] JVA, *supra* note 5 at Sections 1.26 and 1.28.

[12] Croese Affidavit, *supra* note 2 at paras. 23-24.

[13] Croese Affidavit, *supra* note 2 at para. 6.

[14] Croese Affidavit, *supra* note 2 at para. 7.

24. On April 22, 2020, the Applicants sought and received creditor protection pursuant to the CCAA.[15] As a result of the aforementioned extension, on the same day that the Initial Order was obtained, Dominion also defaulted on its $16M Cash Call (the "**Cash Call Default**").[16]

E. Implications of Cash Call Default and Dominion's Inability to Cover Future Post-Filling Costs

25. The effect of the Cash Call Default is to deprive the Manager of the funds necessary to pay the expenses incurred in the ordinary course of the Joint Venture. This prejudice is exacerbated as the cash calls required for the period between April – June are critically important, as these are needed to pay vendors for consumables transported across the seasonal Tibbitt to Contwoyto winter ice road, in preparation for the upcoming season.[17]

26. Dominion does not have the funds necessary to cover the $16M Cash Call or any future ongoing cash calls required in connection with the Joint Venture. Dominion's thirteen-week cash flow forecast, for the period April 24 – July 17, 2020, projects a $42.5 million operational shortfall, which does not account for any post-filing JVA Costs, but includes payment on account of post-filing, and potentially even pre-filing, obligations associated with the Ekati Mine.[18] Estimated JVA Costs over the forecast period total approximately $140.8 million, excluding the unpaid $16M Cash Call, Dominion's 40% share of such Costs is $56.3 million.[19]

27. In order to ensure the ongoing operation of the Joint Venture and the Diavik Mine, all ongoing obligations must be paid. Due to Dominion's financial situation and insolvency, DDMI is being forced to make all such payments. Without the ability to make Cover Payments, DDMI will default in its obligations to its employees, contractors, and vendors, and place the assets of the Joint Venture and the operation of the Diavik Mine at risk.[20] Once Cover Payments are made, without further relief, DDMI will be a post-filing creditor of Dominion, while Dominion will continue

[15] Initial Order, issued on April 22, 2020, by the Honourable Madam Justice K.M. Eidsvik, in the within proceedings.

[16] Croese Affidavit, *supra* note 2 at para. 7.

[17] Croese Affidavit, *supra* note 2 at para. 26.

[18] Croese Affidavit, *supra* note 2 at para. 8; Affidavit of Kristal Kaye, sworn on April 21, 2020 in the within proceedings, at Exhibit "H".

[19] Croese Affidavit, *supra* note 2 at para. 8.

[20] Croese Affidavit, *supra* note 2 at para. 9.

to reap the benefits of ongoing upkeep and production without complying with its duties and obligations under the JVA.

F. Diavik Mine Operating Review

28. With the onset of the COVID-19 pandemic, the Manager undertook a comprehensive review of the operating strategy at the Diavik Mine (the **"Operating Review**"), which included a careful analysis of alternative operating strategies during the COVID-19 pandemic.[21] The Operating Review's key conclusions were as follows:

(a) the 2020 free cash flow benefit associated with continued operations of the Diavik Mine - compared to entering care and maintenance status - is estimated to be materially favourable, in the order of $100 million or more;[22]

(b) the differences in the near-term cash flows between continuing to operate and entering care and maintenance are minimal;[23]

(c) the incremental EBITDA margin of continued operations, compared to care and maintenance, strongly favours continuing operations;[24]

(d) Dominion's share of the Cover Payments in May and June is only expected to reduce by approximately 15% if operations are curtailed from May 1, 2020;[25] and,

(e) continued operations would be pursued in accordance with the protective health measures proactively adopted by DDMI, the Operating Review, and in close collaboration with the Northwest Territories' Chief Public Health Office.[26]

29. While Dominion has suggested that the COVID-19 pandemic has effectively imposed a complete cessation of operations and commerce in the diamond industry, this is inconsistent with DDMI's information and commercial experience. In particular:

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[21] Croese Affidavit, *supra* note 2 at paras. 41, 42.
[22] Croese Affidavit, *supra* note 2 at para. 42(a).
[23] Croese Affidavit, *supra* note 2 at para. 42(b).
[24] Croese Affidavit, *supra* note 2 at para. 42(a).
[25] Croese Affidavit, *supra* note 2 at para. 42(b).
[26] Croese Affidavit, *supra* note 2 at paras. 42(d), 44.

(a) multiple diamond mines continue to operate, while taking increased health-related precautions, including diamond mines in the Northwest Territories;

(b) certain Indian-based companies continue to operate factories outside of India thereby offering customers alternative processing options;

(c) Belgium's Diamond Office has remained in operation throughout the COVID-19 pandemic, thereby permitting the import and export of diamonds;

(d) the Belgian offices of a DDMI corporate affiliate have been able to import rough diamonds from Canada, prepare rough diamonds for sale in Antwerp, and engage with its customers globally to remain in business and generate sales;

(e) "diamond tenders" are not the only sales method presently accessible to sellers. Alternative sales methods are available to generate sales revenue, as are digital sales channels to generate activity with willing buyers; and,

(f) an affiliate of DDMI has achieved material sales during March and April 2020.[27]

30. It is important to note that the Joint Venture does not include or contemplate the sale of any diamonds by the Manager. Instead, the Participants take their share in kind. Diamonds are split between the Participants based on a combination of grade and quality, in lieu of pricing. Once split, the diamonds are sold by each of the Participants, through their individual channels.

31. While discussing financial implications, it is important not to overlook the significant community benefits that result from continued operation of the Diavik Mine. Among other things, DDMI is a major contributor to the local economy, charitable endeavours, and a major employer, in the Northwest Territories.[28] In 2019, the Diavik Mine counted 1,124 employees and contractors, of whom 555 resided in the Northwest Territories and 242 of whom were Indigenous workers from northern communities. In the same year, DDMI also disbursed $500.8 million in operating costs

[27] Croese Affidavit, *supra* note 2 at para. 38.

[28] Croese Affidavit, *supra* note 2 at paras. 29, 31-34.

of which $370.6 million was spent in northern communities and $166.7 million in northern Indigenous communities.[29]

III. ISSUES

32. The primary issue for this Honourable Court to determine is whether the form of order sought by the Applicants should be modified to: (i) allow DDMI to protect its rights and the interests under the JVA; (ii) prevent Dominion from forcing DDMI to provide ongoing services and credit during the CCAA Proceedings without temporal protections being put in place; and, (iii) ensure the ongoing upkeep and operation of the Diavik Mine, and the Joint Venture, for the benefit of all Participants and stakeholders.

IV. LAW

A. Where No Notice was Given of the Initial Application, the Comeback Application is *de novo.*

33. The comeback application provides an opportunity for "any creditor which had no notice of the application to raise any issues or concerns."[30] In cases where a CCAA initial order is obtained *ex parte* or without sufficient notice, "the initial applicant bears the onus [at the comeback application] of satisfying the court that the terms of the initial order are appropriate".[31] In such circumstances, "[…] 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."[32]

34. As a result, at a "true" comeback hearing, "[i]n moving to set aside or vary any provisions of [the initial order], moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied."[33]

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[29] Croese Affidavit, *supra* note 2 at para. 43.

[30] *Victorian Order of Nurses for Canada, Re*, 2015 ONSC 7371 at para. 13 **[TAB 2]**.

[31] *Canada North Group Inc. (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 at para. 77, rev'd on other grounds 2019 ABCA 314, leave to appeal to SCC granted March 26, 2020 (38871) **[TAB 3]**.

[32] *Tepper Holdings Inc., Re*, 2011 NBQB 211 at para. 25 **[TAB 4]**.

[33] *Target Canada Co., Re*, 2015 ONSC 303 at para. 82 (per Morawetz J.) **[TAB 5]**.

B. General Power of the CCAA Court

35. Section 11 of the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") states:

> **General power of court**
>
> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.[34]

36. As the Ontario Court of Appeal recently observed in *U.S. Steel Canada Inc., Re*, Section 11 grants a supervising court the broad jurisdiction to grant orders, provided that the order does not conflict with any express restriction in the CCAA. Specifically, the Court stated:

> Moreover, it is inconsistent with the anatomy and history of the CCAA to maintain that if Parliament had intended that a CCAA judge would have the authority to make a certain type of order, it would have said so. The Supreme Court has made it clear that "[t]he general language of the CCAA should not be read as being restricted by the availability of more specific orders" [citation omitted].[35]

C. Rights of Suppliers and Others to Not Provide Ongoing Credit

37. Section 11.01 of the CCAA ("**Section 11.01**") provides that:

> **Rights of suppliers**
>
> 11.01 No order made under section 11 or 11.02 has the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.[36]

[34] CCAA, s 11 **[TAB 6]**

[35] *U.S. Steel Canada Inc., Re*, 2016 ONCA 662 at para. 79, citing *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 70 **[TAB 7]**.

[36] CCAA, s 11.01 **[TAB 6]**

38. The Ontario Court of Appeal has explained the rationale of the substantively identical predecessor provision to Section 11.01, section 11.3, as follows:

> Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the CCAA restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. […][37]

V. ARGUMENT

A. Dominion's Extension Application is *de novo* and the Applicants Bear the Burden.

39. As Dominion's initial application was brought with no notice to DDMI, Dominion's Extension Application is *de novo*. The case law on this point is clear. The fact that DDMI failed to receive appropriate notice of the initial application is undisputed. The May 1, 2020 stay extension was granted without prejudice to DDMI's position as at May 1, 2020. Therefore, the onus is on the Applicants to establish that the relief granted at the initial application should stand without modification.

40. As the subject matter of the application concerns whether or not a stay of proceedings should be granted and, if so, in what form, an application to lift the stay is unnecessary and contracts the *de novo* nature of the Applicants' application.

B. The Manager has Complete Control over Operations and has Exercised Such Rights Prudently.

41. Pursuant to the JVA, DDMI, in its capacity as Manager, has broad authority to implement the Management Committee decisions. Specifically, Section 7.2 of the JVA lists the Manager's powers, and states:

> 7.2 Powers and Duties of Manager
>
> Subject to the terms and provisions of this Agreement, the Manager shall have the following powers and duties which shall be discharged in accordance with

[37] *Nortel Networks Corp., Re*, 2009 ONCA 833 at para. 34 **[TAB 8]**.

approved Programs and under the general guidance of the Management Committee:

(a) the Manager shall manage, direct and control Operations;

(b) the Manager shall implement the decisions of the Management Committee and shall make all expenditures necessary to carry out adopted Programs, and shall promptly advise the Management Committee if it lacks sufficient funds to carry out its responsibilities under this Agreement;

(c) the Manager shall:

(i) purchase or otherwise acquire for the Venture all material, supplies, equipment, water, utility and transportation services required for Operations, such purchases and acquisitions to be made on the best terms available, taking into account all of the circumstances,

…

(e) the Manager shall:

(i) make or arrange for all payments required by leases, licenses, permits, contracts and other agreements related to the Assets;

(ii) pay all taxes, assessments and like charges on Operations and Assets except taxes determined or measured by the Participants' sales revenue or income.

…

42. Section 7.8 of the JVA provides, in part, that "… The Manager shall have complete control over and supervision of Mining Operations and shall direct and supervise the same so as to ensure their conformity with this Agreement."

43. DDMI has, in the proper exercise of its discretion as Manager, determined that Diavik Mine Mining Operations (as defined in the JVA) should continue at this time, because:

(a) the JVA provides DDMI, as Manager, broad authority to make operational decisions, provided that those decisions are consistent with the approved Program and Budget. The 2020-2025 Program and Budget was executed by Dominion and DDMI and provided for continued operations at the Diavik Mine;

(b) the Operating Review has indicated that the cost of placing the Diavik Mine into care and maintenance would be 75% of the costs needed to continue operations for this year;

(c) the Operating Review has further indicated that continued operations could result in up to $100 million or more in free cash flow for the 2020 full year operating period; and,

(d) placing the Diavik Mine into care and maintenance would have an immediate adverse effect on the Joint Venture's stakeholders, including its employees and vendors in addition to the Government of the Northwest Territories and its citizens.

C. <u>DDMI Should Not be Forced to Supply Ongoing Services and Credit to Dominion Absent Appropriate Protections.</u>

44. As Dominion's Joint Venture partner, DDMI is uniquely situated within the CCAA Proceedings. DDMI is being forced to extend credit to Dominion. Section 11.01 of the CCAA is clear that where a party provides goods or services to a CCAA debtor after the initial order, that party may demand payment in full from the debtor, and that no Stay under the CCAA has the effect of compelling such a supplier to extend credit to the debtor.[38] In *Cow Harbour Construction Ltd.*, this Honourable Court, while dealing with post-filing payment of true leases, ordered that:

> "6. The Monitor's counsel shall forthwith circulate to all parties on the service list in these proceedings (the "Service List") a list of those leases that it has classified as "true leases" ***thereby entitling the lessors under such leases to receive ongoing monthly payments pursuant to Section 11.01 of the Companies' Creditors Arrangement Act ("CCAA").***
>
> *…*
>
> 10. ***CHC shall pay to the Monitor's counsel, to be held in trust pending resolution of any disputes concerning true leases, all monthly payments from and after April 1, 2010 which would have been required to be paid by CHC to lessors under***:
>
> (a) those leases for which there is a dispute as to categorization as a true lease; and
>
> (b) those leases which the Monitor's counsel has not been able to categorize as either capital leases or true leases."[39] [emphasis added].

45. The Joint Venture's ongoing expenses must be met and Dominion will not pay its share. Dominion, as a debtor company under the CCAA "is expected to honour all of its obligations which become owing after the CCAA filing."[40] If Dominion does not honour its post filing obligations and DDMI does not pay ongoing Costs, by way of Cover Payments, the Diavik Mine, its stakeholders, employees, and invested communities, will suffer and DDMI's operations will be immediately

[38] Subject to section 11.4 of the CCAA, which provides a mechanism of compelling suppliers to extend credit so long as they are granted a corresponding charge over the assets of the debtor **[TAB 6]**

[39] *Cow Harbour Construction Ltd., (Re)*, 2010 CarswellAlta 2977 (Order) at paras. 6 and 10 **[TAB 9]**.

[40] *Ascent Industries Corp. (Re)*, 2019 BCSC 1880 at para. 53, citing *Doman Industries Ltd.*, 2004 BCSC 733 at para. 29 **[TAB 10]**.

prejudiced. Furthermore, as DDMI is forced to cover Dominion's post-filing Costs, it will suffer significant and unique prejudice as the effects of the Initial Order will force DDMI to provide ongoing services and credit to Dominion, while: (i) Dominion is insolvent and subject to these CCAA Proceedings; (ii) Dominion is making other post-filing and, potentially, pre-filing payments to critical suppliers associated with the Ekati Mine; (iii) DDMI and its rights, remedies, and interests under the JVA are potentially subject to the Stay; and, (iv) without any appropriate protection or compensation.

46. At the same time, absent appropriate protections such as the retention of the Assets, Dominion will reap all benefits derived from DDMI financing the Joint Venture operations, with no risk and at the direct and corresponding expense of DDMI, its operations, and stakeholders. The CCAA is not meant to provide debtor companies with a post-filing windfall by allowing them to shirk contractual and operational responsibilities while simultaneously laying claim to all corresponding benefits.

47. Furthermore, it would be fundamentally unfair to require DDMI to choose between either: (i) completely foregoing the benefits of its own operations and the upkeep of the Diavik Mine; or, (ii) providing significant benefits to Dominion, an insolvent entity which has admitted that it is unable to pay its post-filing Costs, without any compensation or protection, whatsoever.

D. The Limited Relief Sought by DDMI is the Least Prejudicial Means of Addressing Dominion's Inability to Pay for the Time Being.

48. DDMI's proposed relief is necessary and appropriate in the current circumstances and is the least-intrusive possible means of addressing the issues surrounding the operation of the Diavik Mine and the Joint Venture.

49. Pursuant to Section 11.02, this Court may impose any terms in connection with granting or extending the Stay. DDMI submits that the relief requested herein is appropriate as it is minimally intrusive, but also recognizes and accounts for the unique characteristics of the JVA and the significance of the Diavik Mine to DDMI, which continues to operate and which requires upkeep, to the benefit of all Participants and other major stakeholders.

E. The Requested Relief Will in No Way Prejudice Dominion.

50. The amendments sought by DDMI to the Initial Order will in no way prejudice Dominion, as:

(a) Dominion is currently unable to market any Assets. Allowing DDMI to retain and store the Assets, at the PSF, will have no material effect on Dominion's cash flows;

(b) the Costs of the current Program and Budget (all as defined in the JVA) have been set and agreed to;

(c) Dominion's liability under the JVA and with respect to the Cover Payment is clear;

(d) the first-ranking priority of the Security against the Assets, which secures payment of all Cover Payments, is undisputed; and,

(e) it is in the best interests of all Participants, including Dominion and its stakeholders, for production to continue at the Diavik Mine as continued operations will increase the amount of Product ultimately available to Dominion while preserving the value of the Assets subject to the Security.

51. DDMI is producing, providing, and improving the Assets that will be subject to the Security, all at its own risk and expense. DDMI's proposal places substantially all operational risk on DDMI while allowing Dominion to continue to benefit from any residual value derived from ongoing operations; at no risk and for the benefit of its estate and creditors.

F. The Sealing of the Confidential Exhibits is Necessary and Proportionate.

52. The sealing of the Confidential Exhibits is necessary and proportionate in the circumstances. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada stated:

> … the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
>
> A confidentiality order under R. 151 should only be granted when:
>
> (a) such an **order is necessary in order to prevent a serious risk to an important interest, *including a commercial interest***, in the context of litigation because reasonably alternative measures will not prevent the risk; and

> (b) the **salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects**, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[41]

53. Furthermore, the Court's inherent jurisdiction grants it the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.[42]

54. With respect to the first part of the *Sierra Club* test, the sealing of the Confidential Exhibits is necessary in the circumstances. The Confidential Exhibits contain confidential information with respect to the ongoing operations of both Dominion and DDMI, including confidential financial information, procedures, asset valuations, and other sensitive commercial information which is the subject to confidentiality restrictions. The disclosure of such information, as contained in the Confidential Exhibits, would cause serous and irreparable harm to the commercial interests of all Participants, especially considering the impact that the public disclosure of any financial or asset valuation information could have.[43] DDMI therefore submits that the Confidential Exhibits should not be made publicly available.

55. With respect to the second part of the *Sierra Club* test, DDMI submits that the salutary effects of sealing the Confidential Exhibits outweigh any conceivable deleterious effects. In the normal course, outside the context of these CCAA Proceedings, DDMI's confidential information would be kept strictly confidential and is in fact subject to such confidentiality restrictions, to ensure same. Therefore, other than DDMI and Dominion, no other person has a reasonable expectation or right to be able to access the JVA or any other agreements subject to the JVA or any of the terms contained therein.[44]

56. Finally, DDMI's proposed form of Sealing Order contemplates that that Confidential Exhibits would be unsealed, once the risk of serious and irreparable harm has passed.

