Court File No. CV-19-616077-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED (Response to Motion of Her Majesty the Queen in Right of Ontario)

April 23, 2019

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)
Marc Wasserman (LSO# 44066M)
John A. MacDonald (LSO# 25884R)
Craig Lockwood (LSO# 46668M)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers to the Applicants, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

TO: THE SERVICE LIST

Court File No. CV-19-616077-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Service List
(as of April 15, 2019)

TO: **OSLER, HOSKIN & HARCOURT LLP**

P.O. BOX 50, 1 First Canadian Place
Toronto, ON M5X 1E2

Deborah Glendinning
dglendinning@osler.com
Tel: 416.862.4714

Marc Wasserman
mwasserman@osler.com
Tel: 416.862.4908

John MacDonald
jmacdonald@osler.com
Tel: 416.862.5672

Lawyers for the Applicants, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

AND TO : **DAVIES WARD PHILLIPS & VINEBERG LLP**

155 Wellington Street West
Toronto, ON M5V 3J7

Jay Swartz
jswartz@dwpv.com
Tel: 416.863.5520

Robin Schwill
rschwill@dwpv.com
Tel: 416.863.5502

Natasha MacParland
nmacparland@dwpv.com
Tel: 416.863.5567

Lawyers for the Monitor, FTI Consulting Canada Inc.

AND TO: **FTI CONSULTING CANADA INC.**

79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, ON M4K 1G8

Greg Watson
greg.watson@fticonsulting.com
Tel: 416.649.8077

AND TO: **STIKEMAN ELLIOTT LLP**

5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

David Byers
dbyers@stikeman.com
Tel: 416.869.5697

Paul Bishop
paul.bishop@fticonsulting.com
Tel: 416.649.8053

Jeffrey Rosenberg
jeffrey.rosenberg@fticonsulting.com
Tel: 416.649.8073

Kamran Hamidi
kamran.hamidi@fticonsulting.com
Tel: 416.649.8068

Dilawar Azhar
dilawar.azhar@fticonsulting.com
Tel: 416.649.8133

The Monitor

AND TO: LAX O'SULLIVAN LISUS GOTTLIEB LLP

Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Jonathan Lisus
jlisus@lolg.ca
Tel: 416.598.7873

Matthew Gottlieb
mgottlieb@lolg.ca
Tel: 416.644.5353

Andrew Winton
awinton@lolg.ca
Tel: 416.644.5342

Nadia Campion
ncampion@lolg.ca
Tel: 416.642.3134

Lawyers for the Court-Appointed Mediator

AND TO: THORNTON GROUT FINNIGAN LLP

Toronto-Dominion Centre 100 Wellington Street West, Suite 3200 P.O.

Maria Konyukhova
mkonyukhova@stikeman.com
Tel: 416.869.5230

Lesley Mercer
lmercer@stikeman.com
Tel: 416.869.6859

Sanja Sopic
ssopic@stikeman.com
Tel: 416.869.6825

Lawyers for British American Tobacco p.l.c., B.A.T Industries p.l.c., and British American Tobacco (Investments) Limited

AND TO: BENNETT JONES LLP

3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Jeffrey Leon
leonj@bennettjones.com
Tel: 416.777.7472

Mike Eizenga
eizengam@bennettjones.com
Tel: 416.777.4879

Sean Zweig
zweigs@bennettjones.com
Tel: 416.777.6254

Lawyers for the Province of British Columbia, Province of Manitoba, Province of New Brunswick, Province of Nova Scotia, Province of Prince Edward Island and Province of Saskatchewan, in their capacities as plaintiffs in the Government Medicaid Actions (as defined in the Application Record of the Applicants)

AND TO: FISHMAN FLANZ MELAND PAQUIN LLP

4100-1250 René-Lévesque Blvd. West

Box 329 Toronto, ON M5K 1K7

Robert I. Thornton
rthornton@tgf.ca
Tel: 416.304.0560

Leanne M. Williams
lwilliams@tgf.ca
Tel: 416.304.0060

Rebecca L. Kennedy
rkennedy@tgf.ca
Tel: 416.304.0603

Rachel A. Bengino
rbengino@tgf.ca
Tel: 416.304.1153

Mitch Grossell
mgrossell@tgf.ca
Tel: 416.304.7978

Lawyers for JTI-Macdonald Corp.

AND TO: BLAKE, CASSELS & GRAYDON LLP

199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario M5L 1A9

Pamela Huff
pamela.huff@blakes.com
Tel: 416.863.2958

Linc Rogers
linc.rogers@blakes.com
Tel: 416.863.4168

Chris Burr
chris.burr@blakes.com
Tel: 416.863.3261

Montreal, Quebec H3A 3H3

Avram Fishman
afishman@ffmp.ca
Tel: 514.932.4100

Mark E. Meland
mmeland@ffmp.ca
Tel: 514.932.4100

Margo R. Siminovitch
msiminovitch@ffmp.ca

Jason Dolman
jdolman@ffmp.ca

Nicolas Brochu
nbrochu@ffmp.ca

CHAITONS LLP

5000 Yonge Street 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton
harvey@chaitons.com
Tel: 416.218.1129

Lawyers for Conseil québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau (Quebec Class Action Plaintiffs)

AND TO: MINISTRY OF THE ATTORNEY GENERAL

Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Jacqueline L. Wall
jacqueline.wall@ontario.ca
Tel: 416.325.8435

Shahana Kar
shahana.kar@ontario.ca
Tel: 416.314.2080

Lawyers for Her Majesty the Queen in right of Ontario

Aryo Shalviri
aryo.shalviri@blakes.com
Tel: 416.863.2962

Caitlin McIntyre
caitlin.mcintyre@blakes.com
Tel: 416.863.4174

Lawyers for Deloitte Restructuring Inc., in its capacity as Monitor of JTI-Macdonald Corp.

AND TO: KSV ADVISORY INC.
150 King St W #2308,
Toronto, ON M5H 1J9

Bobby Kofman
bkofman@ksvadvisory.com
Tel: 416.932.6228

Noah Goldstein
ngoldstein@ksvadvisory.com
Tel: 416.932.6207

Financial Advisor for the Provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan, in their capacities as plaintiffs in the HCCR Legislation claims

AND TO: STEWART MCKELVEY
1959 Upper Water Street, Suite 900
PO Box 997
Halifax, NS, B3J 2X2

Robert G. MacKeigan, Q.C.
robbie@stewartmckelvey.com
Tel: 902.444.1771

Lawyers for Sobeys Capital Incorporated

AND TO: KLEIN LAWYERS

100 King Street West, Suite 5600
Toronto, ON M5X 1C9

Douglas Lennox
dlennox@callkleinlawyers.com
Tel: 416.506.1944

Lawyers for the representative plaintiff, Kenneth Knight, in the certified British Columbia class action, *Knight v. Imperial Tobacco Canada Ltd,* Supreme Court of British Columbia, Vancouver Registry No. L031300.

AND TO: JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

800 - 304 8 Ave SW
Calgary, AB T2P 1C

Carsten Jensen
jensenc@jssbarristers.ca
Tel: 403.571.1526

Sabri Shawa
shawas@jssbarristers.ca
Tel: 403.571.1527

Stacy Petriuk
petriuks@jssbarristers.ca
Tel: 403.571.1523

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Kenneth T. Rosenberg
ken.rosenberg@paliareroland.com

Lily Harmer
lily.harmer@paliareroland.com

Massimo (Max) Starnino
max.starnino@paliareroland.com

Danielle Glatt
danielle.glatt@paliareroland.com

Elizabeth Rathbone
elizabeth.rathbone@paliareroland.com

Tel: 416.646.4300

Lawyers for Her Majesty in Right of Alberta

AND TO: MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Craig A. Mills
cmills@millerthomson.com
Tel: 416.595.8596

Lawyers for North Atlantic Operating Company, Inc.

AND TO: BLUETREE ADVISORS

First Canada Place
100 King Street West, Suite 5600
Toronto, ON M5X 1C9

Bill Aziz
baziz@bluetreeadvisors.com
Tel: 416.640.7122

Chief Restructuring Officer of JTI-Macdonald Corp.

AND TO: ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Ontario Regional Office, Tax Law Section
120 Adelaide Street West, Suite 400
Toronto, Ontario, M5H 1T1

Diane Winters

AND TO: CASSELS BROCK & BLACKWELL LLP

2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Shayne Kukulowicz

diane.winters@justice.gc.ca
Tel: 647.256.7459

Lawyers for the Minister of National Revenue

skukulowicz@casselsbrock.com
Tel: 416.860.6463

Jane Dietrich
jdietrich@casselsbrock.com
Tel: 416.860.5223

Joseph Bellissimo
jbellissimo@casselsbrock.com
Tel: 416.860.6572

Monique Sassi
msassi@casselsbrock.com
Tel: 416.860.6886

Lawyers for Ernst & Young Inc., in its capacity as court-appointed monitor of Rothmans, Benson & Hedges, Inc.

AND TO: ERNST & YOUNG INC.

Ernst & Young Tower
100 Adelaide Street West
P.O. Box 1
Toronto, ON M5H 0B3

Murray A. McDonald
Murray.A.McDonald@ca.ey.com
Tel: 416.943.3016

Brent Beekenkamp
Brent.R.Beekenkamp@ca.ey.com
Tel: 416.943.2652

Edmund Yau
Edmund.Yau@ca.ey.com
Tel: 416.943.2177

Monitor of Rothmans, Benson & Hedges, Inc.

AND TO: WESTROCK COMPANY OF CANADA

A-15400, Sherbrooke Est
Montréal, Québec, H1A 3S2

Dean Jones
dean.jones@westrock.com
Tel: 514.642.9251

Senior Counsel, WestRock Company of Canada

AND TO: MCCARTHY TÉTRAULT LLP

66 Wellington Street West, Suite 5300
TD Bank Tower, Box 48
Toronto, ON M5K 1E6

James Gage
jgage@mccarthy.ca
Tel: 416-601-7539

AND TO: BCF LLP

1100, René-Lévesque Blvd.
Suite 2500
Montréal (Québec) H3B 5C9

Me Bertrand Giroux
bertrand.giroux@bcf.ca
Tel: 514.397.6935

Heather Meredith
hmeredith@mccarthy.ca
Tel: 416-601-8342

Paul Steep
psteep@mccarthy.ca
Tel: 416.601.7998

Trevor Courtis
tcourtis@mccarthy.ca
Tel: 416.601.7643

Sharon Kour
skour@mccarthy.ca
Tel: 416.601.8305

Lawyers for Rothmans, Benson & Hedges, Inc.

AND TO: GOWLING WLG (CANADA) LLP

1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Derrick Tay
derrick.tay@gowlingwlg.com
Tel: 416.369.7330

Clifton Prophet
clifton.prophet@gowlingwlg.com
Tel: 416.862.3509

Steven Sofer
steven.sofer@gowlingwlg.com
Tel: 416.369.7240

Lawyers for Philip Morris International Inc.