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[41] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 **[TAB 11]**.

[42] CCAA, s 11 **[TAB 6]**.

[43] Croese Affidavit, *supra* note 2 at para. 47.

[44] Croese Affidavit, *supra* note 2 at para. 47.

VI. RELIEF REQUESTED

57. DDMI respectfully requests that this Honourable Court grant:

(a) a modified form of the Amended and Restated Initial Order, substantially in the form attached as Tab 1 hereto; and,

(b) an Order sealing the Confidential Exhibits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of May, 2020

McCarthy Tétrault LLP

Per: *"McCarthy Tétrault LLP"*
Sean F. Collins / Walker W. MacLeod / Pantelis Kyriakakis
Counsel for Diavik Diamond Mines (2012) Inc.

VII. INDEX OF AUTHORITIES AND MATERIALS

1. DDMI's proposed amendments to the Amended and Restated Initial Order;

2. *Victorian Order of Nurses for Canada, Re*, 2015 ONSC 7371;

3. *Canada North Group Inc. (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, rev'd on other grounds 2019 ABCA 314, leave to appeal to SCC granted March 26, 2020 (38871);

4. *Tepper Holdings Inc., Re*, 2011 NBQB 211;

5. *Target Canada Co., Re*, 2015 ONSC 303;

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

7. *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60;

8. *Nortel Networks Corp., Re*, 2009 ONCA 833;

9. *Cow Harbour Construction Ltd., (Re)*, 2010 CarswellAlta 2977 (Order);

10. *Ascent Industries Corp. (Re)*, 2019 BCSC 1880, citing Doman Industries Ltd., 2004 BCSC 733; and,

11. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.

TAB 1

	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 AND DOMINION FINCO INC.**
DOCUMENT	**AMENDED AND RESTATED INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BLAKE, CASSELS & GRAYDON LLP** Barristers and Solicitors 3500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4J8 Attention: Peter L. Rubin / Peter Bychawski / Claire Hildebrand / Morgan Crilly Telephone No.: 604.631.3315 / 604.631.4218 / 604.631.3331 / 403.260.9657 Email: peter.rubin@blakes.com / peter.bychawski@blakes.com / claire.hildebrand@blakes.com / morgan.crilly@blakes.com Fax No.: 604.631.3309 File: 00180245/000013

DATE ON WHICH ORDER WAS PRONOUNCED:	May 1, 2020
LOCATION OF HEARING:	Calgary
NAME OF JUDGE WHO MADE THIS ORDER:	The Hon. Madam Justice K. Eidsvik

UPON the application of Dominion Diamond Mines ULC, Dominion Diamond Delaware Company, LLC, Dominion Diamond Canada ULC, Washington Diamond Investments, LLC, Dominion Diamond Holdings, LLC, and Dominion Finco Inc. (collectively, the "**Applicants**"); **AND UPON** having read the Originating Application, filed April 21, 2020, the Affidavit of Kristal Kaye sworn April 21, ~~2020,~~2020 (the "**Kaye Affidavit**"), filed, and the Affidavit of Service of [-]~~;~~ and the Affidavit of Thomas Croese, sworn April ●, 2020 on behalf of Diavik Diamond Mines (2012) Inc. ("**DDMI**"); **AND UPON** reading the consent of FTI Consulting Canada, Inc., to act as monitor (the "**Monitor**"); **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application; **AND UPON** hearing counsel for the Applicants, counsel for the Monitor, and any other counsel present; **AND UPON** reading the Pre-Filing Report of the Monitor dated April 21, 2020, filed;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today. Capitalized terms used herein and not otherwise defined shall have the Kaye Affidavit.

APPLICATION

2. The Applicants are companies to which the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

(a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

(b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property;

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

(d) be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of Kristal Kaye sworn April 21, 2020 or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. To the extent permitted by law, the Applicants shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each

case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order; and

(c) with the consent of the Monitor, obligations owing for goods and services supplied to the Applicants prior to the date of this Order if, in the opinion of the Applicants after consultation with the Monitor, the supplier or vendor of such goods or services is necessary for the operation or preservation of the Business or Property, provided that such payments shall not exceed $5,000,000 in the aggregate without prior authorization by this Court.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan, and

(iii) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of this Order, but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of their business or operations and to dispose of redundant or non-material assets not exceeding $250,000 in any one transaction or $2,000,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicants deem appropriate, in accordance with section 32 of the CCAA; and

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

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

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

12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

    (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

    (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

13. Until and including June 1, 2020, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

14. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

    (a) empower the Applicants to carry on any business that the Applicants are not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien; ~~or~~

    (e) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment; or

    (f) prevent DDMI from making Diavik JVA Cover Payments.

15. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be

taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

16. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. During the Stay Period, all persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

    (b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

    are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any person be under

any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant.

19. Unless Dominion Diamond makes arrangements approved by the Monitor and satisfactory to DDMI to make immediate payment to DDMI on account of JVA Cover Payments made by DDMI after the date of the commencement of these CCAA proceeding (the "**Filing Date**"), DDMI be and is hereby authorized to hold an amount of Dominion Diamond's share of production from the Diavik Mine equal to the total value of JVA Cover Payments made by DDMI. The share of production shall be held at the Diavik Production Splitting Facility in Yellowknife, Northwest Territories (the "**PSF**") and the value of the Dominion Diamond's share of production to held at the PSF shall be determined based on royalty valuations performed from time to time at the PSF by the GNWT. DDMI shall release Dominion Diamond's share of production upon receiving payment of the indebtedness owing to it on account of JVA Cover Payments made by DDMI on or after the Filing Date.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. ~~19.~~ During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 15 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date of this Order and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. ~~20.~~ The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

22. ~~21.~~ The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $4,000,000, as security for the indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 33 and 35 herein.

23. ~~22.~~ Notwithstanding any language in any applicable insurance policy to the contrary:

(a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

(b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPOINTMENT OF MONITOR

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

25. ~~24.~~ The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and

immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) advise the Applicants in the preparation of the Applicants' cash flow statements;

(d) advise the Applicants in their development of the Plan and any amendments to the Plan;

(e) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicants or to perform its duties arising under this Order;

(g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(h) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

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

26. ~~25.~~ The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating

to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

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

28. ~~27.~~ In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

29. ~~28.~~ The Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a bi-weekly basis.

30. ~~29.~~ The Monitor and its legal counsel shall pass their accounts from time to time.

31. ~~30.~~ The Monitor, counsel to the Monitor, if any, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $3,500,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before

and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 33 and 35 hereof.

VALIDITY AND PRIORITY OF CHARGES

32. ~~31.~~ The priorities of the Directors' Charge and the Administration Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $3,500,000); and

Second – Directors' Charge (to the maximum amount of $4,000,000).

33. ~~32.~~ The filing, registration or perfection of the Directors' Charge and the Administration Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

34. ~~33.~~ Each of the Directors' Charge and the Administration Charge shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

35. ~~34.~~ Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge or the Administration Charge, unless the Applicants also obtain the prior written consent of the Monitor and the beneficiaries of the Directors' Charge and the Administration Charge, or further order of this Court.

36. ~~35.~~ The Directors' Charge and the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(iii) the payments made by the Applicants pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

37. ~~36.~~ Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge and the Directors' Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

38. ~~37.~~ The Monitor shall (i) without delay, publish in the Globe and Mail and The Northern Miner a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

39. ~~38.~~ The Monitor shall establish a case website in respect of the within proceedings at cfcanada.fticonsulting.com/Dominion (the "**Website**").

40. ~~39.~~ Any person that wishes to be served with any application and other materials in these proceedings must deliver to the Monitor by way of ordinary mail, courier, personal delivery or electronic transmission a request to be added to the service list (the "**Service List**") to be maintained by the Monitor. The Monitor shall post and maintain an up-to-date form of the Service List on the Website.

41. ~~40.~~ Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on the Website.

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

43. ~~42.~~ Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other

party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

GENERAL

44. ~~43.~~ The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

45. ~~44.~~ Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

46. ~~45.~~ Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicants, the Business or the Property.

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

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

49. ~~48.~~ This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of Queen’s Bench of Alberta

Document comparison by Workshare Compare on Wednesday, May 06, 2020 12:48:09 PM

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Description	DOCS-#20337672-v1-Amended_and_Restated_Initial_Order
Document 2 ID	PowerDocs://DOCS/20340889/2
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Insertions	38
Deletions	33
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Moved to	0
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Format changed	0
Total changes	71

TAB 2

CITATION: Victorian Order of Nurses for Canada (Re), 2015 ONSC 7371
COURT FILE NO.: CV-15-11192-00CL
DATE: 20151127

SUPERIOR COURT OF JUSTICE – ONTARIO

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

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C-43 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF NURSES FOR CANADA - EASTERN REGION, AND VICTORIAN ORDER OF NURSES FOR CANADA - WESTERN REGION

BEFORE: Penny J.

COUNSEL: *Evan Cobb and Matthew Halpin* for the Applicants

Joseph Bellissimo for the Bank of Nova Scotia

Mark Laugesen for Collins Barrow Toronto Limited (Proposed Monitor)

Kenneth Kraft for the Board of Directors of the Applicants

HEARD: November 25, 2015

ENDORSEMENT

Overview

[1] On November 25, 2015 I heard an application for an initial order under the *Companies' Creditors Arrangement Act* for court protection of certain Victorian Order of Nurses entities. I treated the application as essentially *ex parte*. In a brief handwritten endorsement, I granted the application and signed an initial order under the CCAA and an order appointing a receiver of certain of the VON group's assets, with written reasons to follow. These are those reasons.

Background

[2] The Victorian Order of Nurses for Canada and the other entities in the VON group have, for over 100 years, provided home and community care services which address the healthcare needs of Canadians in various locations across the country on a not-for-profit basis.

[3] The VON group delivers its programs through four regional entities:

(1) VON – Eastern Region

(2) VON – Western Region

(3) VON – Ontario and

(4) VON – Nova Scotia.

VON Canada does not itself provide direct patient service but functions as the "head office" infrastructure supporting the operations of the regional entities.

[4] The VON group has, for a number of years, suffered liquidity problems. Current liabilities have consistently exceeded current assets by a significant margin; current net losses from 2012 to 2015 total over $13 million; and cash flows from operations from 2012 to 2015 were similarly negative in the amount of over $8 million. The VON group faces a significant working capital shortfall. A number of less drastic restructuring efforts have been ongoing since 2006 but these efforts have not turned the tide. Current forecasts suggest that the VON group will face a liquidity crisis in the near future if restructuring steps are not taken.

[5] Financial analysis of the VON group reveals that VON Canada, VON East and VON West account for a disproportionately high share of the VON group's overall losses and operating cash shortfalls relative to the revenues generated from these entities.

[6] As a result of these circumstances, VON Canada, VON East and VON West seek protection from their creditors under the *Companies' Creditors Arrangement Act*. The applicants also seek certain limited protections for VON Ontario and VON Nova Scotia, which carry on a core aspect of the VON group's business but are not applicants in these proceedings. The applicants also seek the appointment of a receiver of certain of the VON group's assets.

[7] The goal of the contemplated restructuring is to modify the scope of the VON group's operations and focus on its core business and regions. This will involve winding down the non-viable operations of VON East and VON West in an orderly fashion and restructuring and downsizing the management services provided by VON Canada in order to have a more efficient and cost-effective operating structure.

Jurisdiction

[8] The CCAA applies to a "debtor company" with total claims against it of more than $5 million. A debtor company is "any company that is bankrupt or insolvent." "Insolvent" is not defined in the CCAA but has been found to include a corporation that is reasonably expected to run out of liquidity within the period of time reasonably required to implement a restructuring.

[9] In any event, based on the affidavit evidence of the VON group's CEO, Jo-Anne Poirier, the applicants are each unable to meet their obligations that have become due and the aggregate fair value of their property is not sufficient to enable them to pay all of their obligations.

[10] The corporate structure of the applicants does not conform to the parent/subsidiary structure that would be typically found in the business corporation context. I am satisfied, however, that VON East and VON West are under the control of VON Canada from a practical perspective. They are all affiliated companies with the same board of directors. Accordingly, while VON East and VON West do not, on a standalone basis, face claims in excess of $5 million, the applicants, as a group, clearly do. The applicants have complied with s. 10(2) of the CCAA. The application for an initial order is accompanied by a statement indicating on a weekly basis the projected cash flow of the applicants, a report containing the prescribed representations of the applicants regarding the preparation of the cash flow statement and copies of all financial statements prepared during the year before the application.

[11] I am therefore satisfied that I have the jurisdiction to make the order sought.

Notice

[12] The VON group is a large organization with over 4,000 employees operating from coast to coast. I accept that prior notice to all creditors, or potential creditors, is neither feasible nor practical in the circumstances. The application is made on notice to the VON group, the proposed monitor/receiver, the proposed chief restructuring officer and to the VON group's most significant secured creditor, the Bank of Nova Scotia.

[13] There shall be a comeback hearing within two weeks of my initial order which will enable any creditor which had no notice of the application to raise any issues of concern.

Stay

[14] Under s. 11.02 of the CCAA, the court may in its initial order make an order staying proceedings, restraining further proceedings or prohibiting the commencement of proceedings against the debtor provided that the stay is no longer than 30 days.

[15] The CCAA's broad remedial purpose is to allow a debtor the opportunity to emerge from financial difficulty with a view to allowing the business to continue, to maximize returns to creditors and other stakeholders and to preserve employment and economic activity. The remedy of a stay is usually essential to achieve this purpose. I am satisfied that the stay of proceedings against the applicants should be granted.

[16] Slightly more unusual is the request for a stay of proceedings against VON Ontario and VON Nova Scotia, neither of which are applicants in these proceedings. However, the evidence of Ms. Poirier establishes that VON Canada is a cost, not a revenue, center and that VON Canada is entirely reliant upon revenues generated by VON Ontario and VON Nova Scotia for its own day-to-day operations. There is a concern that VON Canada's filing of this application could trigger termination or other rights with respect to funding relationships VON Ontario and VON Nova Scotia have with various third party entities which purchase their services. Such actions would create material prejudice to VON Canada's potential restructuring by interrupting its most important revenue stream.

[17] In the circumstances, I am satisfied that the stay requested in respect of VON Ontario and VON Nova Scotia, which is limited only to those steps that third party entities might otherwise take against VON Ontario and VON Nova Scotia *due to the applicants being parties to this proceeding*, is appropriate.

Payment of Pre-filing and Other Obligations

[18] The initial order authorizes, but does not require, payment of outstanding and future wages as well as fees and disbursements for any restructuring assistance, fees and disbursements of the monitor, counsel to the monitor, the chief restructuring officer, the applicants' counsel and counsel to the boards of directors. These are all payments necessary to operate the business on an ongoing basis or to facilitate the restructuring.

[19] The initial order also contemplates payment of liabilities for pre-filing charges incurred on VON group credit cards issued by the Bank of Nova Scotia. The Bank is a secured creditor. It is funding the restructuring (there is no DIP financing or DIP charge). It has agreed to extend credit by continuing to make these cards available on a go forward basis, but conditioned on payment of the pre-filing credit card liabilities. I am satisfied that these measures are necessary for the conduct of the restructuring.

Modified Cash Management System

[20] Historically, net cash flows were not uniform across the VON group entities. This resulted in significant timing differences between inflows and outflows for any particular VON organization. To assist with this lack of uniformity, the VON group entered into an agreement with the Bank of Nova Scotia whereby funds could be effectively pooled among the VON group, outflows and inflows netted out and a net overall cash position for the VON group determined and maintained. At the date of the commencement of these proceedings, the cash balance in the VON Canada pooled account was approximately $1.8 million. These funds will remain available to the applicants during the CCAA proceedings.

[21] Immediately upon the granting of the initial order, however, the cash management system will be replaced with a new, modified cash management arrangement. Under the new arrangement, the VON Ontario and VON Nova Scotia cash inflows and outflows will take place in a segregated pooling arrangement pursuant to which the consolidated cash position of only those two entities will be maintained.

[22] The applicants will establish their own arrangement under which a consolidated cash position of the applicants will be maintained. Thus, VON Canada, VON East and VON West will continue to utilize their own consolidated cash balance held by those entities collectively.

[23] The segregation of the VON Ontario and VON Nova Scotia cash management is necessary because they are not applicants.

[24] A consolidated cash management arrangement is, however, necessary for the applicants, *inter se*, in order to ensure that the applicants continue to have sufficient liquidity to cover their

costs during these proceedings. Without this arrangement, during the proposed CCAA proceedings VON East and VON West would face periodic cash deficiencies to the detriment of the group as a whole and which would put the orderly wind down of the critical services offered by VON East and VON West at risk.

[25] I am satisfied that the introduction of the new cash management is both necessary and appropriate in order to:

(a) segregate the cash operations of the VON group entities which are subject to the CCAA proceedings from the VON group entities which are not; and

(b) allow the applicants in the CCAA proceedings to pool their cash inputs and outputs, which is necessary in order to avoid liquidity crises in respect of VON East and VON West operations during the wind down period.

Proposed Monitor

[26] Under s. 11.7 of the CCAA, the court is required to appoint a monitor. The applicants have proposed Collins Barrow Toronto Limited, which has consented to act as the court-appointed monitor. I accept Collins Barrow as the court appointed monitor.

Chief Restructuring Officer (CRO)

[27] Section 11 of the CCAA provides the court with authority to allow the applicants to enter into arrangements to facilitate restructuring. This includes the retention of expert advisors where necessary to help with the restructuring efforts. March Advisory Services Inc. has worked extensively with VON Canada to date with its pre-court endorsed restructuring efforts and has extensive background knowledge of the VON group's structure and business operations. The VON group lacks internal business transformation and restructuring expertise. VON Canada's "head office" personnel will be fully engaged simply running the business and implementing necessary changes. I am satisfied that March Advisory Services Inc.'s engagement is both appropriate and essential to a successful restructuring effort and that its appointment as CRO should be approved.

[28] Both the VON group and the monitor believe that the quantum and nature of the remuneration to be paid to the CRO is fair and reasonable. I am therefore satisfied that the court should approve the CRO's engagement letter. I am also satisfied that the CRO's engagement letter should be sealed. This sealing order meets the test under the SCC decision in *Sierra Club*. The information is commercially sensitive, in that it could impair the CRO's ability to obtain market rates in other engagements, and the salutary effects of granting the sealing order (enabling March Advisory Services Inc. to accept this assignment) outweigh the minimal impact on the principle of open courts.

Administration Charge

[29] Section 11.52 of the CCAA enables the court to grant an administration charge. In order to grant this charge, the court must be satisfied that notice has been given to the secured creditors likely to be affected by the charge, the amount is appropriate, and the charge extends to all of the proposed beneficiaries.

[30] Due to the confidential nature of this application and the operational issues that would have arisen had prior disclosure of these proceedings been given to all secured creditors, all known secured creditors were not been provided with notice of the initial application. The only secured creditor of the applicants provided with notice is the Bank of Nova Scotia.