AND TO: PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Kenneth T. Rosenberg
ken.rosenberg@paliareroland.com

Lily Harmer
lily.harmer@paliareroland.com

Massimo (Max) Starnino
max.starnino@paliareroland.com

Danielle Glatt
danielle.glatt@paliareroland.com

Elizabeth Rathbone
elizabeth.rathbone@paliareroland.com

Tel: 416.646.4300

ROEBOTHAN MCKAY MARSHALL

Paramount Building
34 Harvey Road, 5th Floor
St. John's, NL A1C 3Y7

Glenda Best

Me Mireille Fontaine
mireille.fontaine@bcf.ca
Tel: 514.397.4561

Lawyers for the Top Tube Company

gbest@wrmmlaw.com
Tel: 1.705.576.2255

Lawyers for Her Majesty the Queen in Right of Newfoundland

AND TO: SUPERINTENDENT OF FINANCIAL SERVICES

Ministry of the Attorney General Civil Law Division, FSCO Branch
5160 Yonge Street, 17th Floor, Toronto ON M2N 6L9

Michael Scott
Michael.Scott@fsco.gov.on.ca
Tel: 416.226.7834

Counsel for the Superintendent of Financial Service

AND TO: KAPLAN LAW

393 University Av., Suite 2000
Toronto ON M5G 1E6

Ari Kaplan
ari@kaplanlaw.ca
Tel: 416.565.4656

Counsel to the Former Genstar U.S. Retiree Group Committee

AND TO: MCMILLAN LLP

Brookfield Place
181 Bay St, Suite 4400
Toronto ON M5J 2T3

Wael Rostom
wael.rostom@mcmillan.ca
Tel: 416.865.7790

Michael J. Hanlon
michael.hanlon@mcmillan.ca
Tel: 416.987.5061

Lawyers for The Bank of Nova Scotia

AND TO: MERCHANT LAW GROUP LLP

c/o #400 - 333 Adelaide St. West
Toronto, Ontario M5V 1R5

Evatt Merchant, QC
emerchant@merchantlaw.com

Chris Simoes
csimoes@merchantlaw.com

Tel: 613.366.2795

Lawyers for Suzanne Jacklin, Barbara Bourassa on behalf of the Estate of Mitchell David Bourassa, Roderick Dennis Mcdermid, Linda Dorion, Thelma Adams, Ben Semple, and Deborah Kunta, in each of their capacities as Representative Plaintiffs in the relevant class action proceedings.

AND TO: LABSTAT INTERNATIONAL INC.

262 Manitou Drive
Kitchener, ON N2C 1L3

AND TO: CHERNOS FLAHERTY SVONKIN LLP

220 Bay Street, Suite 700
Toronto, Ontario M5J 2W4

Kimberly Stevenson Chow (CFO)
kstevens@labstat.com

Jason Macintosh (Controller)
jmacintosh@labstat.com

Tel: 519.748.5409 x565

Patrick Flaherty
pflaherty@cfscounsel.com
Tel: 416.855.0403

Bryan D. McLeese
bmcleese@cfscounsel.com
Tel: 416.855.0414

STOCKWOODS LLP

77 King Street West, Suite 4130
TD North Tower, P.O. Box 140, TD Centre, Toronto, ON M5K 1Hl

Brian Gover
briang@stockwoods.ca
Tel: 416.593.2489

Justin Safayeni
justins@stockwoods.ca
Tel: 416.593.3494

Lawyers for R.J. Reynolds Tobacco Company and R J. Reynolds Tobacco International Inc.

AND TO: BRAUTI THORNING LLP

161 Bay Street, Suite 2900 Toronto, ON M5J 2S1

Steven Weisz
sweisz@btlegal.ca
Tel:416.304.6522

INCH HAMMOND PROFESSIONAL CORPORATION

1 King Street West, Suite 500
Hamilton, ON L8P 4X8

Amanda McInnis
amcinnis@inchlaw.com
Tel: 905.525.0031

Lawyers for Grand River Enterprises Six Nations Ltd.

AND TO: MILLER THOMSON LLP

1000, rue De La Gauchetière Ouest, bureau 3700, Montréal (Québec) H3B 4W5

Hubert Sibre
hsibre@millerthomson.com
Tel: 514.879.4088

Lawyer for AIG Insurance Canada

AND TO: STROSBERG SASSO SUTTS LLP

1561 Ouellette Avenue
Windsor, Ontario N8X 1K5

HARVEY T. STROSBERG, Q.C.
harvey@strosbergco.com
Tel: 519.561.6228

WILLIAM V. SASSO (LSO# 12134I)
wvs@strosbergco.com
Tel: 519.561.6222

DAVID ROBINS (LSO# 42332R)
drobins@strosbergco.com
Tel: 519.561.6215

Lawyers for The Ontario Flue-Cured Tobacco Growers' Marketing Board, plaintiff in Ontario Superior Court of Justice Court File No. 1056/10CP (Class Proceedings).

AND TO: FOGLER, RUBINOFF LLP

Suite 3000, P.O. Box 95
Toronto-Dominion Centre
77 King Street West
Toronto, Ontario M5K 1 G8

Vern W. DaRe
vdare@foglers.com
Tel: 416.941.8842

CANADIAN CANCER SOCIETY

116 Albert Street, Suite 500
Ottawa, ON K1 P 5G3

Robert Cunningham
rcunning@cancer.ca
Tel: 613.565.2522 ext. 4981

Lawyers for Canadian Cancer Society

E-Mail List

jswartz@dwpv.com; nmacparland@dwpv.com; rschwill@dwpv.com; nrenner@dwpv.com; szaifman@dwpv.com; dglendinning@osler.com; mwasserman@osler.com; jmacdonald@osler.com; greg.watson@fticonsulting.com; paul.bishop@fticonsulting.com; jeffrey.rosenberg@fticonsulting.com; kamran.hamidi@fticonsulting.com; dilawar.azhar@fticonsulting.com; dbyers@stikeman.com; mkonyukhova@stikeman.com; jlisus@lolg.ca; mgottlieb@lolg.ca; awinton@lolg.ca; ncampion@lolg.ca; leonj@bennettjones.com; eizengam@bennettjones.com; zweigs@bennettjones.com; rthornton@tgf.ca; lwilliams@tgf.ca; rkennedy@tgf.ca; rbengino@tgf.ca; mgrossell@tgf.ca; afishman@ffmp.ca; mmeland@ffmp.ca; harvey@chaitons.com; pamela.huff@blakes.com; linc.rogers@blakes.com; chris.burr@blakes.com; jacqueline.wall@ontario.ca; shahana.kar@ontario.ca; bkofman@ksvadvisory.com; ngoldstein@ksvadvisory.com; robbie@stewartmckelvey.com; dlennox@callkleinlawyers.com; jensenc@jssbarristers.ca; shawas@jssbarristers.ca; petriuks@jssbarristers.ca; baziz@bluetreeadvisors.com; diane.winters@justice.gc.ca; cmills@millerthomson.com; skukulowicz@casselsbrock.com; jdietrich@casselsbrock.com; jbellissimo@casselsbrock.com; msassi@casselsbrock.com; Murray.A.McDonald@ca.ey.com; Brent.R.Beekenkamp@ca.ey.com; Edmund.Yau@ca.ey.com; dean.jones@westrock.com; psteep@mccarthy.ca; hmeredith@mccarthy.ca; jgage@mccarthy.ca; bertrand.giroux@bcf.ca; mireille.fontaine@bcf.ca; derrick.tay@gowlingwlg.com; clifton.prophet@gowlingwlg.com; steven.sofer@gowlingwlg.com; lmercer@stikeman.com; ssopic@stikeman.com; aryo.shalviri@blakes.com; caitlin.mcintyre@blakes.com; ken.rosenberg@paliareroland.com; lily.harmer@paliareroland.com; max.starnino@paliareroland.com; danielle.glatt@paliareroland.com; elizabeth.rathbone@paliareroland.com; karen.lam@paliareroland.com; sarita.sanasie@paliareroland.com; natalia.botelho@paliareroland.com; gbest@wrmmlaw.com; msiminovitch@ffmp.ca; jdolman@ffmp.ca; nbrochu@ffmp.ca; ari@kaplanlaw.ca; Michael.Scott@fsco.gov.on.ca; WMalik@osler.com; wael.rostom@mcmillan.ca; michael.hanlon@mcmillan.ca; emerchant@merchantlaw.com; csimoes@merchantlaw.com; kstevens@labstat.com; jmacintosh@labstat.com; pflaherty@cfscounsel.com; bmcleese@cfscounsel.com; briang@stockwoods.ca; justins@stockwoods.ca; skour@mccarthy.ca; tcourtis@mccarthy.ca; kfick@mccarthy.ca; sweisz@btlegal.ca; amcinnis@inchlaw.com; hsibre@millerthomson.com; tbarbiero@dwpv.com; harvey@strosbergco.com; wvs@strosbergco.com; drobins@strosbergco.com; dtempler@mccarthy.ca; vdare@foglers.com; rcunning@cancer.ca

Courtesy Copy List

TO: **DEBTWIRE**

1501 Broadway, 8th Floor
New York, NY 10036

John Bringardner
John.Bringardner@acuris.com
Tel: 646.378.3143

Global Legal Editor

INDEX

Tab 1

1992 CarswellOnt 185
Ontario Court of Justice (General Division)

Campeau v. Olympia & York Developments Ltd.

1992 CarswellOnt 185, [1992] O.J. No. 1946, 14 C.B.R. (3d) 303,
14 C.P.C. (3d) 339, 35 A.C.W.S. (3d) 679, 3 W.D.C.P. (2d) 575

ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA

R.A. Blair J.

Judgment: September 21, 1992
Docket: Docs. 92-CQ-19675, B-125/92

Counsel: *Stephen T. Goudge, Q.C.* and *Peter C. Wardle*, for the plaintiffs.
Peter F. C. Howard, for National Bank of Canada.
Yoine Goldstein, for Olympia & York Development Limited and 857408 Ontario Inc.

Headnote

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General

Stay of proceedings — Companies' Creditors Arrangement Act — Application for lifting of CCAA stay refused where proposed action being part of "controlled stream" of litigation and best dealt with under CCAA.

The plaintiffs brought an action against the defendant, O & Y, alleging that it breached an obligation to assist in the restructuring of C Corp. The plaintiffs also alleged that O & Y actually frustrated the individual plaintiff's efforts to restructure C Corp.'s Canadian real estate operation. Damages in the amount of $1 billion for breach of contract or, alternatively, for breach of fiduciary duty, plus punitive damages of $250 million were claimed. The plaintiffs also claimed against the defendant bank alleging breach of fiduciary duty, negligence and breach of the provisions of s. 17(1) of the *Personal Property Security Act* (Ont.). Damages in the amount of $1 billion were claimed against the bank. This action was brought two weeks before an order was made extending the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to O & Y.

The plaintiffs brought a motion to lift the stay imposed by the order under the CCAA and to allow them to pursue their action against O & Y. They argued that the claim would be better dealt with in the context of the action than in the context of the CCAA proceedings as it was uniquely complex.

The bank brought a motion opposing the plaintiffs' motion and seeking an order staying the plaintiffs' action against it pending the disposition of the CCAA proceedings. The bank argued that the factual basis of the claim against it was entirely dependent on the success of the allegations against O & Y and that the claim against O & Y would be better addressed within the context of the CCAA proceedings.

Held:

The plaintiffs' motion was dismissed and the bank's motion was allowed.

In considering whether to grant a stay, a court must look at the balance of convenience. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts is something with which the court must not lightly interfere. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay. The onus of satisfying the court is on the party seeking the stay.

The CCAA proceedings in this case involved numerous applicants, claimants and complex issues and could be considered a "controlled stream" of litigation; maintaining the integrity of the flow was an important consideration.

The stay under the CCAA was not lifted, and a stay made under the court's general jurisdiction to order stays was imposed, preventing the continuation of the action against the bank. There was no prejudice to the plaintiffs arising from these decisions, as the processing of their action was not precluded, but merely postponed. Were the CCAA stay lifted, there might be great prejudice to O & Y resulting from the diversion of its attention from the corporate restructuring process in order to defend the complex action proposed. There might not, however, be much prejudice to the bank in allowing the plaintiffs' action to proceed against it; however, such a proceeding could not proceed very far or effectively without the participation of O & Y.