[31] For this reason, the proposed initial order provides that the administration charge shall initially rank subordinate to the security interests of all other secured creditors of the applicants with the exception of the Bank of Nova Scotia. The applicants will seek an order providing for the subordination of all other security interests to the administration charge in the near future following notice to all potentially affected secured creditors.

[32] The amount of the administration charge is $250,000. In the scheme of things, this is a relatively modest amount. The proposed monitor has reviewed the administration charge and has found it reasonable. The beneficiaries of the administrative charge are the monitor and its counsel, counsel to the applicants, the CRO, and counsel to the boards of directors.

[33] The evidence is that the applicants and the proposed monitor believe that the above noted professionals have played and will continue to play a necessary and integral role in the restructuring activities of the applicants.

[34] I am satisfied that the administration charge is required and reasonable in the circumstances to allow the debtor to have access to necessary professional advice to carry out the proposed restructuring.

Directors' Charge

[35] In order to secure indemnities granted by the applicants to their directors and officers and to the CRO for obligations that may be incurred in connection with the restructuring efforts after the commencement of the CCAA proceedings, the applicants seek a directors' charge in favor of the directors and officers and the CRO in the amount of $750,000.

[36] Section 11.51 of the CCAA allows the court to approve a directors' charge on a priority basis. In order to grant a directors' charge the court must be satisfied that notice has been given to the secured creditors, the amount is appropriate, the applicant could not obtain adequate indemnification for the directors or officers otherwise and the charge does not apply in respect of any obligation incurred by a director or officer as a result of gross negligence or willful misconduct.

[37] As noted above, all known secured creditors have not been provided with notice. For this reason, the applicants propose that the priority of the directors' charged be handled in the same manner as the administration charge.

[38] The evidence of Ms. Poirier shows that there is already a considerable level of directors' and officers' insurance. There is no evidence that this insurance is likely to be discontinued or that the VON group can not or will not be able to continue to pay the premiums. However, given the size of the VON group's operations, the number of employees, the diverse geographic scope in which the group operates, the potential for coverage disputes which always attends on insurance arrangements and the important fact that this board is composed entirely of volunteers, additional protection for the directors to remain involved post-filing is warranted, *Prism Income Fund (Re)*, 2011 ONSC 2061 at para. 45.

[39] The amount of the charge was estimated by taking into consideration the existing directors' and officers' insurance and potential liabilities which may attach including employee related obligations such as outstanding payroll obligations, outstanding vacation pay and liability for remittances to government authorities. This charge only relates to matters arising after the commencement of these proceeding. It also covers the CRO.

[40] The proposed monitor has reviewed and has raised no concerns about the proposed directors' charge.

[41] The director' charge contemplated by the initial order expressly excludes claims that arise as a result of gross negligence or willful misconduct.

[42] For these reasons, I am satisfied that the directors' charge is appropriate in all the circumstances.

Key Employee Retention Plan

[43] The applicants seek approval of a key employee retention plan in the amount of up to $240,000, payable to key employees during 2016.

[44] This is a specialized business. The experience and knowledge of critical employees is highly valuable to the applicants. These employees have extensive knowledge of and experience with the applicants. The applicants are unlikely to be able to replace critical employees post-filing. Under the contemplated restructuring, the employee ranks of the applicants will be significantly downsized. As a result, there is a strong possibility that certain critical employees will consider other employment options in the absence of retention compensation.

[45] The KERP was approved by the board of directors of the applicants. Provided the arrangements are reasonable, decisions of this kind fall within the business judgment rule as a result of which they are not second-guessed by the courts.

[46] The amount is relatively modest given the size of the operation and the number of employees. I am satisfied that the KERP is reasonable in all the circumstances. I am also

satisfied that the specific allocation of the KERP is reasonably left to the business judgment of the board.

[47] Because the KERP involves sensitive personal compensation information about identifiable individuals, disclosure of this information could be harmful to the beneficiaries of the KERP. I am satisfied that the *Sierra Club* test is met in connection with the sealing of this limited information.

Receivership Order

[48] The *Wage Earner Protection Program Act* was established to make payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership. The amounts that may be paid under WEPPA to an individual include severance and termination pay as well as vacation pay accrued.

[49] In aggregate, over 300 employees are expected to be terminated at the commencement of these proceedings. These employees will be paid their ordinary course salary and wages up to the date of their terminations. However, the applicants do not have sufficient liquidity to pay these employees' termination or severance pay or accrued vacation pay.

[50] The terminated employees would not be able to enjoy the benefit of the WEPPA in the current circumstances. This is because the WEPPA does not specifically contemplate the effect of proceedings under the CCAA.

[51] A receiver under the WEPPA includes a receiver within the meaning of s. 243(2) of the *Bankruptcy and Insolvency Act*. A receiver under the BIA includes a receiver appointed under the *Courts of Justice Act* if appointed to take control over the debtor's property. Under the WEPPA, an employer is subject to receivership if any property of the employer is in the possession or control of the receiver.

[52] In this case, the applicants seek the appointment of a receiver under s. 101 of the *Courts of Justice Act* to enable the receiver to take possession and control of the applicants' goodwill and intellectual property (i.e., substantially all of the debtor's property *other than* accounts receivable and inventory, which must necessarily remain with the debtors during restructuring).

[53] *In Cinram (Re)* (October 19, 2012), Toronto CV-12-9767-00CL, Morawetz R.S.J. found it was just and convenient to appoint a receiver under s. 101 over certain property of a CCAA debtor within a concurrent CCAA proceeding where the purpose of the receivership was to clarify the position of employees with respect to the WEPPA.

[54] In this case, the evidence is that no stakeholder will be prejudiced by the proposed receivership order. To the contrary, there could be significant prejudice to the terminated employees if there is no receivership and former employees are not able to avail themselves of benefits under the WEPPA.

[55] In the circumstances, I find it is just and convenient to appoint a receiver under s. 101 over the goodwill and intellectual property of the applicants.

Further Notice

[56] I am satisfied that the proposed notice procedure is reasonable and appropriate in the circumstances and it is approved.

Comeback Hearing

[57] In summary, I am satisfied that it is necessary and appropriate to grant CCAA protection to VON Canada, VON East and VON West. There shall be a comeback hearing at 10 a.m. before me on Wednesday, December 9, 2015.

Penny J.

Date: November 27, 2015

TAB 3

Court of Queen's Bench of Alberta

Citation: Canada North Group Inc (*Companies' Creditors Arrangement Act*), 2017 ABQB 550

Date: 20170911
Docket: 1703 12327
Registry: Edmonton

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, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Applicants

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

Introduction

[1] This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act* [1](*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

[2] Acknowledging that its success on this motion would cause a chill on commercial restructuring, CRA relies on the comeback provision in an initial *CCAA* Order made July 5, 2017 (Initial Order) to vary "super-priority" charges made in favour of an interim financier, the directors of the debtor companies, and the Monitor and its counsel (Priority Charges), which

[1] RSC 1985, c C-36 as amended, ss 11.2, 11.4, 11.51 11.52.

subordinate its deemed trust claims arising under the *Income Tax Act (ITA)*[2], *Canada Pension Plan Act*[3] *(CPP Act)*, and *Employment Insurance Act*[4] *(EI Act*) (collectively, the Fiscal Statutes)[5].

[3] CRA's view is that the deemed trusts give it a proprietary, rather than a secured interest in the Debtors' assets that cannot be subordinated. Alternatively, if it is a secured creditor, its first place position under the Fiscal Statutes cannot be undermined by the Priority Charges. Canada North Group Inc, Canada North Camps Inc, Camcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd and 1919209 Alberta Inc (the Debtors), the Monitor, and the interim financer, Business Development Bank of Canada (BDC), strenuously oppose the motion.

[4] In addition to the priority issue, there are a number of interconnected, subsidiary issues including: Whether the subject is proper for variance, the onus on a comeback motion, technical service versus actual notice, and delay prejudice.

[5] For the reasons that follow, CRA's interest arising under the Fiscal Statutes is properly subordinated by the Priority Charges. Concerning the subsidiary issues, I have (obviously given the foregoing) found that the question is appropriate for a comeback hearing. I have also found that CRA bears the onus and that, even if CRA had prevailed, it would have been inappropriate to disturb the Priority Charges for the period between the Initial Order and this hearing on August 11, 2017, because of the delay prejudice.

The Factual Landscape

[6] No surprise given the nature of the proceedings, matters have unfolded quickly.

[7] The Debtor's restructuring plan began with s 50.4(1) *Bankruptcy and Insolvency Act* (*BIA*)[6] notice of intention to make a proposal to creditors that very quickly changed to a plea for *CCAA* relief.

[8] The originating *CCAA* materials were served on CRA via courier at its Edmonton office (CRA Office) on June 28. The service package included:

a. The originating application returnable July 5, 2017 seeking a stay of proceedings and basket of other relief, including the Priority Charges;

b. A draft form of initial order that set out the sought after charges: Interim financier charge of $1,000,000, administrative charge of $1,000,000, and the director's indemnity charge of $50,000,000; and

c. An affidavit of a director of the Debtors attesting to a $1,140,000 debt to CRA for source deductions and GST (the evidence does not breakdown what is owed for source deductions, which is the only remittance in issue).

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[2] RSC, 1985, c 1 (5th Supp) 6.
[3] RSC 1985, c C-8.
[4] SC 1996, c 23.
[5] Para 44 of the Initial Order provides that the Priority Charges constitute a charge on all of the debtors' property which, subject to s 34(11) of the *CCAA*, rank in priority to all other security interests, including trusts, liens, and encumbrances, statutory or otherwise.
[6] RSC 1985, c B-3.

[9] On July 5, the Debtors' motion and a cross-motion to appoint a receiver of three of the debtor companies by the Debtor's primary lender, Canadian Western Bank (CWB), proceeded. CRA did not appear (more will be said about this later). The Court refused CWB's receivership application and granted the Initial Order, which included typical service provisions and a comeback clause (Comeback Provision). The Priority Charges track the draft form of Order with one change - a (consensual) $500,000 reduction to the administrative charge.

[10] On July 6, the Debtors served CRA with the Initial Order by mailing it to the CRA Office, a permissible form of service under Alberta's *Rules of Court*. Also on this day, the CRA employee responsible for *CCAA* filings in western Canada (CRA Representative) received the Initial Order. The curious routing was via a Department of Justice Canada (DOJ) lawyer who was given it by a party that noted CRA's manifest absence at the initial hearing.

[11] On July 12, the Monitor published notice of the proceedings in one local and one national newspaper and created a proceeding-specific website.

[12] By July 13, the Debtor's service package had wended its way from the CRA Office to the CRA Representative's hands.

[13] Next, on July 20, when BDC had advanced $900,000 of the Priority $1,000,000 facility, the Debtors served a motion to extend the stay of proceedings (made in the Initial Order) returnable July 27 (Extension Motion). Again, service was on the CRA Offices.

[14] Then, on July 21, CWB served another motion to appoint a receiver also returnable on July 27. CWB served CRA by sending the documents to a DOJ lawyer.

[15] On July 25, the Debtors served CRA with an application to increase interim financing returnable July 27 on the ground that they had a new contract to supply camps for firefighters battling the wildfires then ravaging British Columbia (Enhanced Financing Motion).

[16] Late on the afternoon of July 26, CRA's counsel emailed an unfiled version of this motion and a draft form of the order to be sought to the Monitor's and Debtors' counsel, who passed the information to BDC's counsel.

[17] On July 27, all three motions proceeded. CRA appeared, taking no position. In the result, the stay of proceedings was extended until September 26, and the interim financing was increased to $2,500,000 (written reasons were later filed: 2017 ABQB 508). After the Court delivered its oral reasons for decision, CRA's counsel rose to advise that his client would be filing this motion, noting the risk to BDC for "additional advances subject to the Crown's charges." In response, BDC's counsel indicated that his client had earlier learned of CRA's intentions and was still prepared to advance under the facility.

The Legal Landscape

The *CCAA* and Judicial Decision Making

[18] The *CCAA*'s purpose is to allow financially distressed businesses with more than $5,000,000 debt to keep operating and, where possible, avoid the social and economic costs of liquidation.

[19] The *CCAA* process "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."[7]

[20] When enacting the *CCAA*, Parliament understood that liquidation of insolvent businesses is harmful to creditors and employees and the optimal outcome is their survival.[8] This notion would not have been lost on Parliament when the *CCAA* was substantially amended in 2009 (2009 amendments). Indeed, in a post-2009 amendment case, ***Sun Indalex Finance, LLC v United Steelworkers,***[9] Cromwell J, concurring in result and writing for McLachlin CJ and Rothstein J, spoke of the *CCAA's* purpose saying:

> [It] is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent.[10]

[21] The Court's function during the *CCAA* stay period is to supervise and move the process to the point where the creditors approve a compromise or it becomes evident that the attempt is doomed to fail.[11] Typically, this requires balancing multiple interests.

[22] *CCAA* s 11 cloaks the Court with broad discretionary power to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the *Act*. However, as the Supreme Court of Canada observed in ***Century Services***, there are limits on the exercise of inherent judicial authority in a *CCAA* restructuring.[12]

[23] The Supreme Court also provides this overarching direction for exercising *CCAA* judicial authority in ***Century Services***:

> 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

[7] ***Century Services Inc v Canada (Attorney General***), 2010 SCC 60 at para 77, [2010] 3 SCR 379.
[8] ***Century Services*** at paras 15, 17.
[9] ***Sun Indalex Finance, LLC v United Steelworkers,*** 2013 SCC 6 at para 205, [2013] 1 SCR 271.
[10] ***Indalex*** at para 105.
[11] ***Hong Kong Bank of Canada v Chef Ready Foods Ltd*** (1990), [1991] 2 WWR 136 at 140, 51 BCLR (2d) 84 (BCCA).
[12] ***Century Services*** at paras 64-66.

achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit[13].

[24] In interpreting and applying the *CCAA*, the Court is to employ a hierarchical approach, and consider and, if necessary, resolve the underlying policies at play.[14]

A Brief History of Deemed Trust Litigation

[25] While there are other priority cases involving disputes between CRA and insolvent entities, this discussion necessarily begins with ***Royal Bank of Canada v Sparrow Electric Corp***.[15]

[26] The contest in ***Sparrow Electric*** was between CRA's deemed trust claim for unremitted source deductions under the *ITA* and security interests under the *Bank Act*[16] and the Alberta *Personal Property Security Act.*[17] CRA lost the priority battle since the security interests were fixed charges attaching to the secured property when the debtor acquired it. Consequently, CRA's deemed trust had no property to attach to when it later arose. In response to ***Sparrow Electric,*** Parliament amended the *ITA* by expanding s 227 (4) and adding s 227(4.1) (detailed below).

[27] The next noteworthy case is ***First Vancouver Finance v MNR***,[18] which concerned a priority dispute between CRA's deemed tax trusts and the interest of a third party purchaser of assets bought in an insolvency proceeding sale. The interpretation of *ITA* s 227(4.1) was at the fore.

[28] The Supreme Court found in favour of the third party purchaser. Writing for the majority, Iacobucci J noted:

a. In principle, the deemed trust is similar to a floating charge over all the debtor's assets in favour of the Crown (at para 40);

b. The deemed trust operates "in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction" (at para 33);

c. Property subject to the deemed trust can be alienated by the debtor, after which the deemed trust applies to the proceeds (at para 42); and

d. The deemed trust is not a "true trust," nor is it governed by common law requirements under ordinary principles of trust law, but the effect of s227(4.1) is to revitalize the trust whose subject matter has lost all identity (citing Gonthier J in ***Sparrow Electric***) (at para 27-28).

[29] The Supreme Court concluded that Parliament intended s 227(4) and (4.1):

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[13] ***Century Services*** at para 70.
[14] ***Century Services*** at paras 65 and 70.
[15] ***Royal Bank of Canada v Sparrow Electric Corp,*** [1997] 1 SCR 411.
[16] SC 1991, c 46.
[17] SA 1988, c P-4.05.
[18] ***First Vancouver Finance v MNR,*** 2002 SCC 49, [2002] 2 SCR 720.

> ... to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. (at para 28).

[30] ***First Vancouver*** was considered in the 2007 decision, ***Temple City Housing Inc (Companies' Creditors Arrangement Act)***,[19] and again in June 2017 in ***Re Rosedale Farms Limited, Hassett Holdings Inc, Resurgame Resources***.[20]

[31] In ***Temple City***, CRA opposed a Priority charge in favour of an interim financier (then termed a debtor in possession, or DIP, financier) on the basis that it had a proprietary interest in the debtor's assets under its (tax) deemed trusts. Unlike this case, it was decided before the 2009 amendments.

[32] Like others before her with no statutory authority to grant the super priority charges, Romaine J assessed the merits and relied on the Court's inherent jurisdiction to grant the charge.

[33] The Alberta Court of Appeal denied leave to appeal, finding the issue unimportant to the practice because amendments allowing such charges were on the horizon and future cases would engage statutory interpretation (the Court of Appeal's forecast of looming amendments was sidelined by Parliamentary inaction, and the amendments were eventually proclaimed in force on September 18, 2009). The Court also found the issue unimportant to the case itself for two distinct reasons. First, the proceeding had taken on a momentum that would make it virtually impossible to "unscramble the egg." Second, an appeal would hinder the restructuring as the DIP lender would not advance without being in a priority position.

[34] Next is the seminal decision in ***Century Services***, which considered the deemed trust for GST arising under the *Excise Tax Act* (ETA).[21] Despite the different deemed trust at issue, ***Century Services*** is important for many reasons including, general interpretation of the *CCAA*, policy considerations, the Court's function, and the parameters for exercising inherent jurisdiction.

[35] ***Rosedale Farms*** concerned deemed tax trusts and a super-priority interim financing charge in a *BIA* proposal scenario. The reasons disagree quite strongly with the logic of ***Temple City***. The Court also found that because CRA did not have the requisite notice, it could not be bound by the interim financing Order.

[36] I will return to the conflicting views expressed in ***Temple City*** and ***Rosedale Farms*** in the context of the priority analysis.

The Statutory Provisions

[37] The relevant statutory provisions are set out below. All emphasis is mine.

[38] *CCAA* s 2(1) defines the term, "secured creditor" as including:

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[19] ***Temple City Housing Inc (Companies' Creditors Arrangement Act),*** 2007 ABQB 786, 42 CBR (5th) 274, leave to appeal denied ***Canada v Temple City Housing Inc***, 2008 ABCA 1, 43 CBR (5th) 35.

[20] ***Re Rosedale Farms Limited, Hassett Holdings Inc, Resurgame Resources,*** 2017 NSSC 160.

[21] RSC 1985, c E-15.

> **a holder of ... a trust** in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada... .

[39] *ITA* s 224(1.3) defines "secured creditor" as "a person who has a security interest in the property of another person." It defines "security interest" as:

> **any interest in**, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, **created by or arising out of a** debenture, mortgage, hypothec, lien, pledge, charge, **deemed or actual trust,** assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.

[40] The *EI Act* and *CPP Act* cross-reference these definitions.

[41] The relevant portions of *CCAA* ss 11.2, 11.51, and 11.52 read:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) **The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> (2) **The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
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> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) **The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**

[42] *CCAA* s 37, previously s 18.2, reads:

> 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.
>
> (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 (each of which is in this subsection referred to as a "federal provision")… .

[43] *ITA* ss 227(4) and (4.1) read:

> **(4)** Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) **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 and property held by any secured creditor** (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust **is deemed**
>
> > **(a) to be held**, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, **in trust for Her Majesty whether or not the property is subject to such a security interest**, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

> **and is property beneficially owned by Her Majesty**
> notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[44] *EI Act* s 86(2.1) and *CPP Act* s 23(3) are identical to *ITA* s 227(4.1).

[45] With that legal backdrop, I turn now to address whether I can and, if so should, entertain CRA's motion, or whether it is properly the subject of an appeal to the Court of Appeal.

Jurisdiction to Entertain CRA's Motion

[46] The language of the Comeback Provision is typical in initial *CCAA* Orders made in this province and elsewhere. It reads:

> 58 Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

[47] The answer to whether I have jurisdiction to entertain CRA's motion or whether it is properly a subject of appeal to the Court of Appeal rests on the answers to: for whom and when is the Comeback Provision is available.

Who can rely on the Comeback Provision?

[48] The Comeback Provision is available to any interested party. It is only logical that an interested party that was not given notice of a *CCAA* initial hearing can rely on the comeback clause.[22] Similarly, and depending upon the circumstances, an interested party given notice may also access the comeback clause.

[49] CRA is an interested party that received notice of the motion for the Initial Order. While the Initial Order deemed that service to be good and sufficient, CRA's actual knowledge came the day after it occurred.

When can the Comeback Provision be used?

[50] Recourse through the comeback clause is available when circumstances change. As explained in ***Re Pacific National Lease Holding Corp***:

> [I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems.[23] [emphasis added]

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[22] ***Re Muscletech Research & Development*** (2006), 19 CBR (5th) 54 (ONSC) at para 5; ***Re Comstock Canada Ltd***, 2013 ONSC 4756, 4 CBR (6th) 47 at para 49; ***Re Fairview Industries Ltd*** (1991), 109 NSR (2d) 12, 11 CBR (3d) 43 (SCTD); ***Re CanaSea PetroGas Group Holdings Ltd*** (2014), 18 CBR (6th) 283 at paras 13-14.

[23] ***Re Pacific National Lease Holding Corp*** (1992), 15 CBR (3d) 265, 72 BCLR (2d) 368 (CA) at para 30.

[51] Likewise, in ***Re Royal Oak Mines Inc,*** Blair J (as he then was) observed that the comeback clause is a means of sorting out issues as they arise during the course of the restructuring.[24]

[52] Logically, non-disclosure of material information in an *ex parte* initial application also supports recourse via the comeback clause.[25]

[53] An analogous form of statutory recourse is found in *BIA* s 187(5). A sparingly used tool, variance under this provision is a practical means of determining if an order should continue in the face of changed circumstances or fresh evidence.[26]

[54] Equally, under r 9.15(1) of the Alberta *Rules of Court* the Court can set aside, vary, or discharge an entered judgment or order (interlocutory or final) if it was made without notice to an affected person, or to correct an accident or mistake if the person did not have adequate notice of the trial. In a similar vein, r 9.15(4) allows the Court to set aside, vary, or discharge an interlocutory order by agreement of the parties, or because of fresh evidence, or other grounds that the Court considers just.

[55] Likely because many, if not most, *CCAA* authorities deal with variance of *ex parte* initial orders, little is written about recourse by appeal versus comeback. One example is the rather unusual case of ***Re Algoma Steel Inc***,[27] where creditors filed a simultaneous comeback motion and appeal of the initial *ex parte* order. The appeal was heard first. The Court of Appeal found that the appeal was premature (because the order was a "lights on" order) and said that variance should have been pursued.

[56] Comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in ***Temple City***.[28]

[57] Next, I will discuss service and timing concerns.

Service

[58] It is trite that the point of service is that a party must get notice of the proceeding and that a party serving documents on a proper address for service must be able to do so with confidence.[29]

[59] As previously noted, CRA was served on June 28 at the CRA Office by courier delivery.

[60] Rule 11.14(1)(b) provides that service is effected on statutory entities and other entities by "being sent by recorded mail, addressed to the entity, to the entity's principal place of

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[24] ***Re Royal Oak Mines Inc*** (1999), 6 CBR (4th) 314 (ONSCJ GD) at para 28.
[25] ***Re CanaSea PetroGas Group Holdings Ltd***.
[26] ***Elias v Hutchison*** (1980), 12 Alta LR (2d) 241 (at para 6), 35 CBR (NS) 30 (QB), aff'd (1981), 121 DLR (3d) 95, 37 CBR (NS) 149 (ABCA); ***Christiansen v Paramount Developments Corp***, 1998 ABQB 1005 (at para 24), 8 CBR (4th) 220 ; ***Fitch v Official Receiver*** (1995), [1996] 1 WLR 242 (UK CA); ***Re Lyall*** (1991), 8 CBR (3d) 82 (BCSC).
[27] ***Re Algoma Steel Inc***, [2001] OJ No 1994 (Ont Sup Ct J), leave to appeal refused, 147 OAC 291, 25 CBR (4th) 194 (CA).
[28] At para 14.
[29] ***Re Concrete Equities Inc***, 2012 ABCA 266 at paras 19, 24.

business or activity in Alberta." Recorded mail includes mail by courier and the date of effective service is "on the date acknowledgement of receipt is signed": r 11.14(2)(b).

[61] Rule 3.9 requires that an originating application and supporting affidavits be served at least 10 days before the return date. To comply, the Debtors had to serve by June 25, but because this date fell on a weekend, technically compliant service mandated delivery of the service package on June 23.

[62] CRA points to the Office of the Superintendent of Bankruptcy's (OSB) website in defence of the position that service was lacking. In part, it reads:

> To make sure insolvency documents are processed quickly and effectively, you should send them to the appropriate area of the CRA.

The webpage also identifies "key processing areas for insolvency documents", which in this case is the office where the CRA Representative is located in Surrey, British Columbia.

[63] The OSB website does not assist CRA. While companies seeking relief under the *CCAA* may retain insolvency professionals in advance of their filing, imposing an expectation that debtors heed the OSB's 'unofficial advice' is simply asking too much. More importantly, to require compliance is contrary to the Alberta *Rules of Court*.

[64] Properly, CRA does not cast blame on the Debtors for the fact that its own challenges routing mail caused the delay in getting the service package into the right hands. What CRA does say is that despite this, it should have the opportunity to address its significant challenge to the Priority Charges because if the service package was delivered to the regional office responsible for *CCAA* matters by June 25, it was "very likely that CRA would have been represented at the July 5th application."

[65] The Debtors effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient. Short notice in insolvency proceedings is not a new concept and CRA is not new to insolvency proceedings. Indeed, it is a seasoned and sophisticated player in the *CCAA* arena with access to the might of the federal government's resources.

[66] These observations aside, the *CCAA* is not all about technicalities and technical compliance. It is about ensuring maintenance of the *status quo* in the sorting-out period, balancing interests, and, in that vein, hearing from all affected voices whenever it is practicable to do so.

[67] In the result, despite the glaring failure of CRA's mail management system and although CRA was effectively and technically served on June 28, the purpose of service was not fulfilled until July 6 when CRA became aware of the Initial Order. On this basis, I am satisfied that I have jurisdiction to hear the variance motion. In finding as I do, I am mindful that CRA is asking whether the Priority Charges ought to have been granted in the first instance, which could well be the subject of appeal. However, ***Algoma Steel*** supports the notion that variance may be the preferred route where a party did not have actual notice of an order made early in the proceeding.

Timing

[68] While comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question."[30]

[69] Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, CRA waited twenty days to informally announce its intentions. Then, CRA chose to attend and take no position at the Extension and Enhanced Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.

[70] CRA's dawdling put BDC, the Monitor, and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.

[71] The options for fixing the appropriate date of meaningful notice are the date of informal notice, the hearing date, and the release of these Reasons. In my view, the most appropriate date is the hearing of this motion because experience shows that not all informally announced motions actually proceed.

[72] Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Priority Charges should be unaffected until August 11, 2017.

[73] I turn next to who bears the onus.

The Onus

[74] The authorities disagree on who bears the onus where the party seeking to vary under a comeback clause was served. Indeed, Blair J (as he then was) observed that there may be no formal onus, but there "may well be a practical one if the relief sought goes against the established momentum of the proceeding."[31]

[75] In ***Re General Chemical Canada Ltd***,[32] Farley J stated that "[I]n any comeback situation, the onus rests solely and squarely with the [initial] applicant to demonstrate why the original or initial order should stand."

[76] In contrast, in ***Re Target Canada Co***, Morowetz J directed a comeback hearing that was to be a "true" comeback hearing in which the applying party did "not have to overcome any onus of demonstrating that the order should be set aside or varied."[33] There, the initial order went beyond a usual "first day" order. While service was not addressed, it is evident that many, if not most, of the stakeholders were not represented at the hearing.

[77] Considering the practicalities of *CCAA* matters, my view is that barring unforeseen circumstances, the onus on a variation application should be this:

- When the initial application is made *without notice* or with insufficient notice, the initial applicant bears the onus of satisfying the court that the terms of the initial order are appropriate.

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[30] ***Muscletech***, at para 5.
[31] ***Royal Oak***, at para 28.
[32] ***Re General Chemical Canada Ltd*** (2005), 7 CBR (5th) 102 (ONSC) at para 2.
[33] ***Re Target Canada Co,*** 2015 ONSC 303, 22 CBR (6th) 323 at para 82.

- When the initial application is made *with notice*, the onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.

[78] I now turn to the substantive priority issue.

Who has priority?

[79] It is beyond debate that *ITA* s227 (4) and the mirrored provisions in *EI Act* (s 86(2) and *CPP Act* (s 23(3)) create deemed trusts, and that *CCAA* s 37(2) explicitly preserves their operation. The debate is simply about whether CRA's interest arising from the deemed trusts can be subordinated by the Priority Charges.

[80] Two principal questions arise:

i. What is the nature of CRA's interest?

ii. Does CRA's statutorily secured status elevate it above a Priority Charge?

What is the nature of CRA's interest?

[81] CRA relies on the extension of trust provisions in the Fiscal Statutes to support the notion that it holds a proprietary rather than secured interest in the Debtors' property. Key to its position is the effect of the concluding phrase in s 227(4.1):

> Notwithstanding any other provision of this Act... property held by any secured creditor... is deemed...and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [emphasis added]

[82] CRA asserts that these words take it beyond a mere secured creditor because they do not just **deem** the Crown to be the owner of the interest, but rather, says that it **is** the owner.

[83] This is the same position CRA advocated in ***Temple City***, where Romaine J distilled these features of tax deemed trusts from ***First Vancouver***:

- The "deemed trust" is not in "truth a real one as the subject matter of the trust cannot be identified from the date of creation of the trust;" and
- In principle, the deemed trust is similar to a floating charge over all the assets of the tax debtor in that the tax debtor is free to alienate its property, and when it does, the trust releases the disposed-of property and attaches to the proceeds of sale. To find otherwise would freeze the tax debtor's assets and prevent it from carrying on business, which was clearly not a result intended by Parliament.

[84] Justice Romaine determined that despite the concluding words of s 227(4.1) these features were inconsistent with a property interest, noting that the definition of a "security interest" in the *ITA* included a "deemed or actual trust", which supports the interest being capable of having the same treatment as a security interest under the *CCAA*.[34]

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[34] ***Temple City,*** at para 13.

[85] Moir J in ***Rosedale Farms*** disagreed finding instead that:

- The analogy of the deemed trust to a floating charge in ***First Vancouver*** was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted.[35]
- The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust.[36]
- Reliance on the *ITA* definition of "secured interest" is misguided.[37]

[86] Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in ***First Vancouver***. However, as I read ***Temple City***, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

[87] ***Rosedale Farms*** is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment ... and includes a ... deemed or actual trust ... ."

[88] Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

[89] For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), the discussion of which follows, does not change my conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

[90] It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

[91] *ITA* s 227(4.1) opens with these words:

> **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

[35] ***Rosedale Farms***, at para 39.
[36] *Ibid,* para 35.
[37] *Ibid,* para 29.
[38] ***Rizzo & Rizzo Shoes Ltd. (Re),*** [1998] 1 SCR 27 at para 21.

> 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 notwithstanding any security interest in such property … . [emphasis added] (Notwithstanding Provision)

[92] CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in ***Century Services*** (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

[93] While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

[94] CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] … is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[95] The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

[96] In ***Thibodeau v Air Canada***,[39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "**only** when the existence of the conflict, in the restrictive sense of the word, **cannot be avoided by interpretation**"[40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

[97] Further, in ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***,[41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" ... .

[39] ***Thibodeau v Air Canada***, 2014 SCC 67, [2014] 3 SCR 340.
[40] ***Thibodeau*** at para 92.
[41] ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***, 2006 SCC 4, [2006] 1 SCR 140.

> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)
>
> As in any statutory interpretation exercise ... courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative sch**eme (***Bell ExpressVu***, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co***., at para. 102.[42] [emphasis added]

[98] Deschamps J observed in ***Century Services***, at para. 15:

> ... 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.

[99] She also quoted with approval the reasons of Doherty JA in ***Elan Corp v Comiskey***[43] (Doherty JA was dissenting):

> 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.

[100] In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders.[44]

[101] In ***Indalex***, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

> … case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[45]

[102] The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

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[43] ***Elan Corp v Comiskey*** (1990), 41 OAC 282 (ONCA) at para 57.
[44] Janis P Sarra, *Rescue!: Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199.
[45] ***Indalex*** at para 59.

[103] Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

[104] Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work – where it has the most significance is at the end.

[105] Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under the Court's residual, inherent jurisdiction, shows Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need.

[106] Had Parliament wanted to limit the Court's ability to give priority to these charges, it could have drafted s 11.52(2) (and the mirror provisions) to expressly provide:

> ... priority over the claim of any secured creditor **except the claim of Her Majesty over deemed trusts under s. 227(4) and (4.1) of the Income Tax Act**.

[107] CRA's interpretation recognizes the obvious, underlying policy reason favouring the collection of unremitted source deductions, which is described as being "at the heart" of income tax collection in Canada": ***First Vancouver*** at para 22. However, it fails to reconcile that objective with the Canadian insolvency restructuring regime and Parliament's continued commitment (as evidenced by the 2009 amendments) to facilitating complex corporate *CCAA* restructurings, even if erosion of security is required.

[108] The *CCAA*'s aim is to facilitate business survival and avoid the multiple traumas occasioned by business failure. Interim financiers are an integral part of the restructuring process. Without them, most *CCAA* restructurings could not get off the ground. Likewise, directors and insolvency professionals are essential to the process, and they too need the comfort of primed charges to fully engage in the process. Surely, Parliament knew all of these things when it passed the 2009 amendments authorizing primed charges.

[109] CRA's position, which it acknowledges will cause a chill on complex restructurings, undermines the *CCAA*'s purpose for the sake of tax collection. It disregards the rather obvious, that successful corporate restructurings result in continued jobs to fuel and fund its source deduction tax base. Notably, its interpretation fails to reconcile these purposes.

[110] The Fiscal Statutes and the *CCAA* should, if possible, be interpreted harmoniously to ensure that Parliament's intention in the entire scheme is fulfilled.

[111] It is logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the Fiscal Statues and the *CCAA*. In my view, it is possible to construe these legislative provisions in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme.

[112] I conclude that it is the Court's order that sets the priority of the charges at issue. The relevant *CCAA* sections allow the Court, where appropriate, to grant priority **only** to those

charges necessary for restructuring. The purpose of the deemed trusts in the Fiscal Statutes is still met as deemed trusts maintain their priority status over **all other** security interests, but those ordered under ss 11.2, 11.51, and 11.52.

[113] A harmonious interpretation respecting both sets of statutory goals is one that preserves the deemed priority status over all security interests, subject to a Court order under *CCAA* ss 11.2, 11.51, and 11.52 granting a "super priority' to those charges.

[114] For these reasons, I find that the *CCAA* gives the Court the ability to rank the Priority Charges ahead of CRA's security interest arising out of the deemed trusts.

Heard on the 11th day of August, 2017.
Dated at the City of Edmonton, Alberta this 11th day of September, 2017.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Darren R Bieganek, QC
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for Monitor, Ernst & Young

George F Body
Department of Justice Canada
for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue

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DLA Piper (Canada) LLP
for the Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

TAB 4

COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF EDMUNDSTON

Reference : 2011 NBQB 211 **E/M/4/2011**
Date : 20110722

B E T W E E N :

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

- and -

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE 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.

BEFORE: The Honorable Madam Justice Lucie A. LaVigne

DATE OF HEARING : July 18, 2011

DATE OF DECISION: July 22, 2011

APPEARANCES :

- R. Gary Faloon, Q.C., and James L. Mockler appeared on behalf of the applicants
- Josh J.B. McElman and Rebecca M. Atkinson appeared on behalf of the Bank of Montreal
- Stephen J. Hutchison appeared on behalf of the Monitor Paul A. Stehelin of A.C. Poirier & Associates Inc.
- Ronald J. LeBlanc, Q.C., and Renée Cormier appeared on behalf of the National Bank of Canada

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.

[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 18th 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 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 *Re Rio Nevada Energy Inc.*, [2000] A.J. No. 1596 (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.
>
> 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 *Re Ravelston Corp.*, 2005 CarswellOnt 1619 (Ont. Sup. Ct).

(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 *Re Stelco Inc.*, [2005] O.J. No. 1171 (ONCA), 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 *Re Pacific National Lease Holding Corp.*, (1992), 72 B.C.L.R. (2d) 368 (B.C.C.A.), 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.
>
> (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.

[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) <u>Ending the Protection for Two of the Companies</u>

[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 *Re Stelco Inc.*

[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.

[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 18th. The Monitor recommends September 30th.

[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 31st 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.

[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 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) <u>The Director's Charge</u>

[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.

[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.

[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.

RENDERED at Edmundston, New Brunswick, this 22nd day of July 2011.

Lucie A. LaVigne
Judge of the Court of Queen's Bench
of New Brunswick

TAB 5

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler* and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

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

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

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

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

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

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

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

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

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

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

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

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

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

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

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

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

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

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

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

   a) Should the stay be extended to the Partnerships?

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

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

   d) Should the Court approve protections for employees?