***R.A. Blair J*:**

1 These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

> a) the interests of a debtor which has been granted the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,
>
> b) the interests of a unliquidated contingent claimant to pursue an action against that debtor *and* an arm's length third party, on the other hand.

2 At issue is whether the court should resort to an interplay between its specific power to grant a stay, under s. 11 of the C.C.A.A., and its general power to do so under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

3 This action was commenced on April 28, 1992, and the statement of claim was served before May 14, 1992, the date on which an order was made extending the protection of the C.C.A.A. to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

4 The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

5 The story begins, according to the statement of claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10 per cent of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichmann (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc. (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as chairman and CEO of Campeau Corporation and that company, itself, had filed for protection under the C.C.A.A. (from which it has since emerged, bearing the new name of Camdev Corp.).

6 In the meantime, in September 1989, the Olympia & York defendants, through Mr. Paul Reichmann, had entered into a shareholders' agreement with the plaintiffs in which, it is further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York

breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as chairman and CEO and majority shareholder of Campeau Corporation.

7 Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million are also sought.

The Claim against National Bank of Canada

8 Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

9 In 1988 the plaintiffs had pledged some of their shares in Campeau Corporation to the bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the plaintiffs defaulted on its obligations under the loan and the bank took control of the pledged shares. Thereafter, the statement of claim alleges, the bank became more active in the management of Campeau, through its nominees on the board.

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

12 The first motion is by the Campeau plaintiffs to lift the stay imposed by the order of May 14, 1992 under the C.C.A.A. and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present C.C.A.A. proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

13 The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

14 The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure*. The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the com pany except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of C.C.A.A. Proceedings

17 By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

18 In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be,*

seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.

(emphasis added)

20 I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

21 I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p.779.

22 *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case-managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the C.C.A.A. do not involve a large number of separate actions, they do involve numerous applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad-sweeping issues. In that sense the C.C.A.A. proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

24 In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with — at least for the purposes of that proceeding — in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York — whose alleged misdeeds are the real focal point of the attack on both sets of defendants — is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth

proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim*, supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

Tab 2

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

UNOFFICIAL TYPED ENDORSEMENT
OF JUSTICE MCEWEN

April 17, 2019

For ease of reference I am providing this endorsement by way of the QCAP Factum which references all three Applications.

For reasons to soon follow an order shall go [out] staying any and all current proceedings against the Applicants and related entities as set out in the Initial Orders, and prohibiting the commencement of any further proceedings by or against them except with leave of this Court. This includes any applications for leave to the Supreme Court of Canada.

It is further ordered that, to the extent of any prescription, time or limitation period relating to any proceeding by or against the Applicants that is stayed pursuant to this order may expire, the term of such prescription, time or limitation period shall be deemed to be extended by a period equal to the Stay Period.

This endorsement is being provided to all counsel who attended at the motion.

McEwen J.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF:

JTI-MACDONALD CORP. — **Court File No. CV-19-615862-00CL**

IMPERIAL TOBACCO CANADA LIMITED AND **IMPERIAL TOBACCO COMPANY LIMITED** — **Court File No. CV-19-616077-00CL**

ROTHMANS, BENSON & HEDGES INC. — **Court File No. CV-19-616779-00CL**

4 April 2019

17 April 19

For ease of reference I am providing this endorsement by way of the QCAP Factum which references all three Applications.

For reasons to soon follow an order shall go staying any and all current proceedings against the Applicants and related entities as set out in the Initial Orders, and prohibiting the commencement of any further proceedings by or against them except with leave of this Court. This includes any application for leave to the Supreme Court of Canada.

It is further ordered that, to the extent of any prescription, time or limitation period relating to any proceeding by or against the Applicants that is stayed pursuant to this order may expire, the term of such prescription, time or limitation period shall be deemed to be extended by a period equal to the stay period.

This endorsement is being provided to all counsel who attended at the motion.

mcEwen J.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS

FISHMAN FLANZ MELAND PAQUIN LLP
Barristers and Solicitors
4100-1250 René-Lévesque Blvd. West
Montreal QC H3A 3H3
Tel: 514-932-4100

Avram Fishman
afishman@ffmp.ca
Tel: (514) 932-4100

Mark E. Meland
mmeland@ffmp.ca
Tel : (514) 932-4100

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton
harvey@chaitons.com
Tel: (416) 218-1129

George Benchetrit
george@chaitons.com
Tel : (416) 218-1141

Attorneys for Conseil Québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau
(Quebec Class Action Plaintiffs)

Tab 3

Court of Queen's Bench of Alberta

Citation: Re 843504 Alberta Ltd. (Bankruptcy and Insolvency Act), 2003 ABQB 1015

Date: 20031209
Docket: 0303 19663
Registry: Edmonton

IN THE MATTER of the *Bankruptcy and Insolvency Act* R.S.C. 1985, C. B-3, As Amended; and 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 843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

Memorandum of Case Management Decision
of the
Honourable Madam Justice J.E. Topolniski

Introduction

[1] EdgeStone Capital Mezzanine Fund II Ltd., (EdgeStone) a creditor of 84305 Alberta LTD., more commonly known as Skyreach Equipment, and the Monitor of Skyreach, appointed under an Initial Order pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), seek an extension of the stay of proceedings. With the exception of GE Commercial Distribution Finance Canada Inc. (GE), Skyreach's other creditors oppose the extension of the stay. These reasons further expand upon my oral decision on the reasons given on November 10, 2003.

Facts

[2] Skyreach Equipment, is a well-known name in Alberta. The company specializes in renting, servicing and selling industrial lifts and aerial work platforms to a variety of business sectors. The Skyreach name, up until a short time ago, graced the arena that is home to the Edmonton Oilers, and continues to be the name of

another arena, home to the Kelowna Rockets. It has 142 employees, and operates 12 branches – 19 in Alberta and 3 in British Columbia.

[3] Since this spring Skyreach has operated under the threat of enforcement proceedings by its two general secured creditors, G.E. and EdgeStone. It tried to negotiate a going concern sale.

[4] On September 19 2003, days after making an arrangement with EdgeStone to seek protection under the CCAA, Skyreach filed a Notice of Intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (BIA). EdgeStone then chose to apply instead for the CCAA stay of proceedings, and after a contested motion on October 9, 2003, Skyreach was placed under the protective umbrella of the CCAA for 30 days (Initial Order). PriceWaterhouseCoopers was appointed Monitor, with power to operate the business.

[5] EdgeStone and the Monitor apply to have the stay extended. The PIMSI and mortgage creditors oppose the extension application. It is common ground that the onus in applications of this nature is on the applicant to satisfy the test in section 11(6) of the CCAA that:

a) circumstances exist to make the extension order appropriate and
b) the applicant is acting in good faith and diligently.

The test is not whether the plan of arrangement is doomed to failure – That is the test for terminating, not extending, a stay of proceedings (***Re Rio Nevada Energy Inc***. (2000), 283 A.R. 146 (Q.B.).

[6] The PIMSI and mortgage creditors argue that EdgeStone has not discharged the onus, asserting that the proceeding has been, and continues to be, an impermissible receivership under the guise of a CCAA restructuring. Further, they object to the Monitor's application on the basis that it is inappropriate for it to take a position in opposition to one of the parties.

[7] EdgeStone and the Monitor rely on the Monitor's *Third Report to the Court* and an excerpt from an *Information Circular.* as the necessary evidence of good faith and due diligence in pursuing a plan of arrangement. EdgeStone's officer's affidavit says that, based upon his review of the Monitor's reports, the Monitor is acting diligently, in good faith, and that circumstances exist to warrant the extension.

1. The Initial Order

[8] On October 9th, EdgeStone applied to vacate the Notice of Intention and to obtain a CCAA stay of proceedings. GE supported the application. Skyreach took no position. A number of creditors holding PIMSI and mortgage security opposed the initial application on the ground that the CCAA process would benefit only EdgeStone, and therefore was really a receivership for EdgeStone's benefit at the expense of others and an abuse of the CCAA.

[9] Appreciating the PIMSI creditors' concerns, I granted the Initial Order with conditions designed to protect the interests of all stakeholders. It provided for the usual 30-day moratorium to permit the

development of, at least, a germ of a plan of arrangement, and further required court approval of any sale of assets for more than $100,000 and, in the case of assets subject to PIMSI's, $20,000. It gave the power to carry on business and to solicit invitations from prospective purchasers to the Monitor, and created an expedited process for proving claims for creditors holding PIMSI and mortgage security.

[10] The CCAA contemplates a monitor having powers beyond those required to fulfil the traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and the court. Section 11.7(3) of the CCAA leaves discretion in the court to authorize functions other then those specifically enumerated by Parliament. Further support for this proposition is the explicit recognition of a monitor carrying on the debtor's business in section 11.8. (*Syndicat national de l'amiante d'Asbestos Inc. v. Jeffrey Mines Inc*. (2003) 40 C.B.R. (4th) 95; [2003] R.J.Q. 420 (C.A.). The Monitor's ability to carry on business, at least during the Initial Order phase, was considered necessary given the undisputed evidence of corporate interference and allegations of conflict of interest by Skyreach's Director and CEO, and the imminent resignation of the debtor's directors.

2. Subsequent Motions

[11] The minutes of the initial order were settled. In the course of that hearing the Monitor's powers were reviewed to ensure that it had the powers necessary to carry on the business and to establish a process for soliciting offers to purchase assets. The intention was to provide sufficient, but not overreaching powers, given the unusual situation of the Monitor, rather than the company, operating the business.

[12] GE also sought an order amending an earlier order granted by another judge which permitted funding for Skyreach by GE on specific terms. Notice had not been given to most other creditors. The amending order was refused, with the ability to reapply on notice to affected parties.

3. This Application

[13] The CCAA is intended to provide a structured, court supervised environment for the negotiation of compromises between a debtor and its creditors for the benefit of not only those parties, but also other stakeholders such as employees and shareholders. At the end of day, the objective is to enable the debtor to continue in business so that all stakeholders benefit (*United Auto and Truck Parts Ltd.* v. *Aziz* (2000), 135 B.C.A.C. 96, 2000 BCCA 146 at paras. 10 and 11). The CCAA is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders position at the expense of others - there should be no confiscation of legal rights. This requires a balancing of interests, rights and prejudices to "see if rights are compromised ... and have the pain of the compromise equitably shared." (*Sammi Atlas Inc. (Re),* [1998] O.J. No. 1089 (Ont. Gen. Div.) citing *Re Campeau Corp*., [1992] O.J. No. 237, 10 CBR (3rd) 104 (Ont. Gen. Div.)at 109).

[14] As acknowledged by LoVecchio J. in *Blue Range Resources Corp.,* (1999) 245 A.R. 154,1999 ABQB 1038, reorganization of a company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organizational and management restructuring, downsizing, refinancing, or debt to equity conversion – the solutions

are generally limited only by the creativity of those structuring the plan of arrangement. That said, the solutions in Alberta generally expect the corporate entity to continue in some form or another and do not allow for a liquidation proposal unless exceptional circumstances exist to justify it, notwithstanding that the CCAA seems to allow it (*Royal Bank of Canada v. Fracmaster Ltd.* (1999), 244 A.R. 93, 11 C.B.R. (4th) 230 (C.A.)). Simply put, in this province the corporate entity is expected to continue in some form or another unless there are exceptional circumstances. Liquidation proceedings are typically reserved for receiverships, windings up or bankruptcy.

[15] This is quite different than in Ontario where apparently debtors can use the benefits of the legislation when there is no prospect of corporate survival or no plan of arrangement is proposed: *Anvil Range Mining Corp.* (2002), 25 C.B.R. (4th) 1 (Ont. Sup. Ct. Just.), aff'd (2002) 34 C.B.R. (4th) 157 *; Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at p. 32; *Re Olympia & York Developments* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div.) at p. 104; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 46.

EdgeStone's Application and Evidence

[16] As noted previously, EdgeStone's affidavit is based upon the deponent's review of the Monitor's reports and merely asserts that the Monitor is acting diligently and in good faith, and that circumstances exist to warrant the extension. This offers nothing more than a conclusion about the very determinations that the court is required to make in deciding whether the test has been satisfied. It is of very little assistance, and this form of conclusory affidavit is not acceptable: *Alberta (Human Rights Commission) v. Alberta Blue Cross Plan* (1983), 48 A.R. 192 (C.A.) at para. 8; *Allen v. Alberta*, [2001] A.J. No. 863, 2001 ABCA 171 at para. 8; *Hovsepian v. Westfair Foods Ltd.*, [2003] A.J. No. 1133, 2003 ABQB 641. I note that the Monitor's report is filed with the court for information purposes and is available to me.

[17] GE supports EdgeStone's application, acknowledging that it expects to be paid out in full through an asset sale, and that it continues to be paid full interest at a rate of $15,000 per day on its loan under the terms of a funding order granted earlier by another judge.

The Monitor's Duties, Application, and Evidence

[18] The appropriateness of the Monitor's application to extend the stay of proceedings was questioned on the basis that by its actions, the Monitor was favouring the debtor and EdgeStone.

[19] As an officer of the court, the Monitor owes a duty to treat all creditors reasonably and fairly. Like a court-appointed receiver or liquidator, its duties are those of a fiduciary.

[20] Because of the special circumstances that existed at the date of the Initial Hearing, the Monitor was given the power to carry on Skyreach's business. With that power comes a risk, be it perceived or real, of conflict of interest, and where the Monitor advocates a position or a plan of arrangement that risk may be exacerbated. In making its application for the extension the Monitor presumed that it was reasonable for it to do so since it was operating the business and there were no directors in place. Although motivated by good intentions this gave rise to a perception of conflict of interest, something that must be jealously guarded against. The appointment of a Chief Restructuring Officer or the appointment of new or returning directors can easily avoid perceptions of bias.

[21] The Monitor relies on an affidavit that attaches its Third Report to the Court and two pages from an Information Circular. The report indicates that since the Initial Order, the Monitor has taken control of the business, working closely with management. The report indicates that the Monitor has identified excess equipment and undertaken an extensive process to solicit offers for:

a) all or part of the debtor's assets business and undertakings,
b) refinancing,
c) acquisition of the shares of Skyreach (subject to the approval of EdgeStone which holds and may exercise the shares under its security), or
d) any combination thereof.

[22] The Monitor has advertised in newspapers, posted information on its national electronic bulletin board and web site, delivered some 300 Information Circulars to prospective purchasers, and set up a data room. Negotiations have begun with prospective purchasers, one of whom has expressed an interest in buying Skyreach's significant tax losses. Counsel for the Monitor, EdgeStone, and GE argued that only a sale of the tax losses will result in some payment to the unsecured creditors at the end of the day. Whether this is likely given voting structures under the CCAA is, of course, yet to be seen.

The proposed restructuring process

[23] The Monitor proposes the following restructuring process and time line. The Monitor will:

1. will solicit offers until November 28;
2. report the results of the solicitations to the Court by December 19
3. close transactions after obtaining court approval by January 30 2004, and
4. finally, formulate a plan of arrangement for presentation to the creditors by February 28, 2004.

~~[24]~~ Clearly, this process contemplates the sale of Skyreach's assets, either hard assets or shares, well before a plan is developed and presented to the creditors.

[25] The Monitor, EdgeStone and GE urge that this process will maximize recoveries for the stakeholders, contending that the marketplace can best determine value of the debtor's assets. EdgeStone relies on *Re Consumers Packaging Inc.* (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197 (Ont. CA) and *Re Canadian Red Cross Society* (1998), 72 O.T.C. 99, 5 C.B.R. (4th) 299 (Ont. Gen. Div.) in support of the proposition that this is an acceptable practice.

[26] Once again, the opposing creditors say that this is simply more evidence that this proceeding is nothing more than a receivership in disguise for EdgeStone's benefit.

[27] In *Consumers Packaging* the court approved a going concern sale before the plan of arrangement was presented because the sale would preserve the business, albeit under new ownership, and because of uncertainty over whether the debtor could continue operations given its financiers' demands.

[28] In *Canadian Red Cross Society* provincial and territorial governments decided to transfer responsibility for the Canadian blood supply to a new national agency. The court held that the CCAA was flexible enough that it could be interpreted to convert the company's assets into a cash fund, crystalizing the highest value recovery pool possible. This-was advantageous to unsecured creditors, but did not affect creditors with security interests. The Court ruled that it had jurisdiction to grant the order, noting that the proper question was whether the process was appropriate in all of the circumstances.

[29] I accept that the need for flexibility in CCAA proceedings may, in the appropriate circumstances, warrant a sale of a significant portion of a debtors assets or undertaking before a plan of arrangement is put to the creditors. (*Re PSI Net Ltd* (2001), 28 C.B.R. (4th) 95, [2001] O.J. 3829 (Ont. S.C.J.), *Canadian Red Cross* and *Consumer's Packaging*). Obviously, each case must be assessed on its own unique facts, but in this case there is no evidence that it is either necessary or in the stakeholders' best interests. Accordingly, at this stage the proposed process is unacceptable. In deciding this, I make no finding as to EdgeStone's *bona fides* nor rule out the prospect of evidence being adduced to establish that it would be appropriate.

[30] EdgeStone argues that there is Alberta authority for the sale of all or substantially all of the debtor's assets (*Blue Range Resource Corp, Gauntlet Energy Corp* action 0301-09612, *Liberty Oil & Gas Ltd.* action 0201-03299, and *Mirant Canada Energy Marketing Ltd.* action 0301-11094. *Blue Range* and *Liberty Oil & Gas Ltd.* obtained court sanctioning for liquidation-style plans. *Gauntlet* obtained creditor approval for a liquidation-type plan, but the sanctioning hearing has not yet been held. *Mirant's* creditors have not yet approved a liquidation-style plan, although a plan has been circulated to the creditors.

The Extension should be granted

[31] Applying the three arms of the test in s. 11.7, I find that the Monitor has acted diligently in moving the process along towards the development of a plan. The fact that the on the evidence before me, I disagree with the proposed timing for steps in the restructuring to occur does not detract from that.

[32] Although suspicions are raised by the opposing creditors' arguments, I cannot find on the materials before me that EdgeStone is acting in bad faith. The Monitor is certainly acting in good faith, but that is not an appropriate ingredient in applying the s. 11.7 test.

[33] In considering whether circumstances exist for the extension, the following factors assist the applicant:

1. An extension gives the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation;

2. With sufficient controls in place, an extension will prevent creditors from maneuvering for a better position (*Rio Nevada*, and cases cited at para. 36)

3. There is no evidence about whether the anticipated costs of these proceedings will be similar to costs anticipated in a receivership. What is known is that Skyreach is expected to suffer a $337,000 deficit by the end of January 2004. PIMSI and mortgage creditors want EdgeStone to pay all of CCAA costs. However, it would be inappropriate to allocate costs now since there is no certainty about what benefits will accrue to any given party. That can be done later.

4. The extension Order is only until December 19th. At that time a further assessment of good faith, due diligence, and the appropriateness of the circumstances can be made.

5. I cannot conclude that a liquidation sale is inevitable or the most likely outcome at this stage of the proceedings. The Monitor is offering shares for sale.

6. The prospect of a tax loss sale may have value for unsecured creditors. A tax loss sale is apparently easier to facilitate in CCAA proceedings than other insolvency proceedings;

Order

1. The stay of proceedings under the CCAA is extended to December 19th

2. The Monitor is to hire and hand over possession and operational control of Skyreach to a Chief Restructuring Officer within 14 days;

3. The Monitor is to fulfil its traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and court and play a supportive role in developing the plan and presenting it to the creditors;

4. The proposed sale of all or substantially all of the assets before a plan of arrangement is presented to the creditors is not approved.

5. A further stay extension should be supported by evidence demonstrating significant progress towards a plan of arrangement.

6. If the company is unable to present a viable plan of arrangement before a sale of all or substantially all of the assets, the sale documents should be prepared as though for a receivership sale. However, if the company or another applicant proposes a sale before the presentation of a plan, the appropriate application may be made.

7. Assets subject to PIMSI interests used in the company's daily operations are to be paid for in accordance with the terms of the governing agreement.

8. A cost allocation hearing is to be scheduled to follow an application to sanction the plan of arrangement.

Heard on the 10th day of November, 2003.
Dated at the City of Edmonton, Alberta this 9th day of December, 2003.

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

Appearances:

A. Robert Anderson
Blake, Cassels & Graydon LLP
for EdgeStone Capital Mezzanine Fund II Nominee, Inc.

Emi R. Bossio
Peacock Linder & Halt
for Ingersoll-Rand Canada Inc.

Michael McCabe
Reynolds Mirth Richards & Farmer LLP
for Proposal Trustee, PricewaterhouseCoopers LLP

Kent Rowan
Ogilvie LLP
for GE Commercial Distribution Finance Canada Inc.

Michael Penny
Stuart Weatherill
Emery Jamieson LLP
for Unknown Purchaser; John Deere Credit Inc.

Darren Bieganek
Duncan & Craig LLP
for Transportation Lease Systems Inc.

David Stratton
Davis & Company
for CNH Canada Ltd. (New Holland Construction) and
New Holland (Canada) Credit Company

Jerry Hockin
Parlee McLaws
for JLG Industries Ltd. and CAFO Inc.

Rick Reeson
Witten LLP
for Alberta Treasury Branches

James MacLean
Witten LLP
for Bancorp Financial Services Inc.
Bancorp First Mortgage Fund Inc.
Bancorp Investments (Fund 2) Ltd. et al.

Steven Livingstone
McLennan Ross
for Citicapital Commercial Corp. and Capital City

Tab 4

2000 CarswellAlta 622
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 622, [2000] A.W.L.D. 666, [2000] A.J. No. 1692, 19 C.B.R. (4th) 1

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs and Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., Defendants

Paperny J.

Judgment: May 4, 2000
Docket: Calgary 0001-05071, 0001-05044

Counsel: *G. Morawetz*, *A.J. McConnell* and *R.N. Billington*, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.
A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Canadian Airlines.
S. Dunphy, for Air Canada and 853350 Alberta Ltd.
R. Anderson, Q.C., for Loyalty Group.
H. Gorman, for ABN AMRO Bank N.V.
P. McCarthy, for Monitor - Price Waterhouse Cooper.
D. Haigh, Q.C., and *D. Nishimura*, for Unsecured noteholders - Resurgence Asset Management.
C.J. Shaw, for Airline Pilots Association International.
G. Wells, for NavCanada.
D. Hardy, for Royal Bank of Canada.