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

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

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

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

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

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

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

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

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

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

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

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

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

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

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

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

a) Logistics and supply chain providers;

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

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

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

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

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

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

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

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

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

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

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

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

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

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

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4^{th}) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

TAB 6

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to April 21, 2020

Last amended on November 1, 2019

À jour au 21 avril 2020

Dernière modification le 1 novembre 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 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*;

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

Restriction

(4) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

11.31 [Abrogé, 2005, ch. 47, art. 128]

Fournisseurs essentiels

11.4 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Charge ou sûreté en faveur du fournisseur essentiel

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Priorité

(4) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Révocation des administrateurs

11.5 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur de la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi s'il est convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Security or charge relating to director's indemnification

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

Priority

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

Restriction — indemnification insurance

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

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

TAB 7

COURT OF APPEAL FOR ONTARIO

CITATION: U.S. Steel Canada Inc. (Re), 2016 ONCA 662
DATE: 20160909
DOCKET: C61331

Strathy C.J.O., Lauwers and Benotto JJA.

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

And in the Matter of a Proposed Plan of Compromise or Arrangement with Respect to U.S. Steel Canada Inc.

Gordon Capern, Kristian Borg-Olivier and Denise Cooney, for the appellant United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Union"), Appellant

Andrew Hatnay and Barbara Walancik, for SSPO and non-union retirees and active employees of U.S. Steel Canada Inc.

Tamryn Jacobson, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

Michael E. Barrack, Jeff Galway and John Mather, for United States Steel Corporation, Respondent

Sharon Kour, for U.S. Steel Canada Inc.

Heard: March 17, 2016

On appeal from the order of Justice H. Wilton-Siegel of the Superior Court of Justice, dated August 13, 2015.

Strathy C.J.O.:

[1] U.S. Steel Canada Inc. ("USSC") is in *CCAA*[1] protection. Its former employees claim that its American parent, United States Steel Corporation ("USS"), ran the company into insolvency to further its own interests. An issue arose in the court below as to whether the *CCAA* judge could apply an American legal doctrine called "equitable subordination" to subordinate USS's claims to the appellant's claims.

[2] The *CCAA* judge held he had no jurisdiction to do so. For reasons different than the ones he gave, I agree, and would dismiss the appeal.

FACTUAL BACKGROUND

[3] USS is one of the largest steel producers in North America. In 2007, it acquired Stelco, which was in *CCAA* protection at the time, and changed its name to USSC.

[4] Seven years later, on September 16, 2014, USSC was again granted *CCAA* protection by order of the Superior Court of Justice (Commercial List).

[5] The *CCAA* judge made a Claims Process Order on November 13, 2014, establishing a procedure for filing, reviewing and resolving creditors' claims against USSC.

---

[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[6] The order set out a separate procedure for resolving claims of approximately $2.2 billion by USS against USSC. Most of the claims arose from USS's acquisition and reorganization of Stelco and from advances of working capital. Those claims were to be determined by the court, rather than by the Monitor.

[7] USS filed its proofs of claims. The Monitor recommended they be approved and USS moved for court approval of the claims.

[8] Notices of Objection were filed by four parties: (a) the Province of Ontario and the Superintendent of Financial Services in his capacity as administrator of the Pension Benefits Guarantee Fund; (b) the United Steelworkers, Locals 8782 and 1005; (c) Representative Counsel to the Non-USW Active Salaried Employees and Non-USW Salaried Retirees; and (d) Robert Milbourne, a former president of Stelco, and his wife, Sharon Milbourne, both of whom are beneficiaries of a pension agreement with USSC.

[9] These objections overlapped to some extent. The *CCAA* judge had to develop a procedure to address the objections. He had to decide whether they should be dealt with within the *CCAA* process, outside it, or not at all.

[10] The Province made two allegations. The first was that loans by USS to USSC should be characterized as shareholders' equity, because of the circumstances in which they were made. They should therefore be subordinated to all other claims

pursuant to s. 6(8) of the *CCAA*[2] (the "Debt/Equity Objection"). Second, the Province argued that the security for the loans should be invalidated pursuant to provincial and federal fraudulent assignment and fraudulent preference legislation (the "Security Objection"). USS disputed both allegations, but was content to have the issues determined under the Claims Process Order.

[11] The Union made objections similar to the Province's, but it added a third based on oppression and breach of fiduciary duty arising out of USS's conduct in relation to the Canadian plants, pensioners, pension plan members and beneficiaries (the "Conduct Objections").

[12] The *CCAA* judge described the Conduct Objections as allegations that USS caused USSC to underperform, thereby requiring it to incur significant debt and to be unable to meet its pension obligations. The Union sought, among other things, an order subordinating the USS claims in whole or in part to its claims.

[13] The Milbournes' objections were based on USS's alleged conduct and relied primarily on the doctrine of equitable subordination. They asked that the USS claims be dismissed entirely or subordinated to the claims of the other unsecured creditors.

[14] The *CCAA* judge scheduled a motion to establish a litigation plan for USS's motion for approval of its claims against USSC. The parties agreed that the Security

[2] 6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Objection and the Debt/Equity Objection could be determined pursuant to the Claims Process Order and within the *CCAA* proceedings.[3]

[15] The primary disagreement concerned the procedure and timing for the determination of the other objections. The Union argued that the Conduct Objections should be resolved as part of the Claims Process Order and that an evidentiary record was required to do so. USS and USSC took the position that the Conduct Objections should be litigated outside the *CCAA* claims process.

[16] The *CCAA* judge found that some of the claims of the Union and the Milbournes could be approached as third party claims against USS for oppression for the purpose of s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and for breach of fiduciary duty. He found that neither the Claims Process Order nor the *CCAA* contemplated that such claims would be addressed by or would be relevant to a plan of arrangement or compromise under the *CCAA*. The third party claims fell outside the claims process unless specifically incorporated into the restructuring plan as approved by the parties or otherwise ordered.

[17] The *CCAA*, he said at para. 65, "is directed towards the creation, approval and implementation of a plan of arrangement or compromise proposed between a debtor company and its secured and unsecured creditors". It did not contemplate

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3 In a subsequent ruling, *U.S. Steel Canada Inc., (Re)*, 2016 ONSC 569, the *CCAA* judge dismissed the Debt/Equity objection, finding that approximately $2 billion of USSC's unsecured claims and $73 million in secured claims were properly characterized as debt rather than equity. He also dismissed the objection that approximately $118 million in secured claims should be invalidated due to lack of consideration or as a fraudulent preference.

incorporation of inter-creditor claims into any plan of arrangement or compromise or into the voting process in respect of any proposed plan.

[18] He concluded, at para. 84, that under s. 11 the court had authority to order the remaining claims of the Union and the Milbournes, except the claim for equitable subordination, to be "determined by a process within the *CCAA* proceedings, other than the process contemplated by the Claims Process Order, if the Court is of the opinion that, on balance, such action is likely to further the remedial purpose of the *CCAA*." He held that those claims could be determined within the *CCAA* proceedings, rather than in a separate action in the Superior Court, but not under the Claims Process Order. He noted that the court retained jurisdiction to order that the claims be continued outside the *CCAA* if it was determined that pursuing them within the process would no longer further the remedial process of the *CCAA.*

[19] He held, however, that he had no jurisdiction under the *CCAA* to apply the doctrine of equitable subordination. Before turning to his reasons, I will explain the doctrine of equitable subordination.

EQUITABLE SUBORDINATION

[20] Equitable subordination was developed as an equitable remedy in American insolvency law to subordinate a creditor's claim based on its inequitable conduct. The principles were articulated in *Re Mobile Steel* (1977) 563 F. (2d) 692 (5th Cir.), which set out a three-part test:

a. the claimant must have engaged in some type of inequitable conduct;

b. the misconduct must have resulted in injury to creditors of the bankrupt or conferred an unfair advantage on the claimant; and

c. equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

[21] Paragraph 105(a) of the U.S. *Bankruptcy Code* authorizes bankruptcy courts to use equitable principles to alter the provisions of Title 11 or to prevent an abuse of process. One year after *Mobile Steel*, the *Code* was amended to give legislative effect to equitable subordination: *Bankruptcy Reform Act*, 11 U.S.C. §510(c)(1).

[22] The Supreme Court of Canada considered the doctrine on two occasions. In both, the court found it unnecessary to determine whether equitable subordination should be applied, because the underlying facts did not meet the test: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, at p. 609; and *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 77*.* This court also found it unnecessary to decide the issue in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 14 O.R. (3d) 1 (C.A.).

[23] The availability of the doctrine has been considered in various Canadian superior courts at the trial level, in various contexts and with inconclusive results: see *e.g. Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, [2006] O.J. No. 3087 (S.C. [Commercial List]), (in the context of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3); *Christian Brothers of Ireland*

in Canada (Re) (2004), 69 O.R. (3d) 507, *(*in the context of the *Winding-up and Restructuring Act*, R.S.C. 1985, C. W-11, as amended).

[24] In *AEVO Co. v. D & A Macleod Co*. (1991), 4 O.R. (3d) 368 (Gen. Div.), Chadwick J. rejected the application of equitable subordination in Canadian law, observing, at p. 372, that to introduce the doctrine would create chaos and would lead to challenges to security agreements based on the conduct of the secured creditor. In *I. Waxman & Sons Ltd. (Re)* (2008), 89 O.R. (3d) 427 (S.C.), Pepall J. queried, at para. 33, whether statutory priorities should be upset by a doctrine "divorced from its legal home". This observation was followed, however, with the comment that "a vibrant legal system must be responsive to new developments in the law and the need for reform. Jurisprudence from other jurisdictions often provides the impetus or basis for much needed legal developments."

[25] On the other hand, the Newfoundland and Labrador Supreme Court (Trial Division) applied the doctrine in a bankruptcy case in *Oppenheim v. J.J. Lacey Insurance Limited*, 2009 NLTD 148, 291 Nfld. & P.E.I.R. 149.

[26] The Supreme Court of Canada's silence on the issue of equitable subordination in *CDIC* and *Indalex* cannot be taken, as the *CCAA* judge appears to have thought, as an outright rejection of the doctrine. In my view, the Supreme Court simply left the issue for another day.

[27] It is unnecessary to decide that issue in order to resolve this appeal. The only issue is whether the *CCAA* judge was right in deciding that he had no jurisdiction to

grant equitable subordination under the *CCAA*, assuming the remedy is available in Canadian law.

SUBMISSIONS AND ANALYSIS

A. PROCEDURAL OBJECTION

[28] The appellant's first submission is procedural. It claims that it was unnecessary for the *CCAA* judge to determine whether he had jurisdiction to grant equitable subordination. The Union essentially says it was blindsided. It says it made no submissions on the doctrine of equitable subordination and the *CCAA* judge did not indicate that he was going to address the issue in the context of the scheduling motion. It was inappropriate and unnecessary for the court to shut the door on a novel and controversial remedy without a full factual record.

[29] The respondent acknowledges that equitable subordination was not a central issue in the oral submissions before the *CCAA* judge, but points out that it was raised in some of the factums and memoranda filed before and after the hearing. The *CCAA* judge was required to determine what conduct-based inter-creditor claims would be litigated, either under the Claims Process Order or under the *CCAA.* He was entitled to determine whether he had jurisdiction to grant equitable subordination within the *CCAA*.

[30] I do not accept the appellant's submission. The issue of equitable subordination was plainly before the *CCAA* judge in submissions made before and after the hearing. The Milbournes' factum made extensive submissions on equitable

subordination and argued that it, along with fiduciary duty and oppression, were "live issues which should be the subject matter of a robust evidentiary record and subject to a fair and thorough due process in this court". The Union's factum suggested that some of USS's unsecured claim could be subordinated to the claims of other creditors "on account of a breach of fiduciary duty, a finding of oppression, or otherwise." USSC's factum argued that the Union's claim for equitable subordination should be rejected and that suitable remedies were available outside the Claims Process. In supplementary written submissions, the Union argued, in response to USSC's submissions, that the determination of the issue of equitable subordination should await an evidentiary record.

[31] Moreover, the issue before the *CCAA* judge was not simply scheduling. The motion sought directions on the extent and nature of production and discovery with respect to the various objections. The Union argued that the objections had to be resolved before there could be approval of a plan of restructuring, a sale process or a distribution to creditors. The allegations that USS's claims should be re-characterized, invalidated, disallowed or subordinated had to be resolved and the *CCAA* judge had to determine a process for their resolution. Some might be dealt with under the Claims Process Order and some might be dealt with outside that Order but nevertheless in the *CCAA* proceedings. Some might not be dealt with under the *CCAA* at all.

[32] The *CCAA* judge was plainly aware that a determination of the inter-creditor claims could have implications for the approval of any subsequent reorganization, sale of the business or credit bid. It was appropriate for him to consider whether the court had jurisdiction to address those claims and, if so, how and when.

[33] An evidentiary record was unnecessary. The *CCAA* judge was not deciding whether equitable subordination applied on the facts of this case. The issue was whether he had jurisdiction to grant equitable subordination under the *CCAA*.

[34] I turn now to the question whether the *CCAA* judge correctly held that he had no jurisdiction under the *CCAA* to order equitable subordination of USS's claims.

B. JURISDICTION TO ORDER EQUITABLE SUBORDINATION

[35] I will begin by summarizing the *CCAA* judge's reasons on this issue. I will then set out the submissions of the parties, identify the standard of review, describe the methodology I will use and apply that methodology to the legislation.

(1) The *CCAA* judge's reasons

[36] The *CCAA* judge noted that although the *CCAA* gives authority to re-characterize debt as equity and to invalidate a preference or assignment, there is no express provision conferring jurisdiction to grant equitable subordination. He was of the view that any jurisdiction to do so would have to be found in s. 11, which provides that "the court … may, subject to the restrictions set out in this Act … make any order that it considers appropriate in the circumstances."

[37] He observed that there is no Canadian case law supporting that authority and, when given the occasion to confirm the existence of equitable subordination on two occasions, the Supreme Court of Canada had declined to do so: *Canada Deposit Insurance Corp.*; and *Indalex*. He suggested that one might infer from this that the Supreme Court had rejected the principle of equitable subordination.

[38] He found, however, that to the extent the issue remained open, the *CCAA* evidenced an intention to exclude equitable subordination. When Parliament amended the legislation in 2009, it gave authority under s. 6(8) to subordinate debt as being in substance equity, but it did not enact any provision to subordinate a claim based on the conduct of the creditor. Nor had it drafted s. 36.1, which permitted the court to invalidate preferences and assignments, broadly enough to permit the court to make an order for equitable subordination. These provisions, he said, were "restrictions set out in this Act", limiting the court's broad discretion under s. 11. Parliament's failure to include equitable subordination in the remedies introduced in 2009 must be taken as indicative of an intention to exclude the operation of the doctrine under the *CCAA*. This, he said, was a policy decision the court must respect.

(2) The submissions of the parties

[39] The appellant submits the *CCAA* judge had jurisdiction to grant equitable subordination pursuant to s. 11 of the *CCAA* in the absence of express "restrictions"

on that jurisdiction. He erred in implying restrictions based on Parliament's failure to amend the legislation.

[40] The respondent submits that Canadian courts have all the tools they need to assess, review and, where necessary, subordinate or invalidate creditors' claims in a manner consistent with the underlying legislation, without the need for equitable subordination. Some of these tools are the result of the 2009 amendments to the *BIA* and the *CCAA*. Parliament might have expanded those amendments to incorporate equitable subordination or some other conduct-based remedy, but declined to do so. The court should not invoke a controversial doctrine that Parliament declined to adopt when it had the opportunity to do so.

(3) The standard of review

[41] The parties agree that the applicable standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, at para. 8; and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 40.

(4) Framework for analysis

[42] In *Century Services v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 65ff., the Supreme Court of Canada gave guidance on the approach to the scope of statutory remedies under the *CCAA,* and, if need be, under related sources of judicial authority. The court adopted the analysis proposed by Justice Georgina R. Jackson of the Court of Appeal for Saskatchewan and

Professor Janis Sarra in an article entitled, “Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters” in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Toronto: Thomson Carswell, 2007), at p. 41. Blair J.A. also approved of this approach in *Metcalfe & Mansfield*, at paras. 48-49.

[43] Jackson and Sarra note that the *CCAA* is skeletal legislation and advocate a transparent and consistent methodology as judges define the scope of their jurisdiction under the statute. They propose that the courts should take a hierarchical view of the powers at their disposal, adopting a broad, liberal and purposive interpretation of the statute and applying the principles of statutory interpretation before turning to other tools such as the common law or the exercise of inherent jurisdiction.

[44] At para. 66 of *Century Services*, the Supreme Court held that in most cases, the search for jurisdiction under the *CCAA* should be an exercise in statutory interpretation. The starting point is the “big picture” principles of statutory interpretation.

[45] Driedger’s modern principle is the crucial tool for construing skeletal legislation such as the *CCAA*. A court must go beyond an examination of the wording of the statute and consider the scheme of the Act, its object or the intention of the legislature and the context of the words in issue:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: Jackson and Sarra, at p. 47; Elmer A. Driedger, *The Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at p. 87, cited in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. See also: *Rizzo & Rizzo Shoes Ltd*. *(Re)*, [1998] 1 S.C.R. 27, at paras. 23, 40.

[46] With this in mind, I will apply the framework in *Century Services* to the search for jurisdiction. I turn first to a consideration of the purpose and scheme of the *CCAA*, before considering the language of the statute.

(5) Application of the framework

(i)The purpose of the CCAA

[47] There is no dispute about the purpose of the *CCAA*. It describes itself as "An Act to facilitate compromises and arrangements between companies and their creditors". Its purpose is to avoid the devastating social and economic effects of commercial bankruptcies. It permits the debtor to continue to carry on business and allows the court to preserve the status quo while "attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all": *Century Services*, at para. 77.

[48] The *CCAA* has proven to be a flexible and successful tool to enable businesses to avoid bankruptcy. As Professor Sarra notes, "[i]t has been the statute

of choice for debtor corporations in every major Canadian restructuring in the past quarter century, including national airlines, major steel and forestry companies, telecommunications companies, major retail chains, real estate and development groups, and the national blood delivery system": Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2d ed. (Toronto: Carswell, 2013), at p. 1.

[49] The *CCAA* achieves its goals through a summary procedure for the compromise or arrangement of creditors' claims against the company. It was described in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36, as:

> a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders.

[50] The process has been effective because it is summary, it is practical, it is supervised by an independent expert monitor and it is managed in real time by an experienced commercial judge.

[51] *Century Services* is a good example of how the purpose of the *CCAA* informs the exercise of the court's authority. At issue in that case were the reconciliation of another federal statute with the *CCAA* and the scope of a *CCAA* judge's discretion. At para. 70, the orders of the *CCAA* judge were considered squarely within the context of the purpose of the Act:

> 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. [emphasis added]

[52] The Supreme Court concluded, at para. 75, that the order advanced the underlying purpose of the *CCAA.*

(ii)The scheme of the CCAA

[53] The *CCAA* has been described as “skeletal” or “under-inclusive” legislation, (Jackson and Sarra at p. 48) which grants broad powers to the courts in general terms.

[54] The Act has five parts. Part I, entitled “Compromises and Arrangements” permits the court to sanction a compromise or arrangement between a company and its secured or unsecured creditors, or both.

[55] The powers of the court are found in Part II, entitled “Jurisdiction of Courts”. The statute gives the court jurisdiction to receive applications, order stays, approve debtor-in-possession financing and appoint a monitor, among other things.

Proceedings are commenced by an application to the Superior Court. The court generally grants an initial stay, appoints a monitor with authority to repudiate leases and other agreements and authorizes debtor in possession financing. A process is established for the identification and review of creditors' claims by the monitor and to deal with disputed claims, with the ultimate purpose of establishing classes of creditors who will vote, by class, on the compromise or arrangement.

[56] One possible outcome is the preparation of a plan of arrangement. Creditors vote by class on the plan at a meeting called for that purpose. A majority by number of creditors in each class, together with two-thirds of the creditors in that class by dollar value, must approve the plan. If a class of creditors approves the plan, it is binding on all creditors within the class, subject to the court's approval of the plan. If all classes of creditors approve the plan, the court must then approve the plan as a final step.

[57] Part III, entitled "General", deals with such issues as the determination of the amount of creditors' claims, classes of creditors, the duties of monitors, the disclaimer of agreements between the company and third parties and preferences and transfers at undervalue.

[58] Section 19 identifies "claims" that may be dealt with in a compromise or arrangement. Those are claims provable in bankruptcy that relate to debts or

liabilities, present or future, to which the debtor company is subject or may become subject before the compromise or arrangement is sanctioned.[4]

[59] The significance of this definition is that the focus of the plan of arrangement is claims against the debtor company that are provable in bankruptcy. The *CCAA* judge identified this significance at para. 59 of his reasons, where he noted that s. 19(1) of the *CCAA* provides, effectively, "that a plan of compromise or arrangement may only deal with claims that relate to debts or liabilities to which a debtor company is subject at the time of commencement of proceedings under the *CCAA*". At para. 61, he noted that neither the Claims Process Order nor the *CCAA* contemplated that inter-creditor claims would be addressed by or be relevant to a plan of arrangement.

[60] Section 20 sets out the method for determining the amount of the claim of any secured or unsecured creditors. In most cases, it will be the amount "determined by the court on summary application by the company or by the creditor".

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[4] *CCAA*, s. 2(1): "*claim* means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*." Section 121 of the *BIA* states that claims provable in bankruptcy are those to which the bankrupt is subject: "121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act."

[61] Section 22 provides for the establishment of classes of creditors for the purpose of voting on a compromise or arrangement, based on, among other things, the nature of their claims, the nature of the security in respect of their claims and the remedies available to them in relation to their claims. Creditors may be included in the same class “if their interests or rights are sufficiently similar to give them a commonality of interest”.

[62] Part IV deals with Cross-Border Insolvencies. Its stated purposes are to give mechanisms to provide for the fair and efficient administration of such insolvencies, to promote cooperation with courts of other jurisdictions, to promote “the rescue of financially troubled businesses to protect investment and preserve employment” and to protect the interests of creditors, of other interested persons and of the debtor company. Part V deals with Administration.

[63] The *CCAA* was amended in 2009. The amendments were the product of extensive discussion of the *BIA* and the *CCAA* in the Standing Senate Committee on Banking, Trade and Commerce. The Committee recommended amendments to the legislation, including an expanded power to review, invalidate or subordinate creditors’ claims under the *CCAA*.

[64] These recommendations were reflected in the 2009 amendments in two respects. First, s. 6(8) provides that a compromise or arrangement will not be approved unless it provides that all other claims are to be paid in full before an equity claim is paid.

[65] This provision, coupled with the definition of "equity interest"[5] and "equity claim"[6] in s. 2(1), permits the court to determine whether a creditor's claim is in substance a share, warrant or option. This is the underpinning of the Debt/Equity Objection, an objection based on a disagreement as to the proper characterization of the disputed claims.

[66] Section 22.1, also added in 2009, provides that all creditors with equity claims are to be in the same class unless the court otherwise orders, and may not, as members of that class, vote at any meeting unless the court otherwise orders.

[67] Second, the 2009 amendments harmonized the rules of reviewable transactions under the *BIA* and the *CCAA*. Creditors in a *CCAA* proceeding are now entitled to invoke the provisions of the *BIA* to invalidate security granted by a debtor corporation to a creditor where a fraudulent preference or transfer at undervalue is established. Section 36.1 of the *CCAA* provides that ss. 38 and 95 to 101 of the *BIA* apply, with any required modifications, in respect of a compromise or arrangement, unless the compromise or arrangement provides otherwise.

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[5] "*Equity interest* means (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt."

[6] "*Equity claim* means a claim that is in respect of an equity interest, including a claim for, among others, (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)."

[68] USS says that the 2009 amendments reflected Parliament's decision concerning the extent of the court's jurisdiction over "reviewable transactions" in *CCAA* proceedings and the extent to which a creditor's claim can be subordinated to other claims as a result of its conduct. It says Parliament might have included jurisdiction to rearrange priorities between creditors, for example through equitable subordination, but it declined to do so.

[69] The scheme of the *CCAA* focuses on the determination of the validity of claims of creditors against the company and the determination of classes of claims for the purpose of voting on a compromise or arrangement. Except as contemplated by ss. 2(1), 6(8), 22.1 and 36.1, the statute does not address either conflicts between creditors or the order of priorities of creditors. Priorities are, however, part of the background against which the plan of compromise or arrangement is negotiated.

[70] There is nothing in the record before us to indicate that the issue of equitable subordination was given serious consideration at the time of the 2009 amendments or that those amendments were intended to import other remedies.

(iii) Interpreting the particular provisions before the court

[71] I now turn to the words of the statute itself, considered in context and having regard to the scheme of the *CCAA*, the object of the act and the intentions of Parliament.

[72] As Blair J.A. put it when deciding whether the *CCAA* granted the court the power to sanction the disputed order in *Metcalfe & Mansfield*, at para. 58, "[w]here in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases?" The question before us is "where (if at all) in the words of the statute is the court (implicitly or explicitly) clothed with authority to make an order for equitable subordination of the USS claims?"

(a) Section 11: "The engine that drives the statutory scheme"

[73] The parties focussed their arguments on whether the powers granted by s. 11 include the power to grant the remedy of equitable subordination. In order to inform the scope of s. 11, they urge us to consider the treatment of "equity" claims in s. 6(8) of the *CCAA* and the remedies available under s. 36.1.

[74] In *Stelco*, at para. 36, Blair J.A. described s. 11 as "the engine that drives this broad and flexible statutory scheme". Section 11 states, in full:

> 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. [Emphasis added.]

[75] Prior to amendment in 2005 (S.C. 2005, c. 47, s. 128), the underlined portion above had read "subject to this Act". In *Century Services*, the Supreme Court, at

paras. 67-68, interpreted this amendment as being an endorsement of the broad reading of *CCAA* jurisdiction that had been developed in the jurisprudence.

[76] The jurisdiction under s. 11 has two express limitations. First, the court must find that the order is "appropriate in the circumstances". Second, even if the court considers the order appropriate in the circumstances, it must consider whether there are "restrictions set out in" the *CCAA* that preclude it.

[77] As I have noted, the *CCAA* judge held that s. 11 did not confer jurisdiction to apply the doctrine of equitable subordination. The statute could have provided the authority to subordinate claims on this basis, as it did with equity claims, but it did not. He also held that the definition of "equity claim" and the option to bring proceedings under s. 36.1 were "restrictions" within the meaning of s. 11.

[78] In my view, the interpretative process should start with the scope of s. 11 before the restrictions are considered in the analysis. The broad powers exercised by *CCAA* judges evolved in the jurisprudence before the concept of "restrictions" was legislated.

[79] Moreover, it is inconsistent with the anatomy and history of the *CCAA* to maintain that if Parliament had intended that a *CCAA* judge would have the authority to make a certain type of order, it would have said so. The Supreme Court has made it clear that "[t]he general language of the *CCAA* should not be read as being restricted by the availability of more specific orders": *Century Services*, at para. 70.

[80] What is apparent from the many creative orders that have been made, before and since the 2009 amendments, is that such orders are made squarely in furtherance of the legislature's objectives. In *Century Services*, at para. 59, the Supreme Court observed that "[j]udicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes", to avoid the devastating social and economic effects of bankruptcy while an attempt is made to organize the affairs of the debtor under court supervision.

[81] The words "may … make any order it considers appropriate in the circumstances" in s. 11 must, in my view, be read as "may … in furtherance of the purposes of this act, make any order it considers appropriate in the circumstances."

[82] There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

[83] I turn to the second limit on the court's jurisdiction under s. 11, the "restrictions set out in this Act". The first question is whether such restrictions must be express or can be implied.

[84] It bears noting that there are numerous express restrictions on the court's jurisdiction contained within the *CCAA* itself. Some are contained in Part II (Jurisdiction of Courts) and some are actually preceded by the heading "Restriction". In *North American Tungsten Corp. v. Global Tungsten and Powders*

Corp., 2015 BCCA 426, 81 B.C.L.R. (5th) 102, at para. 34, the British Columbia Court of Appeal observed that “where other provisions of the statute are intended to restrict the powers under ss. 11 and 11.02 of the statute, they do so in unequivocal terms.”

[85] The *CCAA* judge found that there were “restrictions set out” in the *CCAA* that prevented the court from applying equitable subordination, namely the definition of “equity claim” in s. 2(1) and the provisions of s. 36.1. Essentially, he found that Parliament could have introduced equitable subordination into the *CCAA* when it amended the legislation in 2009, but declined to do so. “The court must respect that policy decision”, he said at para. 53. The respondent supports this interpretation.

[86] I agree with the appellant that “equity claim” is not a restriction at all, but a definition. Together with s. 6(8), it codifies what was essentially the law before the 2009 amendments. The purpose of this involvement in the priority of claims is to remove shareholders from the process of arriving at a compromise or arrangement, absent permission of the court. It has nothing to do with any wrongdoing by the person with the equity interest. The only “restriction”, if any, would be the lack of flexibility to reverse this statutory subordination, as Pepall J. pointed out in *Nelson Financial Group Ltd. (Re)*, 2010 ONSC 6229, 75 B.L.R. (4th) 302, at para. 34. However, this has to do only with subordination flowing from the characterization of a claim and not equitable subordination.

[87] I also agree that the plain meaning of the words "subject to the restrictions set out in this Act" refers to express restrictions, of which there are a number.

(b) Subsection 6(8): Subordination of "equity claims"

[88] In the court below, and in the appellant's submissions in this court, there was a blurring of the distinction between the separate concepts of "equity claim" and the doctrine of "equitable subordination". The *CCAA* judge's reasons referred at times to the "subordination claims" of the Union and the Milbournes as including the equitable subordination claims and the claims for oppression and breach of fiduciary duty.

[89] As explained earlier, s. 6(8) of the *CCAA* effectively subordinates "equity claims", as defined, to the claims of all other creditors. No compromise or arrangement can be approved unless it provides for other claims to be paid, in full, before equity claims are paid.

[90] With the exception of environmental claims, ss. 6(8) and 22.1 are the only provisions of the *CCAA* to deal expressly with priorities between creditors.[7] There is a clear rationale for these provisions. In E. Patrick Shea*, BIA, CCAA & WEPPA: A Guide to the New Bankruptcy & Insolvency Regime* (Markham: LexisNexis Group, 2009), at p. 89, the author explains that "[t]he intention of these amendments is to

[7] Subsection 11.8(8) gives the federal and provincial Crowns priorities for environmental claims against the debtor.

remove the shareholder/creditor from the reorganization process, unless the court orders that they have a seat at the table."

[91] "Equitable subordination", on the other hand, refers to the doctrine at issue here: a form of equitable relief to subordinate the claim of a creditor who has engaged in inequitable conduct. Such a claim is not an "equity claim", as defined. If it were, it would be subordinated without the need for intervention by the court.

[92] Pepall J. dealt with these different principles and distinguished them clearly in *I. Waxman & Sons Ltd.*, a Commercial List decision that predated the 2009 amendments. There, a trustee in bankruptcy brought a motion for advice and directions as to whether a judgment creditor's claim should be allowed. Other creditors argued that his claim was rooted in equity and was not a debt claim. In the alternative, they argued that even if it was a debt claim, it should be subordinated to their claims pursuant to the doctrine of equitable subordination.

[93] Pepall J. addressed the argument that the judgment creditor's claim was an equity claim under the heading "Characterization" (paras. 18-26), because the issue was whether his claim was properly characterized as one of equity or debt, with the attendant priority consequences. Next she considered whether, even though she had found that the claim was a debt claim, it should be subordinated pursuant to the doctrine of equitable subordination (paras. 27-35). She noted, at para. 27, that "[a]s its name suggests, the basis for development of the doctrine is the equitable

jurisdiction of the court". She held that even if it applied in Canada, which was not established, there was no evidence on which to apply it in that case.

[94] By contrast, the *CCAA* judge in this case disposed of these issues under one heading, "The Authority of the Court to Adjudicate Claims for Debt Re-Characterization and for Equitable Subordination", at paras. 38-53. He found, at para. 51, that the absence of any provision in the *CCAA* that would permit the application of equitable subordination was indicative of an intention to exclude the operation of the doctrine.

[95] The *CCAA* judge appears to have treated equitable subordination as akin to equity claims as defined in s. 2(1), the subordination of equity claims in s. 6(8) and the remedies under s. 36.1. He found that because equitable subordination is not mentioned in the context of these remedies, Parliament must have intended to exclude it.

[96] The distinction between these terms undermines the argument that equitable subordination does not exist because it was not included as part of the definition of (or together with the subordination of) equity claims. Equity claims are subordinated in order to keep shareholders away from the table while the claims of other creditors are being sorted out. Even prior to being explicitly subordinated by statute in 2009, they generally ranked lower than general creditors: *Sino-Forest Corp. (Re)*, 2012 ONCA 816, 114 O.R. (3d) 304, at para. 30. The purpose of the 2009 amendments appears to have been to confirm and clarify the law: see The Report

of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa, November 2003), at p. 158-59.

(c) Section 36.1: Preferences and Assignments

[97] Section 36.1, which was part of the 2009 amendments, incorporates by reference provisions of the *BIA* permitting the court to invalidate prior fraudulent preferences or fraudulent assignments.

> 36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

[98] The respondent argues that the inclusion of these express provisions implies that no other form of equitable remedy was contemplated. Its argument is that, had Parliament wished to invalidate or subordinate claims of creditors who had engaged in inequitable conduct in relation to other creditors, it could have expressly included that remedy.

[99] I would not read anything into s. 36.1, one way or the other. Nor would I regard it as a "restriction" set out in the Act within the meaning of s. 11.

(6) Summary

[100] The appellant requested "a declaration that the *CCAA* contains no restrictions within the meaning of s. 11 on the court's ability to apply the doctrine of equitable

subordination." In my view, this is the wrong inquiry and this is why I reach the same result as the *CCAA* judge, but for different reasons.

[101] I would not grant the relief sought because, applying the principles of statutory interpretation, nowhere in the words of the *CCAA* is there authority, express or implied, to apply the doctrine of equitable subordination. Nor does it fall within the scheme of the statute, which focuses on the implementation of a plan of arrangement or compromise. The *CCAA* does not legislate a scheme of priorities or distribution, because these are to be worked out in each plan of compromise or arrangement. The subordination of "equity claims" is directed towards a specific group, shareholders, or those with similar claims. It also has a specific function, consistent with the purpose of the *CCAA*: to facilitate the arrangement or compromise without shareholders' involvement.

[102] The success of the *CCAA* in fulfilling its statutory purpose has been in large measure due to the ability of judges to fashion creative solutions, for which there is no express authority, through the exercise of their jurisdiction under s. 11. As Blair J.A. noted in *Metcalfe and Mansfield*, however, the court's powers are not limitless. They are shaped by the purpose and scheme of the *CCAA.* The appellant has not identified how equitable subordination would further the remedial purpose of the *CCAA*.

[103] At this stage of the analysis, I am mindful of the Supreme Court's observation in *Century Services* that in most cases the court's jurisdiction in *CCAA* matters will

be found through statutory interpretation. I am also mindful of its observation in *Indalex*, at para. 82, that courts should not use an equitable remedy to do what they wish Parliament had done through legislation. In my view, there is no "gap" in the legislative scheme to be filled by equitable subordination through the exercise of discretion, the common law, the court's inherent jurisdiction or by equitable principles.

[104] There is no provision in the *CCAA* equivalent to s. 183 of the *BIA* or §105(a) of the U.S. *Bankruptcy Code.* Section 183 invests the bankruptcy court with "such jurisdiction at law and in equity" as will enable it to exercise its bankruptcy jurisdiction. This is significant, because if equitable subordination is to become a part of Canadian law, it would appear that the *BIA* gives the bankruptcy court explicit jurisdiction as a court of equity to ground such a remedy and a legislative purpose that is more relevant to the potential reordering of priorities.

CONCLUSION

[105] For these reasons, I would dismiss the appeal. I would order that counsel may make written submissions as to costs, not to exceed five pages in length, excluding costs outlines. I would assume counsel can agree on a timetable for delivery of all costs submissions within 30 days of the release of these reasons.

"George R. Strathy C.J.O."
"I agree P. Lauwers J.A."
"I agree M.L. Benotto J.A."

Released: "GRS" September 09, 2016

TAB 8

CITATION: Sproule v. Nortel Networks Corporation, 2009 ONCA 833
DATE: 20091126
DOCKET: C50986 and C50988

COURT OF APPEAL FOR ONTARIO

Goudge, Feldman and Blair JJ.A.

BETWEEN:

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

C50986

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Appellants

and

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor

Respondents

C50988

AND BETWEEN:

National Automobile, Aerospace, Transportation and General Workers Union of Canada

(CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915

George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Appellants

and

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor

Respondents

Mark Zigler, Andrew Hatnay and Andrea McKinnon, for the appellants Nortel Networks Former Employees

Barry E. Wadsworth, for the appellant CAW-Canada

Suzanne Wood and Alan Mersky, for the respondents Nortel Networks Limited, Nortel Networks Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Lyndon A.J. Barnes and Adam Hirsh, for the respondents Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

Benjamin Zarnett, for the monitor Ernst & Young Inc.

Gavin H. Finlayson, for the Informal Nortel Noteholder Group

Thomas McRae, for the Nortel Canadian Continuing Employees

Massimo Starnino, for the Superintendent of Financial Services

Alex MacFarlane and Jane Dietrich, for the Official Committee of Unsecured Creditors

Heard: October 1, 2009

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated June 18, 2009, with reasons reported at (2009), 55 C.B.R. (5th) 68.

Goudge and Feldman JJ.A.:

[1] On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, ("*CCAA*").

[2] In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, *inter alia*, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.

[3] The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for directions seeking certain relief from the order

granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

[4] The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.

[5] We will address each of the two appeals in turn.

THE UNION APPEAL

Background

[6] The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan ("RAP"), payments under the Voluntary Retirement Option ("VRO"), and termination and severance payments to

unionized employees who have been terminated or who have severed their employment at Nortel.

[7] Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.

[8] The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the *CCAA*. At the time this appeal was argued, it read as follows:[1]

> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.