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and had voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — In determining whether stay should be lifted, court had to balance interests of all parties who stood to be affected — This would include general public, which would be affected by collapse of airline — Evidence indicated that liquidation would be inevitable were noteholders to realize on collateral — Objective of stay was not to maintain literal status quo but to maintain situation that was not prejudicial to creditors while allowing airline "breathing room" — It was premature to conclude that plan would be rejected or that proposal acceptable to noteholders could not be reached — Evidence indicated that airline was moving to effect compromises swiftly and in good faith — Appointment of receiver to manage collateral would negate effect of stay and thwart purposes of Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — Proposal that airline make interim payments for use of security was not viable — Suggestion that other airline financially supporting plan should pay out airline's debts to noteholders was without legal foundation — Existence of solvent entity financially supporting plan with view to obtaining economic benefit for itself did not create obligation on that entity to pay airline's creditors — Noteholders could not require sale of assets or shares of airline's subsidiary — Subsidiary was not debtor company but was itself property of airline — Marketing of subsidiary's assets would constitute "proceeding in respect of petitioners' property" within meaning of s. 11 of Act — Even if marketing of subsidiary's assets did not so qualify, court has inherent jurisdiction to grant stays in relation to proceedings against third parties where exercise of jurisdiction is important to reorganization process — In deciding whether to exercise inherent jurisdiction, court weighs interests of insolvent corporation against interests of parties who would be affected by stay — Threshold of prejudice required to persuade court not to exercise inherent jurisdiction to grant stay is lower than threshold required to persuade court not to exercise discretion under s. 11 of Act — Noteholders failed to meet either threshold — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

***Paperny J.* (orally):**

1 Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

> 1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
>
> 2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or

2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
>
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
>
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

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

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

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold

required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

Tab 5

2005 CarswellOnt 6648
Ontario Superior Court of Justice [Commercial List]

Grace Canada Inc., Re

2005 CarswellOnt 6648, [2005] O.J. No. 4868, 17 C.B.R. (5th) 275

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF GRACE CANADA INC.

Farley J.

Heard: November 14, 2005
Judgment: November 14, 2005
Docket: 01-CL-4081

Counsel: D. Tay, O. Pasparakis, J. Stam for Plaintiffs, Grace Canada Inc.
E. Merchant for Merv Nordick, Ernest Spencer
K. Ferbers for Raven Thundersky
Ian Dick for Attorney General of Canada
Michel Bélanger, Jean-Philippe Lincourt, Matt Moloci for Association Des Consommatuers Pour La Qualité Dans La Construction, Jean-Charles Dextras, Viviane Brosseau, Léotine Roberge-Turgeon

Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Quebec plaintiffs in their putative class proceedings worked out arrangement with federal Crown — As result, Quebec plaintiffs were not proceeding with their request to lift stay and other ancillary relief — Saskatchewan plaintiffs were not opposed to Grace relief — Stay was extended to April 1, 2006, and included proceedings against federal Crown related to Grace proceedings in class actions — Modified preliminary injunction granted on January 22, 2002, by US Bankruptcy Court was recognized pending further order of Canadian court — There had been recognition in US Bankruptcy Court that Canadian proceedings would be governed by Canadian substantive law.

***Farley J.*:**

1 This endorsement applies to the 3 motions of Grace, the Quebec class proceeding and the Manitoba class proceeding.

2 The Quebec plaintiffs in their putative class proceedings have worked out an arrangement with the Federal Government. As a result they are not proceeding with their request to lift the stay and other ancillary relief, but without prejudice to it or similar relief being sought if the insolvency/CCAA recognition proceedings get bogged down. The Grace relief was then supported by the Quebec plaintiffs.

3 The "Sask" plaintiffs (represented by the Merchant firm were not opposed to the Grace relief.

4 The Manitoba plaintiffs represented by the Atkins firm took the position that the Grace relief was all right so long as it did not apply to their proceedings except that judgment would not be enforced without leave of this court.

5 It would seem to me that the various class proceedings would benefit from cooperation and coordination — using the 3Cs of the Commercial List (communication, cooperation and common sense). Otherwise they will be faced with the

practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and therefore susceptible to being conquered.

6 The stay is extended to April 1, 2006 and includes proceedings against the Federal Crown related to the Grace proceedings in these class actions. As well the Modified Preliminary Injunction granted on January 22, 2002 by the US Bankruptcy Court is recognized pending further order of this Court.

7 The foregoing does not prevent any of the parties entering into consensual resolutions with the Federal Crown.

8 I note that the Grace interests represented before me today indicated that it was their goal to emerge from their insolvency proceedings as soon as reasonably possible but under the guidelines that there be justice for all affected persons.

9 I also note that there has been recognition in the US Bankruptcy Court that Canadian proceedings will be governed by Canadian substantive law.

10 The foregoing relief granted is pursuant to the principles set out in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) and is in furtherance of the long standing respect for comity extended by the courts of this country for the courts of the US and vice versa.

11 It would seem to me that the insolvency adjudicative proceedings would, at least under presently anticipated circumstances, result in a more effective efficient process than would a full-blown class action proceeding.

12 I concur with the views of the US court in *Maryland Casualty* re respect to the necessity/desirability of a stay against the Federal Crown as a "3rd party" given the interrelated aspects of the claims against the Crown and Grace. There would in my mind be a considerable risk of record taint if the action against the Crown were allowed to proceed on its own without direct Grace evidence and counsel. See also *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.); *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 137 D.L.R. (3d) 287 (Ont. H.C.), aff'd (1983), 145 D.L.R. (3d) 266 (Ont. Div. Ct.); *Noma Co., Re*, [2004] O.J. No. 4914(Ont. S.C.J. [Commercial List]); *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

13 The stay does not affect the ability of the plaintiffs from coming back to court if they feel that there is foot dragging or other elements of prejudice.

14 I note that the Federal Crown may accept service of the Sask claim without that being an infringement of the stay now imposed (and previously requested). This is without prejudice to the Crown moving for relief on, say, a limitations point.

15 What the Manitoba plaintiffs are in essence requesting is that they obtain a leg up on all other Canadian plaintiffs (and US plaintiffs) and that there be by this court somewhat of a quasi-certification, although indicating that the actual certification would be dealt with by the Manitoba court.

16 This would result in a lack of single control in insolvency proceedings which was cautioned against in *Eagle River International Ltd., Re*, [2001] 3 S.C.R. 978 (S.C.C.). It would also fragment and possibly destabilize the other proceedings by other affected persons (including those claiming for personal injury including serious personal injury). In saying that I in no way wish to or intend to be taken as minimizing the terrible tragedy which has befallen the Thundersky/Bruce family.

17 I look forward to seeing that continued timely progress is being made with respect to this insolvency proceeding including the effective efficient way of dealing with personal injury and property damage claims. The information officer should ensure that this court and affected parties including these class action plaintiffs are kept abreast of proposed material developments and their outcome. That is the report on the regular time period basis should be the minimum.

18 The motion of the Manitoba plaintiffs is dismissed, but without prejudice to similar or other relief being sought in the future based on a change in circumstances.

Order accordingly.

Tab 6

2006 BCSC 669
British Columbia Supreme Court [In Chambers]

Hawkair Aviation Services Ltd., Re

2006 CarswellBC 1007, 2006 BCSC 669, [2006] B.C.W.L.D. 3778,
[2006] B.C.J. No. 938, 18 B.L.R. (4th) 294, 22 C.B.R. (5th) 11

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

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

And In the Matter of Hawkair Aviation Services Ltd. (Petitioner)

Burnyeat J.

Heard: April 18, 2006
Judgment: April 26, 2006
Docket: Vancouver L052400

Counsel: A.H. Brown for Hawkair Aviation Services Ltd.
A. Frydenlund for I.M.P. Group Ltd.
M.I.A. Buttery for Field Aviation Company Inc.
R.D. Leong for Attorney General of Canada representing Transport Canada
B. Lewis-Hand for Campbell Saunders Ltd.
S.A. Rush, Q.C. for National Automobile, Aerospace, Transporation and General Workers Union of Canada

Headnote

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

Court made order staying proceedings against debtor company — Second order continued stay, but deleted specific reference to B.C. Labour Code — Union applied for certification of company's employees under Canada Labour Code — Company brought motion for declaration that application was null and void — Union brought cross-motion to vary order and for leave to continue application — Motion granted, cross-motion dismissed — Application for certification was "proceeding against the company" as phrase was defined in s. 11(3) of Act and used in orders — Provision in Act for stay postponed exercise of employees' rights under Code — Order applied to employees, even if not creditors, as their actions affected company — Effect of stay was not changed by variation in second order — It was not appropriate to lift stay as application seriously impaired company's ability to focus on reorganization efforts — Company met onus of showing union and employees would not be prejudiced by maintaining status quo for relatively short period until proposal was made.

***Burnyeat J.*:**

1 There are two motions in these proceedings pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, C. -36 ("*Act*"). First, a Motion by Hawkair Aviation Services Ltd. ("Company") for:

> (a) a declaration that by filing with the Canada Industrial Relations Board on February 17, 2006 an Application for Certification against the Petitioner, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) is in breach of the Initial Order of this Honourable Court pronounced herein on October 7, 2005, as extended by Orders pronounced herein on November 4 and December 19, 2005 and February 10, 2006;

(b) an Order that the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) shall, on or before March 30, 2006, comply with the Orders by providing notice in writing to the Canada Industrial Relations Board that they formally withdraw their Application for Certification dated and filed with the Canada Industrial Relations Board on February 17, 2006.

(c) In the alternative, an Order that the Application for certification of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) dated and filed with the Canada Industrial Relations Board on February 17, 2006 be declared null and void and of no force or effect whatsoever, as having been filed in breach of the Initial Order of this Honourable Court pronounced herein on October 7, 2005, as extended by Orders pronounced herein on November 4 and December 19, 2005 and February 10, 2006.

(d) In the further alternative, an Order that the Application for Certification of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) dated and filed with the Canada Industrial Relations Board on February 17, 2006 be stayed pending further Order of this Honourable Court, as having been filed in breach of the Initial Order of this Honourable Court pronounced herein on October 7, 2005, as extended by Orders pronounced herein on November 4 and December 19, 2005 and February 10, 2006.

2 Second, a Motion by the National Automobile Aerospace, Transportation, General Workers Union of Canada (CAW-Canada)("Union"):

(a) vacating paragraph 3 of the Order of Mr. Justice Tysoe dated March 9, 2006 staying the application for certification of the Union;

(b) that the Initial Order, dated October 7, 2005 be varied by adding the following words to paragraph 1(c) in the fourth line after the word Petitioner "but not including an application for certification brought by the Union on behalf of employees of the Petitioner pursuant to the Canada Labour Code";

(c) in the alternative, for leave to permit the Union to commence and to continue an application for certification by the Union on behalf of the employees of the Petitioner pursuant to the Canada Labour Code;

(d) in the further alternative that the certification proceedings before the Canada Industrial Relations Board commenced by the Union on behalf of the employees of the Petitioner are not proceedings which are stayed by the Initial Order;

(e) in the further alternative, for leave to permit the Union to carry on certification proceedings on behalf of employees of the Petitioner pursuant to the Canada Labour Code.

3 The Orders that have been made to date in these proceedings include the following:

(a) The October 7, 2005 Order of Madam Justice Brown made on an *ex parte* basis which provided the following provisions relevant to these applications:

(i) Paragraph 1(c) which provided the following stay of proceedings:

> no suit, action, enforcement process, extra-judicial proceeding or proceeding of any other nature, including without restriction, any application or proceeding pursuant to the British Columbia Labour Code or other legislation of like or similar import, shall be proceeded with or commenced against the Petitioner;

(ii) Paragraph 5(b)(i) allowing the Company to remain in possession of the assets and undertaking of the Company but having the following power:

> it shall have the right without further Order of this Court, but subject to the consent of the Monitor, to proceed with an orderly disposition of such of its Assets outside of the ordinary course of its business as it deems appropriate in order to facilitate the downsizing or restructuring of its business and operations ("Downsizing or Restructuring"), including:
>
> > (i) terminating the employment of or renegotiating agreements with such of its employees or temporarily laying off such of its employees, as it deems appropriate; ...
>
> all without interference of any kind from third parties, including its landlords and notwithstanding the provisions of any lease, mortgage other instrument or law affecting or limiting the rights of the Petitioner to move or liquidate Assets from leased premises, and may take any Downsizing or Restructuring steps at any time after the Filing Date irrespective of whether or not payments have been made subsequent to the Filing Date under any lease or mortgage, provided that the financial obligations, if any, of the Petitioners to creditors affected by such Downsizing shall be provided for and dealt with in the Plan of Arrangement to be filed by the Petitioner.
>
> (iii) the appointment of a Monitor to maintain the business and financial affairs of the Company;
>
> (b) The next Order was made on November 4, 2005 by Mr. Justice Rice confirming the October 7, 2005 Order. However, this Order amended paragraph 1(c) of the earlier Order so that this paragraph then read that the following was prohibited:
>
> > no suit, action, enforcement process, extra-judicial proceeding or proceeding of any other nature.

4 The Union applied for certification with the Canada Industrial Relations Board ("CIRB") on February 17, 2006 describing the proposed bargaining unit as "pilots and flight attendants". In his Affidavit, John Bowman who is a National Representative of CAW sets out the background leading up to the application for certification:

> On or about the first of February, 2006, I was contacted over the phone by an employee from Hawkair Aviation Services Ltd. ("Hawkair") who was interested in finding out how the employees of Hawkair could go about joining the Union.
>
> The employee advised that the employees were concerned that their wages had been reduced and that there were arbitrary layoffs by the company. Nothing was said during this conversation about the company operating under CCAA protection.
>
> Arrangements were made to have membership cards and information about the Union given to this individual for distribution to the employees. The information was provided on February 7, 2006.
>
> After distributing the information to co-workers and obtaining the membership support from a majority of the workers in the bargaining unit applied for, the signed membership cards were returned to the Union on or about February 16, 2006. In further discussions with this individual during the week of February 13, there was no mention of the company operating under CCAA protection.

5 Given the publicity surrounding the filing by the Company and the information available to employees, it is inconceivable that whoever contacted the Union would not have known about the filing and the Order which was in effect. However, I cannot find that any official with the Union had knowledge of the filing by the Company.

6 A Motion was then brought by the Company for a declaration that the Certification Application was in breach of the provisions in the Order establishing the Stay of Proceedings. That Motion was heard by Mr. Justice Tysoe on March 9, 2006 who ordered that the Stay of Proceedings be further extended to June 9, 2006 and that the following stay be in effect regarding the Certification Application:

The Application for Certification of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) dated and filed with the Canada Industrial Relations Board on February 17, 2006 be and the same is hereby stayed pending further Order of this Honourable Court.

7 I am satisfied that the Orders made to date have not dealt with the issues which are before me so that it will be necessary to deal with the following questions:

(1) Did the October 7, 2005 and November 4, 2005 Orders prohibit the filing of the Certification Application?

(2) Did the November 4, 2005 Order have the effect of removing any prohibition regarding labour proceedings as set out in the October 7, 2005 Order so that the Certification Application could be filed?

(3) If the Certification Application was prohibited, should there be a declaration that it is void and of no effect or should approval of the filing of the Application be given *nunc pro tunc* but a Stay of Proceedings then imposed?

Status of the Preparation of a Plan of Reorganization

8 In his Affidavit, the General Manager of the Company states that an agreement has been arranged with one of its aircraft financiers, that this agreement with Field Aviation Ltd. was approved by the Court on January 18, 2006, that negotiations are ongoing with its other financier, I.M.P. Group Ltd. ("I.M.P."), and that the Certification Application would create the following difficulties for the Company:

I have no previous experience as an employer with unions and did not know how to deal with this development. I was completely unfamiliar with the certification process.

I contacted a number of individuals who have substantial experience in the airline industry and who had previously indicated a willingness to join Hawkair's board of directors. Discussions with those individuals and other restructuring experts led me to appreciate that, when taking into account: a) the change in Transport Canada regulations rendering our aircraft less than optimum for our needs; b) our inability to negotiate an acceptable compromise with IMP; and c) the fact that the company is now at risk of having a unionized work force, Hawkair is truly in a fight for its existence. To maximize Hawkair's ability to survive in both the short and longer term, it is imperative that the company take a more aggressive approach to its restructuring than had previously been done.

Attached ... is a true copy of the letter Hawkair received from the Canada Industrial Relations Board. The presentation of this application has rendered it necessary for Hawkair to incur the additional cost of engaging legal counsel to deal with the application. It has also required that I and Hawkair's insolvency counsel spend a good deal of time learning the implications of certifications and developing a strategy to respond. This has imposed a significant detriment upon Hawkair's ability to successfully conclude its restructuring.

I understand that section 24(4) of the Canada Labour Code specifies that where an application for certification has been made, the employer is prohibited from altering any term or condition of employment or any right or privilege, of any of Hawkair's pilots or flight attendants. If that section applies to Hawkair's restructuring it would likely impede Hawkair's ability to carry out the Downsizing or Restructuring contemplated in paragraph 5(b) of the Initial Order. For that reason, I believe it is inadequate for this Honourable Court to merely order that the certification application be stayed. In my view it is imperative that it be either declared null and void or be dismissed.

I do not yet have any well developed sense of the financial and other implications to Hawkair if a Union Certification Application is successful. Hawkair needs to investigate this and determine what effects, if any it has on our presently envisioned restructuring plan and upon the viability of Hawkair in both the short and long term.

I have been told that if the union certification application proceeds, it would typically take 60 to 90 days to run its course.

In my opinion, Hawkair is at a critical crossroad. It is imperative that management be given sufficient time to:

(a) assess the financial and other impact of a potential union certification application;

(b) locate replacement aircraft; and

(c) carefully consider the best way to make Hawkair as competitive as possible in its current situation.

9 The February 20, 2006 letter from the CIRB referred to, advised the Company that "except under certain circumstances", the terms and conditions of employees could not be changed, that information regarding all employees was to be compiled and forwarded, that any objections regarding the proposed Bargaining Union had to be forwarded with 10 days, that any response to the application had to be forwarded within 10 days, and that an oral hearing before the Board could be requested. Counsel for the CAW advised that the entire process leading to a contract if there was a Certification might take anywhere from six to nine months depending on how active a role was played by the Company and how long it would take to negotiate a contract.

Purpose of the Act and the Stay of Proceedings

10 Section 11(3) of the *Act* provides the Court with the power to make an order on an "Initial Application" to be effective for no more than 30 days. That Initial Order can have the effect of:

(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) [being the ***Bankruptcy and Insolvency Act*** or the ***Winding-up and Restructuring Act***];

(b) restraining until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

11 After the "Initial Order" has been made, a further order can be made pursuant to s. 11(4) of the *Act* which states:

A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose;

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

12 Pursuant to s. 11(6) of the *Act*, an order shall not be made under s. 11(3) or s. 11(4) unless:

(a) The applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) In the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

13 The purpose of the *Act* was described by our Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) as follows:

> The purpose of the C.C.A.A. 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.... When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.
>
> There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8, which negates any contracting out provisions in a security instrument. (at paras. 10 and 11)

14 The purpose of maintaining the status quo existing at the time of the filing is so that the proceedings under the *Act* can produce a plan of reorganization which will benefit the company, its creditors, and, potentially, the community in which the Company operates. In this case, the Company has 98 employees in Terrace, Vancouver, Prince Rupert, Fort St. John, and Dawson Creek.

15 The intension was also set out in *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C. [In Chambers]) at p. 117. and where Trainor J. cited with approval the following statement made by Duff C.J.C. on behalf of the Court in *Reference re Companies' Creditors Arrangement Act (Canada)* (1934), 16 C.B.R. 1 (S.C.C.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. (at p. 2)

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) Farley J. stated:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. (at para. 5)
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* ... [(1990), 1 C.B.R. (3d) 101 (Ont. C.A.)] at pp. 297 and 316; *Re Stephanie's Fashions Ltd.*, ... [(1990), 1 C.B.R. (3d) 248 (B.C.S.C.)] at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* ... [(1990), 1 O.R. (3d) 321 (Ont. G.D.)] at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* ... [1984] 5

W.W.R. 215 (Alta. Q.B.) p. 220]. The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.), at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.*, *supra* at pp. 251-252. (at para. 6)

17 The purpose of the stay of proceedings is to forestall the possibility that anyone will obtain an advantage to the detriment of others while those others remain bound by the general stay of proceedings commonly ordered in the First Order. In this regard, Tysoe J. in *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) stated:

> The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process. (at p. 241)

18 In *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.), R.A. Blair J. stated:

> By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors. (at p. 309)

19 In deciding whether a stay of proceedings should be ordered on the hearing of the first application or continued in subsequent orders, the stay of proceedings set out in s. 11 of the *Act* will be invoked if not restraining a judicial or extra judicial conduct will seriously impair the ability of a company either to continue in business or to bring a Plan forward. In this regard, Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (B.C. C.A.) stated on behalf of the Court:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. (at p. 113)

20 While adopting that statement, R.A. Blair J. in *Campeau*, *supra*, added:

> I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

Did the Stay of Proceedings Apply to the Certification Application?

21 A certification application comes within the definition of a "proceeding against the company" as that phrase is used in s. 11(3) of the *Act* or a "extra-judicial proceeding or proceeding of any other nature" as set out in the Orders made in these proceedings: *I.W.A., Local 1-324 v. Wescana Inn Ltd.* (1977), 82 D.L.R. (3d) 368 (Man. C.A.); and *C.U.P.E., Airline Division v. Air Canada*, [2003] C.I.R.B. No. 225 (C.I.R.B.). While the Canada Labour Code sets out the procedure to be followed when an application for certification is made and provides rights to employees and unions and imposes obligations of entities sought to be unionized, I am satisfied that the broad scope of the *Act* to postpone the exercise of those rights should prevail.

22 A number of decisions have dealt with a potential conflict between the *Act* and other federal legislation. For instance, the Court in *Chef Ready*, *supra*, stated:

> Having regard to the broad public policy objectives of the C.C.A.A., there is good reason why s. 178 security [under the ***Bank Act*** R.S.C. 1985, c. B-1] should not be excluded from its provisions (at para. 22).
>
> If a bank's rights in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern (at para. 24).

23 On behalf of the Court Gibbs J. A. then concluded:

> The trend which emerges from this sampling will be given effect here by holding that where the word security occurs in the C.A.A.A. it includes s. 178 security and where the word creditor occurs it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes therefore, the broad scope of the C.C.A.A. prevails (at para. 26).

24 There is no indication that the broad scope of the *Act* should not prevail over the procedures and the rights given to employees and unions as set out in the Canada Labour Code. It would have been easy for the Canada Labour Code or the *Act* to have excluded the possibility that the *Act* would not apply. The next question is whether pilots and flight attendants and the Union would ordinarily be bound by the Stay of Proceedings.

25 I am advised by counsel for the Company that the pilots and flight attendants who would be in the proposed bargaining unit may not be creditors of the Company. Clearly, the Union is not a creditor of the Company. However, an order under s. 11 of the *Act* is effective against third parties who are not creditors where the actions of the third parties could potentially prejudice the ability of the company to continue in business or to bring forward a Plan having any likelihood of success: *Lehndorff General Partner Ltd., Re*, *supra*, at paras. 14-16 and 21 where a stay of proceedings was granted against assets of the limited partnership in which the applicants held interests; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) at p. 12 where a stay of proceedings was granted against a non-creditor joint operator of an oil and gas property prohibiting the substitution of a new operator in place of the company where it was noted that the effect of the removal of the company as operator would likely be "fatal to attempt to restructure the company" (at p. 13); *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6 where a non-creditor, landlord was subjected to the stay of proceedings; in *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.* (2000), 48 O.R. (3d) 746 (Ont. S.C.J. [Commercial List]) where a proposed meeting to consider whether or not to suspend trading in the securities of the company was subjected to the stay of proceedings; and *Versatech Group Inc., Re*, [2000] O.J. No. 3785 (Ont. S.C.J. [Commercial List]) where a stay of proceedings was not set aside where the Toronto Stock Exchange wish to commence proceedings to consider whether to suspend trading in the listing shares of Versatech.