[9] The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the

[1] The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended *CCAA*.

CCAA.

[10] The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:

> The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[11] The Union challenges this conclusion.

[12] In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

[13] Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

[14] Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the *CCAA* as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

[15] In our opinion, this argument must fail.

Analysis

[16] Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. The primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

[17] Second, we also agree with the motion judge when he stated at para. 66:

> In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

[18] Because of s. 11.3(a) of the *CCAA*, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

[19] What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Re: Mirant Canada Energy Marketing Ltd.* (2004), 36 Alta. L.R. (4th) 87 (Q.B.).

[20] Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

[21] The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Police Service Board v. Ontario Municipal Employees Retirement Board et al.* (1999), 45 O.R. (3d) 622 (C.A.) at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

[22] Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only be enforceable by the Union on behalf of the former employees: see *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services

being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

[23] In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing employees after January 14, 2009. Section 11.3(a) of the *CCAA* does not exclude these payments from the effect of the order of that date.

[24] The Union's appeal must be dismissed.

THE FORMER EMPLOYEES' APPEAL

Background

[25] The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not

dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a "Me too motion."

[26] After he dismissed the union motion, the motion judge turned to the "me too" motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees' motion was also dismissed.

[27] For the purposes of the appeal, the former employees narrowed their claim only to statutory termination and severance claims under the *ESA* that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the *CCAA* that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the doctrine of paramountcy has not been triggered.

[28] Neither the provincial nor the federal governments responded to the notice on this appeal.

[29] Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *shall be entitled but not required to pay* the following expenses whether incurred prior to, on or after the date of this Order:
>
> (a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> 11. THIS COURT ORDERS that each of the Applicants shall have the right to:
>
> …
>
> (b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court*.
>
> …
>
> all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business. [Emphasis added.]

[30] Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The *ESA* sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

[31] As the motion judge stated, it is acknowledged by all parties on this motion that the *ESA* continues to apply while a company is subject to a *CCAA* restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the *CCAA*.

[32] Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the *CCAA* are the stay provisions of the Act. Section 11(3) provides:

> 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; [the Bankruptcy and Insolvency Act and the Winding Up Act]

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Analysis

[33] As earlier noted, the stay provisions of the *CCAA* are well recognized as the key to the successful operation of the *CCAA* restructuring process. As this court stated in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme…

[34] Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination

and severance pay.[2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

[35] As there is no specific protection from the general stay provision for *ESA* termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. v. Domgroup Ltd*., [2004] 1 S.C.R. 60 at para. 43.

[36] The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R.161:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

[2] The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In *Windsor Machine & Stamping Ltd. (Re)* [2009] O.J. No. 3195, decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

[37] However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access*:

> Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)

[38] Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

[39] The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past

services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

[40] The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the *CCAA* oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

[41] In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the *CCAA* proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been

considered or classified for ultimate treatment under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

[42] While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

[43] The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need.

This will have the effect of granting the "super-priority" to some. This is an acceptable result in appropriate circumstances.

[44] However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

[45] Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

[46] Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the

CCAA process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[47] The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the *CCAA* judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the *ESA*, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

[48] We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

[49] The appeal by the former employees is also dismissed.

RELEASED: November 26, 2009 (“S.T.G.”)

“S.T. Goudge J.A.”
“K.N. Feldman J.A.”
“I agree. R.A. Blair J.A.”

TAB 9

Action No. 1003 05560
Bankruptcy No. 24-115359

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

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 COW HARBOUR CONSTRUCTION LTD.

BEFORE THE HONOURABLE JUSTICE K.D. YAMAUCHI	)	
IN CHAMBERS, LAW COURTS	)	**ON FRIDAY, THE 21ST DAY**
EDMONTON, ALBERTA	)	**OF MAY, 2010.**

ORDER

UPON the applications of Cow Harbour Construction Ltd. ("**CHC**") and Deloitte & Touche Inc. as Monitor (the "**Monitor**") appointed pursuant to Order of this Honourable Court dated April 7, 2010 (the "**Initial Order**"); AND UPON having read the 5th Report of the Monitor dated May 19, 2010 (the "**5th Report**") and the 6th Report of the Monitor dated May 21, 2010 (the "**6th Report**"); AND UPON having made reference to the Affidavit of Demetri Koumarelas sworn May 19, 2010; AND UPON having made reference to the application of the employees of CHC represented by Local 955 of the International Union of Operating Engineers ("**Union**") for special protection for those employees; AND UPON having made reference to the application of DeLage Landen Financial Services Canada Inc. ("**DeLage**"); AND UPON having heard Counsel for CHC, the Monitor and various creditors.

IT IS HEREBY ORDERED AND DECLARED THAT:

A. STAY OF PROCEEDINGS AND GENERAL MATTERS

1. The Stay of Proceedings referenced at paragraph 17 of the Initial Order is hereby extended for a further period of 2 weeks to and including June 4, 2010.

2. All capitalized terms not otherwise defined herein shall have the meanings given to them in the Initial Order

B. ADJOURNMENTS

3. The DeLage application is hereby adjourned *sine die*.

4. The Union application is hereby adjourned to June 4, 2010 at 9:00 a.m.

5. Counsel for the Union and CHC are directed to formulate a recommendation to provide assurances with respect to the recoverability of Union member wages and counsel for CHC and the Union shall canvas key creditors of CHC to elicit support for such recommendation.

C. CHALLENGE TO CLASSIFICATION AS "TRUE LESSORS"

6. The Monitor's counsel shall forthwith circulate to all parties on the service list in these proceedings (the "Service List") a list of those leases that it has classified as "true leases" thereby entitling the lessors under such leases to receive ongoing monthly payments pursuant to Section 11.01 of the *Companies' Creditors Arrangement Act* ("**CCAA**").

7. Any party on the Service List will have 10 days following receipt of the Monitor's classification to dispute such classification by advising the Monitor and CHC in writing with a copy to the Service List. If no disputes are lodged with the Monitor within such 10 day period, all parties are estopped from taking any further dispute with respect to such leases and CHC is entitled to make payments to such true lessors in accordance with the terms of its agreements with such lessors and Section 11.01 of the CCAA.

8. Any party who claims to have a "true lease" with CHC, but whose agreement is not included in the Monitor's classification referred to in paragraph 6 above, shall have until June 2, 2010 to advise the Monitor's counsel, in writing, of its disagreement with such categorization, failing which such parties shall be barred from thereafter asserting that such leases are true leases for the purposes of payment under Section 11.01 of the CCAA.

9. The parties shall speak to the scheduling of an application for determination of disputes concerning alleged true leases at the June 4, 2010 Court application.

10. CHC shall pay to the Monitor's counsel, to be held in trust pending resolution of any disputes concerning true leases, all monthly payments from and after April 1, 2010 which would have been required to be paid by CHC to lessors under:

    (a) those leases for which there is a dispute as to categorization as a true lease; and

    (b) those leases which the Monitor's counsel has not been able to categorize as either capital leases or true leases.

D. CLAIMS PROCESS

11. The substantive content of the Monitor's Checklist for Lessor's Critical Supplier Claims (the "**Checklist**") and Proof of Claim for Payable Claims as at April 1, 2010 ("**Proof of Claim**" and together with the Checklist, the "**Forms**") attached to Appendix "A" to the 5th Report, are hereby approved, and in the case of the Checklist, such form shall also be adapted for and appended to the Proof of Claim to be sent to equipment lessors, and:

    (a) the Monitor shall forthwith undertake, in conjunction with CHC representatives, completion of the Checklist with respect to all equipment lessors with whom CHC has agreements;

    (b) the Monitor's counsel shall forthwith circulate the relevant Proof of Claim form to:

        (i) all lessors of equipment to CHC; and

        (ii) those parties with payables outstanding as at April 1, 2010;

    (c) all such lessors and claimants of payables shall, by June 16, 2010, complete and deliver to the Monitor so as to be received by June 16, 2010, a Proof of Claim;

    (d) any lessor or claimant of a payable failing to deliver to the Monitor by June 16, 2010, a completed Proof of Claim, shall be disqualified as a Critical Supplier and not entitled to the benefit of the Critical Suppliers' Charge, unless otherwise ordered by the Court; and

    (e) so soon as practical following June 16, 2010, the Monitor shall report to this Honourable Court, with respect to the Proofs of Claim received and other matters relating to claimants under the Critical Suppliers' Charge.

E. SALES PROCESS

12. A committee, composed of:

    (a) the Chief Restructuring Advisor;

    (b) one representative of each of CHC, The Royal Bank of Canada ("**RBC**") and the equipment lessors of CHC; and

    (c) the Monitor

    (the "Committee") shall forthwith meet and formulate a recommendation to this Honourable Court for a sales and refinancing process, to be considered by this Honourable Court at the hearing scheduled for May 28, 2010 at 9:00 a.m.

13. The Monitor shall collect and disseminate to the Committee such information with respect to the business and financial affairs of CHC as may assist in implementing a sales or refinancing process, including establishment of a data room and control thereof, and preparation of a confidential information memorandum, and shall provide to the Committee names of the parties accessing the data room and summaries of responses and inquiries advanced by such parties.

14. The Monitor shall observe but not participate in actively marketing or eliciting offers for refinancing or sale of the CHC business, except as otherwise directed by this Honourable Court or as may be requested from time to time by the Committee.

F. MAINTENANCE

15. The Advisor shall report to this Honourable Court prior to June 4, 2010, with respect to any equipment of CHC which is not necessary or required in CHC's business operations.

16. The Monitor shall report to this Honourable Court forthwith upon receiving the report from Ground Force which has been commissioned by CHC or any other substantive reports of maintenance requirements of CHC's equipment.

G. TIME TO REGISTER A LIEN

17. The Monitor's assessment of which parties qualify as "Critical Suppliers" under the Initial Order, shall be based on a 45 day time frame within which to file a Builders' Lien with any party to be at liberty to argue that 90 days is applicable to determination of Critical Supplier status, when this matter comes back before this Court after June 16, 2010.

H. DISPUTED LEASES – PAYMENT OF CRITICAL SUPPLIERS

18. The payment of claims to Critical Suppliers pursuant to paragraph 37 of the Initial Order shall be stayed until further order of this Court.

I. MONITOR'S REPORTS

19. In addition to the other reports by the Monitor as reflected herein, the Monitor shall forthwith report to this Honourable Court upon determination of the extent, if any, to which the assumptions in the cash flow projections which are attached as Appendix "D" to the 5th Report, must be adjusted based on new information with respect to anticipated revenue and expenses, and in any event prior to the application scheduled for June 4, 2010 at 9:00 a.m.

J. DISSEMINATION OF INFORMATION

20. The information provided to RBC pursuant to paragraph 19(i) – (iv) of the Commitment Letter, shall be disseminated to AIG Commercial Equipment Finance Company, Canada,

BAL Global Finance Canada Corporation, Canadian Western Bank, Caterpillar Financial Services Limited, Equirex Vehicle Leasing (2007) Inc., Finning (Canada), a division of Finning International Inc., GE Canada Equipment Financing G.P., GE Canada Asset Financing Inc. and the Monitor, coincidental with dissemination to RBC. Other parties are at liberty to speak to access to such information at the May 28, 2010 application.

"K D Yamauchi"

J.C.C.Q.B.A.

ENTERED THIS 28 DAY OF May, 2010.

CLERK OF THE COURT OF QUEEN'S BENCH OF ALBERTA

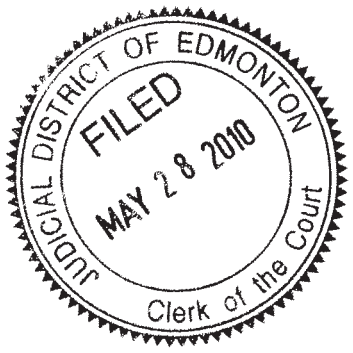
Action No. 1003 05560
Bankruptcy Action No.: 24-115359 2010

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF THE
BANKRUPTCY AND INSOLVENCY ACT,
R.S.C. 1985, c. B-3, AS AMENDED

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 COW HARBOUR
CONSTRUCTION LTD.



ORDER

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File: 101122

TAB 10

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ascent Industries Corp. (Re),*
2019 BCSC 1880

Date: 20191104
Docket: S192188
Registry: Vancouver

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

And

In the Matter of Ascent Industries Corp., Agrima Botanicals Corp., Bloom Holdings Ltd., Bloom Meadows Corp., Pinecone Products Ltd., Agrima Scientific Corp., and West Fork Holdings NV Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

In Chambers

Counsel for the Petitioners:	J. Dutrizac
Counsel for Ernst & Young Inc., the Monitor:	L. Williams
Counsel for Clarus Securities Inc.:	A. Taylor J. Buysen
Counsel for Blair Jordan and Karin Lelani:	S. Turner B. Khatra A/S
Counsel for Green Sage, LLC and OpenFource, Inc. dba Trek Global:	K. Robertson
Place and Dates of Hearing:	Vancouver, B.C. July 26, 2019
Place and Date of Judgment:	Vancouver, B.C. November 4, 2019

Introduction

[1] Clarus Securities Inc. ("Clarus") brings this application to approve a payment by the petitioners. The petitioners are currently in the midst of these creditor protection proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] Clarus seeks an order directing the petitioners to pay it $949,200, being a fee payable as a result of the completion of a sales process of the petitioners' Canadian assets after the commencement of these proceedings.

[3] There is no opposition to the payment to Clarus by any party or stakeholder, including the petitioners and the Monitor.

Background

[4] The petitioner Ascent Industries Corp. is the parent company and direct or indirect shareholder of the other petitioners. For the purposes of these reasons, I will refer to the petitioners globally as "Ascent" and also refer to the parent company by its full name.

[5] As of the fall 2018, Ascent was in the business of cultivating, producing, processing and distributing cannabis and cannabis by-products in BC and in the United States.

[6] In September 2018, Ascent's business was severely compromised by the suspension of its Canadian cannabis licenses, as issued by the Government of Canada. Ascent was unsuccessful in its attempts to lift the suspensions.

The SISP

[7] On November 26, 2018, Ascent engaged Clarus to assist with a review of its strategic alternatives. Clarus and Ascent Industries Corp. executed an engagement letter dated November 26, 2018 (the "Engagement Letter").

[8] In early December 2018, as part of its mandate, Clarus provided Ascent with a valuation of Ascent's assets. In addition, Clarus advised Ascent that, given the need to move quickly to address liquidity concerns, the best course of action was to pursue a sale of Ascent's Canadian assets as soon as possible to another producer who held the applicable licenses.

[9] In December 2018, Ascent instructed Clarus to pursue a formal sale and investment solicitation process of the Canadian assets (the "SISP"). The SISP included the usual steps seen in that process, including the establishment of a data room, the execution of non-disclosure agreements and the preparation of letters of intent (LOI) forms. It was anticipated that Clarus would assist interested parties in their due diligence. The SISP produced multiple LOIs and bids to purchase Ascent's assets.

[10] From December 2018 into February 2019, Ascent dealt with many interested parties, at all times assisted in that respect by Clarus. The process was not entirely straightforward, as some bids were withdrawn by the bidders or Ascent decided to not pursue some proposals. Also, some difficulties arose in pursuing bids given disputes with certain of Ascent's shareholders.

[11] Later in the process, Ascent determined that it was in its best interests to continue its restructuring efforts in a *CCAA* proceeding and, within that proceeding, secure outside financing so as to extend the SISP for a short period of time. On February 27 and 28, 2019, Ascent advised bidders participating in the SISP that any final bids were required by March 7, 2019. In addition, Ascent provisionally accepted the terms of an interim financing facility to allow Ascent sufficient funds to complete the SISP process.

CCAA Filing

[12] On March 1, 2019, Ascent filed for creditor protection pursuant to the *CCAA*. It appears that this was the first insolvency filing by a Canadian cannabis company.

[13] On March 1, 2019, I granted an order (the "Initial Order") authorizing an interim funding facility in favour of Ascent's major secured creditor, Gulf Bridge Ltd. ("Gulf Bridge"), in the amount of $2 million. This financing was approved rather than that offered by the original party through the SISP.

[14] The SISP continued in the lead up to the *CCAA* filing and was expected to be concluded after that date. However, the imminent *CCAA* filing generated some concern on Clarus' part about recovery of its fee after the filing.

[15] Prior to the filing, Clarus raised the matter with the Monitor (then only the proposed monitor). A representative of the Monitor confirmed the general view that the sale was anticipated to generate proceeds well in excess of claims and there were no concerns that Clarus would be paid. That representative expressed concern about Clarus seeking a court-ordered charge for its potential fee at the hearing for the Initial Order since a change to the court materials could affect the timing of the filing and thereby posed some risk for the anticipated closing of a sale transaction.

[16] At the time of the Initial Order, Ascent's management were estimating the value of the group's Canadian assets as more than sufficient to satisfy all secured and unsecured creditor claims, leaving substantial value for the shareholders.

[17] In the end, Clarus did not seek a court-ordered charge to protect its potential fee under the Engagement Letter. Clarus continued to provide its services under the Engagement Letter after the *CCAA* filing. The Initial Order did not address the ongoing efforts of Clarus under the SISP or the matter of the Engagement Letter.

[18] By the deadline under the SISP of March 7, 2019, Ascent had received multiple bids for its Canadian assets, including a bid by Gulf Bridge. On that date, Ascent accepted Gulf Bridge's bid. On March 14, 2019, Ascent entered into an asset purchase agreement ("APA") with BZAM Management Inc. ("BZAM"), Gulf Bridge's affiliate.

[19] On March 25, 2019, Ascent sought a court order approving the BZAM sale transaction under the APA. At that time, there was extensive evidence before the

Court that the process undertaken under the SISP, both before and after the *CCAA* filing, had been fair and reasonable. That evidence was largely found in the Affidavit #1 of Edward M. Drake sworn March 11, 2019.

[20] Mr. Drake is the Vice President of Investment Banking at Clarus. In his Affidavit, Mr. Drake outlines Clarus' significant expertise in the cannabis industry and the substantial efforts made by Clarus' employees throughout the "robust" SISP, both before and after the *CCAA* filing.

[21] The reasonableness of the SISP had also been the subject of favourable comment by the Monitor in the Proposed Monitor's Report dated March 1, 2019. Also, the First Report of the Monitor dated March 15, 2019 confirmed the Monitor's view that the SISP had been conducted reasonably in the context of the approval of the BZAM APA. The Monitor's conclusion was reached, having noted that the SISP was not court-approved at any point and that certain aspects of the SISP were unusual. Ultimately, the Monitor still recommended that the BZAM APA be approved.

[22] On March 25, 2019, I was satisfied that the activities and efforts under the SISP had been fair and reasonable and I granted an order approving the BZAM APA. The BZAM transaction closed on April 5, 2019, resulting in Ascent holding net proceeds of just over $29 million.

New Developments

[23] As of April 2019, the stakeholders were still generally proceeding on the basis that there were more than sufficient funds to satisfy all claims. In fact, as of mid-April 2019, Ascent had approximately $19.1 million on hand after payment of the secured loan, the interim financing loan approved by the Court and certain legal fees.

[24] On April 26, 2019, the Court approved a claims process (the "Claims Process Order" and the "Claims Process") to determine all claims, as I will discuss in more detail below. The Claims Process Order was made with a view toward the distribution of funds to proven creditors. The Claims Process was, at that time, estimated to still provide significant net funds for Ascent's shareholders.

[25] In those circumstances, even at that time, there was still no concern on the part of anyone, particularly Clarus, that it would not be paid its fee under the Engagement Letter by which it had undertaken the SISP.

[26] However, in early April 2019, the Monitor became concerned when Ascent's management advised the Monitor, for the first time, that a California subsidiary, West Fork Holdings CA, Inc. ("West Fork") (not a petitioner company), had signed a lease in Oakland, California with Green Sage, LLC ("Green Sage") in October 2018. The lease was for 10 years and was for premises that West Fork intended to occupy, but had not yet occupied by the time of the *CCAA* filing. Ascent Industries Corp. had signed a guarantee with respect to West Fork's obligations under that lease.

[27] The Monitor became further concerned when it learned from Ascent's management that Green Sage had terminated the lease, with Ascent's agreement, on June 6, 2019. This termination arose because Ascent did not pay certain amounts to Green Sage on behalf of West Fork after April 2019. This information was a surprise given that Ascent had made an earlier protective lease payment to Green Sage in mid-April 2019, which the Monitor had supported in its Second Report dated April 23, 2019 as necessary to preserve this significant capital investment in the Oakland facility. This new information was also in stark contrast to the budget projections reproduced in the Monitor's Report from April 2019 that allowed further monthly protective lease payments to Green Sage under the Oakland lease.

[28] The potential ramifications of these developments were significant and presented the distinct possibility that, in fact, the claims against Ascent would overwhelmingly exhaust the funds on hand arising from the BZAM sale.

[29] On June 26, 2019, Green Sage filed a claim in the Claims Process against Ascent Industries Corp., the guarantor under the Oakland lease, totalling approximately US$34.1 million (CDN$45.3 million). Ascent has disputed that claim and the matter is yet to be determined in these *CCAA* proceedings.

[30] At bottom, if Green Sage's claim is valid, or even substantially valid, Ascent Industries Corp. is insolvent. This is both on a balance sheet basis, in addition to a cash flow basis, the latter being the basis upon which Ascent entered these proceedings. For that reason, in its Fourth Report dated July 9, 2019, the Monitor stated that the potential claim of Green Sage, if valid, constitutes a potential material adverse change in these *CCAA* proceedings.

The Fee

[31] The Engagement Letter provides for the payment of a "Transaction Fee" upon the closing of a "Transaction". Pursuant to the Engagement Letter:

> … The term "**Transaction**" shall include a transaction or series of transactions that result in … (ii) a sale of all or substantially all of the Company's assets or a material portion of, or any interest in, the assets of the Company, by way of a negotiated purchase, lease, license, exchange, joint venture transaction or other means ….

[32] There is no doubt that the completion of the BZAM APA comes within the definition of a "Transaction" under the Engagement Letter.

[33] The relevant portion of the "Consideration for Services" section of the Engagement Letter provides:

> In consideration for its services rendered in connection with the Engagement, Clarus shall be paid the following consideration by the Company:
>
> a) Work Fee: An announcement fee of C$75,000 (the "**Work Fee**") will become due and payable upon execution of this Agreement. The Work Fee will be credited against any Transaction Fee (as defined below) actually paid to Clarus by the Company.
>
> b) Transaction Fee: If Ascent enters into a Transaction during the term of the Engagement and a Transaction is subsequently completed, a cash fee equal to (i) in the case of a Transaction that is not a Financing, 2.0% of the Transaction Value (as defined below) and (ii) in the case of a Financing, 6% of the Transaction Value (each a "**Transaction Fee**") shall be due and payable immediately upon closing of such Transaction.

[34] Pursuant to the Engagement Letter, Ascent also agreed to reimburse Clarus for all reasonable out-of-pocket expenses (not exceeding $15,000 without prior written approval) and pay applicable sales taxes.

[35] On April 8, 2019, Clarus sent Ascent an invoice for $949,200. The invoiced amount includes a Transaction Fee of $830,000, expenses of $10,000 and applicable taxes.

[36] There is no issue with the adequacy or quality of services provided by Clarus under the Engagement Letter. In addition, Ascent does not dispute that the invoice properly calculates the amount of the fees owing to Clarus under the Engagement Letter and that this amount was properly payable under the Engagement Letter immediately after the closing of the BZAM sale transaction. Likewise, the Monitor raises no issues in that respect.

The Claims Process

[37] As stated above, this Court approved the Claims Process on April 26, 2019. This was well before the Green Sage claim had arisen.

[38] The Claims Process Order allowed claimants to file "Claims", being a "Pre-Filing Claim", a "Restructuring Claim" or "Director/Officer Claim". A Pre-Filing Claim was a claim that arose from a pre-filing matter. The definition of a "Restructuring Claim" (such as post-filing disclaimer of pre-filing contracts) expressly did not include an "Unaffected Claim". The definition of "Unaffected Claim" referred generally to other claims arising after the filing and included amounts owed after that date for the supply of services.

[39] Ascent and the Monitor were to review all claims and they could revise or disallow them in their discretion in the Claims Process, which they did in respect of Clarus, as I will discuss in more detail below.

[40] Clarus was advised by the Monitor that it would be prudent to file a Proof of Claim. It is common ground that Clarus' claim was not a "Restructuring Claim" and it certainly was not a "Director/Officer Claim". Given that the liability arose under the pre-filing Engagement Letter, and that services were rendered both before and after the filing and that the triggering of payment had occurred after the filing, Clarus was understandably uncertain about whether it held a "Pre-Filing Claim" or a post-filing

claim payable in the ordinary course (i.e. an "Unaffected Claim") that was not included in the definition of "Claim" and did not require a Proof of Claim to be filed.

[41] On May 13, 2019, Clarus filed a Proof of Claim. Even so, it is accepted on this application that, despite the Claims Process, all stakeholders understood that the payment to Clarus and the priority of that payment would be referred to the Court for determination at a later time.

Clarus' Application

[42] Clarus' application for immediate payment of its fee under the Engagement Letter is founded on two major arguments:

a) That it is a "post-filing" claim (or "Unaffected Claim") payable now in priority to the claims of the pre-filing creditors, as will be determined under the Claims Process;

b) In the alternative, that it is a Pre-Filing Claim that should nevertheless be paid in priority to other pre-filing claims.

[43] Initially, Ascent disputed the claim in some fashion and also disputed the amount claimed by Clarus. However, that position was later reversed such that, on July 16, 2019, Ascent accepted Clarus' claim in full, taking no position on whether the claim should be paid in priority to other unsecured claims.

Is the Fee a Pre or Post-Filing Claim?

[44] The successful closing of the BZAM sale transaction after the *CCAA* filing triggered Ascent's obligation to pay the fee pursuant to the Engagement Letter which provides for an "immediate" payment after closing.

[45] Clarus relies on the Claims Process and the consequences of steps taken in the Claims Process as confirming its right to payment.

[46] On May 13, 2019, Clarus filed a Proof of Claim with the Monitor indicating a Pre-Filing Claim for $949,200 on an unsecured basis based on the Engagement Letter and Clarus' invoice.

[47] The Claims Process Order provided:

> 21. The Petitioners and the Monitor shall review all Proofs of Claim received and shall accept, revise or disallow each Claim as set out therein. If the Monitor, or the Petitioners in consultation with the Monitor, wish to revise or disallow a Claim, the Monitor shall … send such Creditor a Notice of Revision or Disallowance advising that the Creditor's Claim as set out in its Proof of Claim has been revised or disallowed and the reasons therefor.

[48] On June 28, 2019, the Monitor issued a Notice of Revision or Disallowance entirely disallowing Clarus' Proof of Claim stating:

> Proof of Claim is for a post-filing amounts and therefore does not meet the definition of a Claim pursuant to the Claims Process Order.

[49] The Notice of Revision or Disallowance was issued at the behest of Ascent who, at that time, also disputed the amount of Clarus' claim.

[50] The Claims Process Order provided that a creditor had the ability to dispute any revision or disallowance by filing a Notice of Dispute:

> 22. Any Creditor who is sent a Notice of Revision or Disallowance pursuant to paragraph 21 in this Claims Process Order and wishes to dispute such Notice of Revision or Disallowance shall deliver a completed Notice of Dispute to the Monitor… <u>If a Creditor fails to deliver a Notice of Dispute by such date, the Claim set out in the applicable Notice of Revision or Disallowance, if any, shall be a Proven Claim</u>.
>
> …
>
> 30. The Claims Bar Date and the Restructuring Claims Bar Date, and the amount and status of every Proven Claim as determined under the Claims Process, including any determination as to the nature, amount, value, priority or validity of any Claim shall be final for all purposes including in respect of any Plan and voting thereon (unless otherwise provided for in any subsequent Order of the Court), and, including for any distribution made to Creditors of the Petitioners…
>
> [Emphasis Added]

[51] Clarus did not file a Notice of Dispute in response to the Monitor's Notice of Revision or Disallowance, seemingly happy to accept that it had a post-filing claim or "Unaffected Claim".

[52] Clarus' argument in this respect tackles the sometimes difficult question of post-filing obligations and when and how those are paid in a *CCAA* proceeding.

[53] In *Doman Industries Ltd.*, 2004 BCSC 733, Justice Tysoe (as he then was), commented tangentially on the issues that might arise in that respect:

> [28] Once an insolvent company seeks the assistance of the court by commencing ***CCAA*** proceedings, the company comes under the supervision of the court. The supervision also involves a consideration of the interests of the broad constituency served by the ***CCAA*** mentioned in ***Skeena Cellulose*** by Newbury J.A. These interests, when coupled with the exercise by the court of its equitable jurisdiction, bring into play the requirements for fairness and reasonableness in weighing the interests of affected parties.
>
> [29] Generally speaking, the indebtedness compromised in ***CCAA*** proceedings is the debt which is in existence at the time of the ***CCAA*** filing, and the debtor company is expected to honour all of its obligations which become owing after the ***CCAA*** filing. It is common for the initial stay order or the come-back order to provide that the debtor company is to continue carrying on its business and to honour its ongoing obligations unless the court authorizes exceptions.
>
> [30] In many reorganizations under the ***CCAA,*** it is necessary for the insolvent company to restructure its business affairs as well as its financial affairs. Even if the financial affairs are restructured, the company may not be able to survive because portions of the business will continue to incur ongoing losses. In such cases, it is appropriate for the court to authorize the company to restructure its business operations, either during the currency of the ***CCAA*** proceedings or as part of a plan of arrangement. The process is commonly referred to as a downsizing if it involves certain aspects of the business coming to an end. The liabilities which are incurred as a result of the restructuring of the business operations, for such things as termination of leases and other contracts, are included in the obligations compromised by the plan of arrangement even though the debtor company will have been honouring its ongoing commitments under the leases and other contracts after the commencement of the ***CCAA*** proceedings. The inclusion of these liabilities in the plan of arrangement is an exception to the general practice of debtor companies paying the full extent of post-filing liabilities and compromising only the pre-filing liabilities.
>
> [Bold emphasis in original; underlining emphasis added.]

[54] Here, paragraph 6 of the Initial Order contemplated, but did not require, ongoing payment of expenses incurred by Ascent in carrying on its business in the

ordinary course. Paragraph 5(b) of the Initial Order similarly allowed, but did not require, payment of fees and disbursements of any "Assistants" employed by Ascent which were related to the restructuring. No one argues on this application that these provisions would allow payment to Clarus in these circumstances, likely having accepted that Clarus cannot argue that its fee is payable by reason of ordinary course dealings by Ascent.

[55] There are examples, albeit unusual ones, of a debtor incurring unsecured liabilities after a *CCAA* filing which remain outstanding when restructuring efforts fail and stop and there are insufficient funds to pay those creditors after payment of secured debts. In that sense, such creditors take some risk in allowing payables to remain outstanding without taking action to pursue recovery in the *CCAA* proceedings.

[56] This was the case in *Sanjel Corporation*, 2017 ABQB 69, leave to appeal ref'd 2017 ABCA 120. That case involved an application by a financial advisor for an order requiring payment of its full fees (namely the unsecured portion that exceeded the court-ordered charge granted in the initial order) in priority to the claim of the secured creditor. In that case, at para. 28, Justice Romaine commented that this was a pre-filing claim even if it was payable after the *CCAA* filing and even if services had been rendered after the filing.

[57] The present case is somewhat different in that all secured claims have been paid and it is only pre-filing claims that remain outstanding. Accordingly, per *Doman Industries*, all other post-filing claims (as "Unaffected Claims") incurred by Ascent (with some exceptions for "Restructuring Claims" similar to that noted in *Doman Industries*) are expected to be paid before consideration of the pre-filing creditors.

[58] The Claims Process and Clarus' involvement in that Claims Process are unusual given the circumstances. It is an interesting question whether its claim is a pre or post-filing claim given the timing of the Engagement Letter (pre-filing), the timing of the services (pre and post-filing), the triggering of the payment obligation

(post-filing) and the process under the Claims Process. As the Monitor notes, Clarus' claim arguably was unaffected by its participation in the Claims Process.

[59] In my view, however, it is not necessary to decide the issue on this application arising from the Claims Process and Clarus' decision not to dispute the Notice of Revision and Disallowance. Rather, I will consider Clarus' argument as to the circumstances of its claim and its participation under the Claims Process as substantially framing its unique circumstances in this *CCAA* proceeding.

Should Clarus' Fee Be Paid Now?

[60] Pursuant to s. 11 of the *CCAA*, this Court has the general authority to make any order that it considers "appropriate" in the circumstances. That general authority and the discretion to grant relief is substantially informed by any restrictions found in the *CCAA* (as noted in s. 11) and a consideration of the statutory objectives of the *CCAA*: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[61] I agree that there are unique circumstances in this case to support that a payment to Clarus at this time, and in priority to pre-filing claims, is appropriate.

[62] As set forth in detail in the Affidavit #1 of Mr. Drake and the Monitor's First Report, the SISP was an extensive and challenging process that included numerous steps and retracing of steps due to multiple leading bidders dropping out of the process after executing LOIs. I am satisfied that Clarus' employees were extensively involved in that process and provided real and substantial value to Ascent in formulating, conducting and assessing the SISP process.

[63] There is no question that Clarus conducted the SISP in a professional manner from early December 2018 until the *CCAA* filing on March 1, 2019.

[64] When Ascent determined that they required creditor protection to conclude a sale under the *CCAA*, Clarus was fully aware of and supported those efforts.

[65] At that time in late February 2019, Clarus could have insisted upon a court application to approve the Engagement Letter and the fee and also, obtain a court-ordered charge in its favour under s. 11.52(1)(b) of the *CCAA* to protect that fee:

> **11.52 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> …
>
> **(b)** any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> …
>
> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[66] The Initial Order granted in this proceeding reflects the general approach in these proceedings that require the Court's consideration and oversight in relation to the incurring of such non-ordinary course fees and expenses in the context of the restructuring. Ascent, Clarus and the Monitor were well aware of this requirement and that, in normal circumstances, court approval should be sought beforehand in terms of considering whether it is appropriate to allow such liability to be incurred and, pursuant to s. 11.52 of the *CCAA*, whether a charge should be granted and with what priority, if any.

[67] Clarus did not make any such application but only because the Monitor suggested to Clarus that it could create risk for Ascent if it did so. Clarus agreed not to potentially upset an imminent sale that was anticipated to realize, quite rightly, substantial value for the benefit of the stakeholders. Considering the matter now, albeit in hindsight, I agree that it is more than likely that the Court would have granted such a charge without objection from any party.

[68] At the time of the *CCAA* filing, all parties fairly believed that there would be more than enough proceeds to pay not only all of Ascent's post-filing claims, but also all their pre-filing claims. At all times, the Monitor was aware, and the Court was fully aware, of Clarus' involvement and the fact that a fee had been negotiated beforehand. Absolutely no concerns were raised at any time concerning that fee.

[69] Based on the flawed presumption that there were more than sufficient proceeds for all creditors arising from the BZAM sale, Clarus continued to provide substantial services to Ascent (and thereby other stakeholders) in these *CCAA* proceedings.

[70] Mr. Drake provided his sworn affidavit as to the conduct of the SISP in support of the proposed sale, which was accepted by the Court. Clarus worked diligently and in good faith to complete the SISP and achieve a very successful outcome to the benefit of Ascent and their stakeholders. Again, no difficulties were raised at that time with respect to Clarus' performance or its entitlement to the fee under the Engagement Letter.

[71] All of these efforts led, on March 7, 2019, to the acceptance of the successful bidder, Gulf Bridge/BZAM. The true fruits of the efforts under the SISP would be realized on the closing of the transaction in early April 2019, resulting in substantial proceeds of over $29 million.

[72] All secured creditors have been paid in full or otherwise addressed. As Clarus argues, payment of the fee under the Engagement Letter will have little or no impact on the pre-filing unsecured creditors. The concern for the other creditors is not the payment of the fee to Clarus, but rather the potential payment to Green Sage under its claim: if the Green Sage claim is disallowed, it is anticipated that all other such claims will be paid in full; if the Green Sage claim is allowed, in whole or in substantially the claimed amount, there will be little effect to the recovery even if Clarus is paid. This analysis is supported by the fact that Green Sage does not dispute Clarus' application for immediate payment.

[73] Finally, and importantly, the issue of payment in full of both Ascent's unsecured pre-filing claims and Clarus' fee has only been brought into question due to the very recent termination of the Oakland lease. It was that later event, clearly not contemplated by anyone during the SISP or even early in this *CCAA* proceeding when the BZAM transaction was finalized, that has caused a situation where Clarus might not be paid in full.

[74] Fairness is often cited as a touchstone of *CCAA* proceedings, where stakeholders are to be treated as fairly and equitably as the circumstances allow: see for example, *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344 at paras. 2-3; *Target Canada Co.*, 2015 ONSC 303 at paras. 6-7 and 24; and *Century Services* at para. 70.

[75] In my view, it would unfair in the extreme to deny Clarus its fee which has benefited all stakeholders significantly. The only reason it chose not to protect itself within these *CCAA* proceeds by obtaining approval of the Engagement Letter and a court-ordered charge is by reason of the very unusual circumstances here, which were beyond its control and beyond the expectations of all concerned parties until only very recently and well after Clarus provided its services.

Conclusion

[76] I conclude that it is appropriate to grant an order directing immediate payment by Ascent to Clarus in respect of the amounted invoiced as payable under the Engagement Letter.

"Fitzpatrick J."

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada (Procureur général) c. Contrevenant No. 10 | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence

XIV Privilege
XIV.8 Public interest immunity
XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un

cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, *(*sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General))* [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit

prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration

in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the

programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> > (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
> >
> > (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights

were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*,

at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

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