26 In this regard, it should be noted that ss. 11(3) and (4) does not make reference to proceedings taken or that might be taken by creditors. Rather, it is merely proceedings taken or that might be taken "in respect of the company". As well, it is clear that the inherent power of the Court to grant stays of proceedings can be used to supplement s. 11 *Act* when it is just and reasonable to do so: *Lehndorff General Partner Ltd., Re*, *supra*, at para. 16.

27 I am satisfied that the October 7, 2005 and November 4, 2005 Orders prohibited the filing of the Certification Application. Even if it is ultimately determined that the pilots and flight attendants are not found to be creditors of the Company, I am satisfied that the Certification Application is a "proceeding" and that a liberal and expansive interpretation of the powers under s. 11 of the *Act* would include the Stay of Proceedings being in effect against the pilots and flight attendants and the Union.

28 At the time of the filing, the "status quo" was that none of the employees of the Company were unionized and there was no application for certification. At the time of the Initial Order and the subsequent November 4, 2005 Order, the maintenance of the status quo required an order that the Court would maintain the relationship that the Company had with its employees. The next question raised is whether the November 4, 2005 Order had the effect of removing the prohibition set out in the October 7, 2005 Order so that the Certification Application could have been filed because it was not prohibited by the Stay of Proceedings.

29 The Union submits that the November 4, 2005 amendment to paragraph 1(c) of the October 7, 2005 Order had the effect of removing the effect of the Stay of Proceedings regarding any application pursuant to the Canada Labour Code. It was submitted that the removal of the specific reference should be interpreted as meaning that the general reference remaining does not apply to the Application for Certification. I cannot accede to that submission.

30 First, the remaining reference to "extra-judicial proceeding or a proceeding of any other nature" applies to Certification Applications. Second, paragraph 5(b)(i) confirms that the Company has the ability to downsize or restructure its business operations including the ability to terminate the employment of or to renegotiate agreements with its employees or to temporary lay off its employees. This power is "all without interference of any kind from third parties". These powers remaining available to the Company contemplate something that would not necessarily be available to the Company if an Application for Certification was filed with the CIRB. If paragraph 5(b)(i) of the Initial Order is to have any meaning, the amendment to paragraph 1(c) of the Initial Order could not have had the effect submitted by the Union. Accordingly, I am satisfied that the amendment to paragraph 1(c) would not contemplate the ability of some or all of the employees to apply for Certification. The Stay of Proceedings ordered remained in effect after November 4, 2005 so that the Certification Application should not have been filed.

31 The appropriate procedure that the Union should have followed would be to have applied to have the stay lifted: *C.U.P.E., Airline Division v. Air Canada*, *supra*, at para. 15. Such an application parallels what is available under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3: *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2004), 48 C.B.R. (4th) 256 (Ont. C.A.). The question which then arises is whether the Stay of Proceedings should now be lifted in order to allow the filing of Application for Certification.

32 The granting of the stay under the s. 11 of the *Act* is discretionary and the burden of proof to obtain a stay of proceedings or an extension of the stay is on the Company. In this regard, the Company had to satisfy the onus of showing that circumstances exist that make the request for a stay extension appropriate and that it has acted and is acting in good faith and with due diligence. However, there is no statutory test under the *Act* to guide the Court in deciding whether it is appropriate to lift a stay of proceeding. While I am satisfied that the burden of proof to lift a stay of proceedings should lie with the party making such an application, I will proceed on the assumption that the Company must satisfy the onus of showing that the Stay of Proceedings should not be lifted.

33 In deciding the question of whether the Stay of Proceedings should be lifted in order that the Application for Certification can be continued or a new Application for Certification filed, I am guided by the statements of Paperny J. in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.):

> In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):
>
> > In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.
>
> (at para. 15)

Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holdings Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
>
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
>
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze or relative pre-stay positions.
>
> (6) The court has a broad discretion to apply these principles to the facts of the particular case.

At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

> 1. When the plan is likely to fail;
>
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
>
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
>
> 4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
>
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
>
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
>
> (at paras. 19-20)

34 I am satisfied that the filing of the Certification Application has and will seriously impair the ability of the Company to focus and concentrate on its efforts to bring forward a plan of reorganization. While I am not satisfied that the Certification Application will seriously impair the ability of the Company to carry on business, it is clear that the management of the Company does not have the financial or personnel resources to deal with the Certification Application on its own. In a small company such as this, I am satisfied that there are insufficient resources to carry through with the

submissions and negotiations which will be required if a collective agreement is to be reached on the assumption that Certification will be granted. I am satisfied that the Company will be better able to handle such an application once the reorganization has taken place as the Company will then know with certainty the economic status of the Company. I am also satisfied that one of the purposes of the stay of proceedings provided under s. 11 of the *Act* is to allow time and energy to be directed towards the preparation and presentation of a plan of reorganization in a timely manner. There have already been a number of delays and extensions of deadlines to present a Plan. If the Company is required to follow through with the Application for Certification and, if there is certification, the negotiations for a contract, the purpose of providing a Plan of Reorganization on a timely basis will be thwarted. The Plan is now scheduled to be before all parties by June 9, 2006. If the Union is in a position to proceed with the Certification Application, no certainty will be available regarding the status of the employees until late in the year at the earliest. That can hardly be described as a Plan which is presented to all parties on a timely basis.

35 I am satisfied that the Company has satisfied the onus of showing that there would be no injustice to the Union or the flight attendants and pilots if the Stay of Proceedings stays in effect. In order to move the process along to the point where a Plan is available or it is evident that the attempt to find an acceptable Plan is doomed to failure, the status quo must be maintained. At this point, I cannot be satisfied that the Plan is likely to fail. I am also satisfied that it has been shown that the Union and the employees will not suffer hardship or will be prejudiced. It has not shown that anyone will be severely prejudiced by the refusal to lift the stay or that any right or advantage would be lost by the passage of time which, in this case, is only until June 9, 2006. It has not been shown that any rights will be lost by the passage of time if the Stay of Proceedings is not lifted to allow the Certification Application to continue. I am also satisfied that the Company has acted and continues to act in good faith and with due diligence.

36 I make a declaration that the Application for Certification of the Union is in breach of the October 7, 2005 Order as extended by the Orders pronounced November 4, 2005, December 19, 2005 and February 10, 2006 and is null and void and of no force or effect. Those declarations are made in accordance with the application by Hawkair Aviation Services Ltd. and as supported by Field Aviation, a secured creditor who agreed to become an unsecured creditor, I.M.P. Group Ltd., an owner of two aircraft leased to the Company, and the Monitor appointed under the Order. I dismiss the application of the Union that the October 7, 2005 Order be varied and I do not grant leave to the Union to commence and to continue an application for certification on behalf of any employees of Hawkair Aviation Services Ltd.

37 All creditors plus the pilots and flight attendants and the Union will not have to wait long to see what Plan is proposed by the Company and I am satisfied that it is appropriate that the Stay of Proceedings be continued against the Union and the employees of the Company in the interim.

38 I will remain seized of all future applications relating to these proceedings. Those parties represented at the April 18, 2006 applications will be at liberty to speak to the question of costs.

Motion granted; cross-motion dismissed.

Tab 7

CITATION: Imperial Tobacco Canada Limited, et al, Re, 2019 ONSC 1684
COURT FILE NO.: CV-19-616077CL
DATE: 20190315

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36 AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED, AND IMPERIAL TOBACCO COMPANY LIMITED, Applicants

BEFORE: McEwen J.

COUNSEL: *Deborah Glendinning*¸ *Marc Wasserman*, *John A. MacDonald*, and *Michael De Lellis*, for the Applicants

David Byers and *Maria Konyukhova*, for the British American Tobacco p.l.c, B.A.T. Industries p.l.c., and British American Tobacco (Investments) Limited

Jay Swartz, *Robin Schwill*, and *Natasha MacParland*, for the Proposed Monitor, FTI Consulting Canada Inc.

Jonathan Lisus and *Matthew Gottlieb*, for the Proposed Tobacco Claimant Representative

HEARD: March 12, 2019

ENDORSEMENT

[1] On March 12, 2019 I granted the Initial Order, as amended, with reasons to follow. I am now providing those reasons.

Background

[2] Imperial Tobacco Canada Limited ("ITCAN") and its subsidiary Imperial Tobacco Company Limited ("ITCO") (together, the "Applicants") seek an Initial Order for a stay of all existing and prospective proceedings pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), primarily so that they can effect a global resolution of multiple claims that have been brought or may be brought against ITCAN and related companies in Canada. They also seek the same relief on behalf of their related companies.

[3] The timing of this Application stems from the recent judgment of the Quebec Court of Appeal in *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 (the "Quebec Appeal Judgment"), in which the Applicants and co-defendants were

found liable for damages totalling approximately $13.5 billion. Based on the filed record, enforcement of the Quebec Appeal Judgment would likely spell the end of the Applicants' business because ITCAN does not have sufficient funds to satisfy the judgment. ITCAN's share of the judgment exceeds $9 billion.

[4] Amongst other submissions, the Applicants stress that enforcement of the Quebec Appeal Judgment places in serious jeopardy the continued employment of the Applicants' 466 full-time and 98 contract employees across Canada who receive wages and salaries of approximately $70 million per year. The Applicants also point to the fact that they generate taxes payable to various levels of government across Canada totalling approximately $4 billion per year. They further stress that, based on industry publications, if the Applicants and other legal producers of tobacco products in Canada cease to operate then the illegal tobacco trade could expand to fill the void.

[5] In addition to the Quebec Appeal Judgment, ITCAN (and in some cases related companies) face more than 20 large proceedings across Canada. In Ontario alone there are four actions claiming damages in excess of $330 billion. The actions across the country include government actions to recover healthcare costs incurred in connection with smoking related diseases; smoking and health class actions seeking damages on behalf of individuals; and a class action brought by Ontario tobacco growers in relation to certain pricing practices of ITCAN. Most of these cases are in the preliminary stages.

[6] The Applicants submit that in the above circumstances the proposed Initial Order is necessary and reasonable as it seeks an overall solution with respect to the Quebec Appeal Judgment and other outstanding and potential proceedings.

Analysis

[7] ITCAN and ITCO are incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. ITCO is a privately held subsidiary of ITCAN. Their registered head offices are located in Brampton, Ontario. Their liabilities clearly exceed $5 million as a result of the Quebec Appeal Judgment. According to the affidavit filed by Mr. Eric Thauvette, the vice-president and chief financial officer of ITCAN, the Applicants do not have sufficient funds to pay the Quebec Appeal Judgment that is currently payable.

[8] Based on the above, the Applicants are insolvent companies to which the CCAA applies. I am also of the view that it is appropriate to grant the stay of proceedings requested by the Applicants. This court, pursuant to the provisions of s. 11.02 of the CCAA, may grant a stay of proceedings if it is satisfied that circumstances exist that make such an order appropriate.

[9] It is settled law that the principal purpose of the CCAA is to maintain the *status quo* while a debtor company has the opportunity to consult with its creditors and stakeholders with a view to continue the company's operations. In the circumstances of this case, ITCAN cannot pay the amount of the Quebec Appeal Judgment and the Judgment is currently enforceable. Enforcement would cause the Applicants serious harm. As I have outlined above, it would also jeopardize tax revenue and legal trade in tobacco. It is therefore appropriate to grant the stay of proceedings requested by the Applicants as all stakeholders would likely be detrimentally

affected if the Quebec Appeal Judgment was enforced. These stakeholders include employees, retirees, customers, landlords, suppliers, the provincial and federal governments, and contingent litigation creditors. Specifically, a stay creates a level playing field amongst the litigation claimants.

[10] Insofar as the proposed monitor is concerned I am satisfied that FTI Consulting Canada Inc. ("FTI") is a suitable monitor and should be appointed in these proceedings pursuant to s. 11.7 of the CCAA. FTI is an experienced monitor who frequently acts in this capacity in CCAA proceedings. FTI is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

[11] I also agree with the Applicants that the CCAA extension should be extended to the non-Applicants British American Tobacco p.l.c. ("BAT") and B.A.T. International Finance p.l.c., B.A.T. Industries P.L.C., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, and entities related to or affiliated with them (the "BAT Affiliates"), Liggett & Myers Tobacco Company of Canada Limited ("Liggett & Myers"), and other non-Applicant subsidiaries noted in the Application Record.

[12] I have jurisdiction to extend the stay: *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461 and *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429. In my view, it is reasonable to do so in circumstances where most of the outstanding proceedings against ITCAN also name BAT and the BAT Affiliates as co-defendants. Further, Liggett & Myers and the other non-Applicant subsidiaries are highly integrated with the Applicants and indispensable to the Applicants' business and restructuring. As submitted, certain of them hold trademarks or other assets of ITCAN, provide services to ITCAN, share the cash management system with ITCAN, and /or have guaranteed ITCAN debts from time to time. It is reasonable to extend the stay to these entities. Failure to do so would undermine the intent of the stay. Further, given the stay of proceedings that I have granted with respect to the Applicants, I see no prejudice to claimants in existing and potential proceedings if the stay is extended.

[13] I am further satisfied that the charges requested below by the Applicants are reasonable and should be granted.

[14] The Administration Charge in the amount of $5 million is fair and reasonable. The restructuring will be an extremely extensive and expensive undertaking. It will involve a great deal of effort by the professional advisors who are subject to this charge. I do not see any duplication of the roles. Furthermore, the Administration Charge is supported by the Applicants' parent and other related companies, which are secured creditors. The amount is reasonable given the size of this matter.

[15] I am further satisfied that the Tobacco Claimant Coordinator Charge is reasonable. I pause here to note that the Applicants had proposed that a Tobacco Claimant Coordinator be described as the "Tobacco Claimant Representative". To avoid any confusion that might suggest that the Honourable Warren K. Winkler, Q.C., whom I have appointed, may be seen to displace existing counsel, or to take some sort of role that may be considered binding in nature with

respect to any of the litigants affected by this order, the title was amended to Tobacco Claimant Coordinator.

[16] Given the immense size and complexity of this matter, I am of the view that a charge is reasonable with respect to the Honourable Warren K. Winkler, Q.C. as per the terms of the Interim Order so that he, along with others, can begin a claims process. It is also reasonable to allow him to retain the independent counsel requested and provide for a charge of $1 million.

[17] It is reasonable that the Administration and Tobacco Claimant Coordinator Charges rank as first charges *pari passu* given their importance.

[18] The Directors' and Officers' Charge sought should also be approved to ensure that the Applicants enjoy ongoing stability during these CCAA proceedings.

[19] The directors and officers reasonably insist that a charge be put in place. I agree with their concerns. They also have significant knowledge and experience. The Applicants and related companies require that the directors and officers can continue on with the management of the businesses.

[20] The proposed charge of $16 million, which stands second in priority to the aforementioned Administration and Tobacco Claim Coordinator Charges, is also reasonable.

[21] Last, insofar as the charges are concerned, I am also satisfied that the charge concerning Sales and Excise Taxes in the maximum amount of $580 million is also reasonable as a third charge. It is important that this charge be granted so that the directors and officers do not face personal liability for the taxes. I reviewed the Applicants' record and I am satisfied that the amount is fair and reasonable.

[22] All of the charges are supported by FTI.

[23] In addition to the above specific comments, I am further satisfied that the remaining terms of the proposed Interim Order ought to be granted. The Applicants will be carrying on business during the CCAA proceedings. The filed materials demonstrate that the Applicants and their affiliated companies expect that the Applicants will continue to carry on their business in a profitable fashion and be able to meet both their pre-filing and post-filing obligations. It is in the best interests of all stakeholders to allow for the payment of these obligations.

[24] BAT, the BAT Affiliates, and FTI all support the Applicants' position, including their intention and ability to meet their current payables in the ordinary course of conducting business.

[25] For all of the reasons above, the Application was granted and the Interim Order was signed, as amended.

McEwen J.

Date: March 15, 2019

Tab 8

2006 CarswellOnt 264
Ontario Superior Court of Justice [Commercial List]

Muscletech Research & Development Inc., Re

2006 CarswellOnt 264, [2006] O.J. No. 167, 19 C.B.R. (5th) 54

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

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

Farley J.

Heard: January 18, 2006
Judgment: January 18, 2006
Docket: 06-CL-6241

Counsel: Jay Carfagnini for Muscletech Research and Development Inc. et al.
Derrick Tay for Paul Gardiner, Iovate Health Sciences Inc.
Natasha MacParland for RSM Richter Inc., Proposed Monitor

Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues
Group of companies applied for initial order under Act — Application granted — Companies were insolvent given imbalance of assets to debt — Debt was over $5,000,000 threshold of Act — Stay of products liability actions against companies would facilitate bona fide resolution discussions forming basis of plan of compromise — It was practical to have actions involving applicants and non-applicants dealt with together as latter were derivative — Companies were all registered in Ontario and had substantial connection to it.

***Farley J.*:**

1 This is a short endorsement which may be elaborated upon.

2 I am satisfied that the applicants are insolvent given their imbalance of assets to debt (both determined and contingent liability as to product liability suits) and that the debt of the applicant group is over the $5 million threshold as to the CCAA test.

3 The product liability situation vis-à-vis the non-applicants appears to be in essence derivative of claims against the applicants and it would neither be logical nor practical/functional to have that product liability litigation not be dealt with on an all encompassing basis: see *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.). It is understood that this stay will likely facilitate the entering into of overall *bona fide* resolution meetings/discussions which would form the foundation of a plan of reorganization and compromise.

4 I further understand that the applicants, all of which are Canadian companies registered in Ontario and with the substantial connections to this jurisdiction as set out a paragraph 67 of the applicants' factum:

67. In addition to the location of each Applicant's registered office, it is respectfully submitted that the following factors further support a finding that each Applicant's COMI is Ontario, Canada:

(a) each of the Applicants was incorporated in Ontario;

(b) each Applicant's mailing address is an Ontario address;

(c) the principals, directors and officers of the Applicants are residents of Ontario;

(d) all decision-making and control in respect of the Applicants, including product development, takes place at the Applicants' premises located in Ontario;

(e) the Applicants' principal banking arrangements have been conducted in Ontario through the Canadian Imperial Bank of Commerce; and

(f) all administrative functions associated with the Applicants and all of the employees that perform such functions, including general accounting, financial reporting, budgeting and cash management, are conducted and situated in Ontario.

will be making an application later today in the Southern District of New York U.S. Bankruptcy Court for recognition, pursuant to Chapter 15 of the US Bankruptcy Code, of the Initial Order which I am granting. In that respect, I would observe that as I discussed in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), the courts of Canada and of the US have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency.

5 As this order today is being requested without notice to persons who may be affected, I would stress that these persons are completely at liberty and encouraged to use the comeback clause found at paragraph 59 of the Initial Order. In that respect, notwithstanding any order having previously been given, the onus rests with the applicants (and the applicants alone) to justify *ab initio* the relief requested and previously granted. Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question. This endorsement is to be provided to the creditors and others receiving notice.

6 Order to issue as per my fiat.

Application granted.

Tab 9

2006 CarswellOnt 3632
Ontario Superior Court of Justice

2006 CarswellOnt 3632

Muscletech Research and Development Inc. - CCAA

Ground J.

Heard: June 8, 2006
Judgment: June 8, 2006
Docket: 06-CL-6241

Counsel: Sara J. Erskine, for Richard Ward and Ward Conceptual Communications
N. MacParland, J. Swartz, for RSM Richter Inc.
Jeff Carhart, David Molton, for Ad Hod Committee of Tort Claimants
Derrick Tay, for Iovate Companies
Stuart Brotman, for GNC Oldco Entities
Sheryl Seigel, for GNC Corporation

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

***Ground J.*, (Orally):**

1 The motion brought by Richard Ward and Ward Conceptual Communications (collectively "Ward") for the lifting of the stay imposed in the within the CCAA proceeding is, in my view, premature and does not resolve the concern of Ward.

2 It must be kept in mind that the claim which would be filed in the CCAA proceeding and which will be dealt with by the claims resolution officer and which will be dealt with in the Plan submitted to creditors and ultimately to the court for sanction can only be the claim Ward against Muscletech in respect of the infringing activities of Muscletech. It cannot impact on any claim which Ward may have for infringing activities by Mr. Gardiner ("Gardiner") personally or by the Iovate companies (collectively "Iovate"). On the other hand, a determination by the claims officer or by this court that Ward has a valid claim against Muscletech in respect of its infringing activities would, in my view, be either raised *res judicata* or issue estoppel with respect to Ward's claims against Gardiner or Iovate because the activities of all three alleged infringers are the same activities. It, therefore, seems to me that no steps should be taken at this stage with respect to the proposed action against Iovate or the continuance of the action against Gardiner until the determination and final resolution of the claims resolution procedure which will determine whether or not Ward has any claim in respect of the alleged infringing activities against Muscletech and accordingly, whether Ward would have any claim in respect of similar activities against Gardiner or Iovate.

3 In addition, if the "full release" referred to in the factum of the Applicants purported to impose a condition, on the acceptance of Ward's claim, that Ward release Gardiner personally and/or Iovate from any liability they may have with respect to their own infringing activities, I would have thought that would be a basis on which Ward would appeal the decision of the claims officer or would certainly be an issue raised by Ward at the sanction hearing of the Plan.

4 Accordingly, I do not see that Ward's rights are, in any way, affected by delaying any motion to proceed with its action against Gardiner and Iovate until after the determination of its claim in the CCAA proceeding against Muscletech.

5 Accordingly, the motion is dismissed without prejudice to the rights of Ward to bring any motion before this court, subsequent to the completion of the claims resolution process or the approval or non-approval of the Plan, to permit it to continue or bring its action against Gardiner or Iovate with respect to their distinct alleged infringements. Pursuant to paragraph 8 of the Initial Order in this matter, the postponement of the bringing of such motion as a result of the dismissal of today's motion will not result in the limitation period running against Ward with respect to any such proposed action or continued action against Gardiner or Iovate. The dismissal of today's motion is also without prejudice to the rights of Ward or the Applicants to seek costs of today's motion dependent upon the resolution of Ward's claim against Muscletech during the claims resolution process.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED., *et al.*

Applicants

Court File No. CV-19-616077-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE APPLICANTS
IMPERIAL TOBACCO CANADA LIMITED
AND IMPERIAL TOBACCO COMPANY LIMITED

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)
Marc Wasserman (LSO# 44066M)
John A. MacDonald (LSO# 25884R)
Craig Lockwood (LSO# 46668M)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers to the Applicants, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Matter No: 1144377