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

AND IN THE MATTER OF **KMC MINING CORPORATION**

DOCUMENT **BRIEF OF LAW IN SUPPORT OF APPLICATION FOR EXTENSION OF STAY OF PROCEEDINGS**

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TABLE OF CONTENTS

I. INTRODUCTION and SUMMARY OF CCAA PROCEEDINGS 3
II. FACTS 5
III. ISSUES 6
IV. ARGUMENT 6
A. Extension of the Stay Period 6
B. Union Grievances and WEPPA 11
C. Security Deposit 13
D. Assignment of Insurance and Warranty Claim re: 2022 Liebherr Dozer 14
E. Interim Distribution 17
V. CONCLUSIONS AND RELIEF SOUGHT 18
TABLE OF AUTHORITIES 19

I. INTRODUCTION and SUMMARY OF CCAA PROCEEDINGS

1. In this Application, KMC Mining Corporation ("**KMC**" or the "**Applicant**") seeks an Order:

   a) extending the stay of proceedings ("**Stay Period**") as against KMC to and including November 30, 2025, in respect of all proceedings, rights and remedies against KMC including its respective businesses and property, or the Monitor;

   b) declaring that any of KMC's grieving former employees who are members of International Union of Operating Engineers, Local Union No. 955 ("**Union**") are not entitled to further pay (including severance or termination pay), or alternatively, confirming the WEPPA Declaration continues to apply to KMC, including but not limited to as related to any of KMC's grieving former employees who are members of the Union and who are owed eligible wages under WEPPA;

   c) ordering Gellarne Holdings (2001) Ltd. to forthwith pay the sum of $13,125.00 to counsel for KMC, being the security deposit under a former lease of a commercial property located at 5809 – 98 Street, Edmonton between Gellarne Holdings (2001) Ltd. (as landlord) and KMC;

   d) assigning all rights and obligations of KMC under the insurance policies and contracts listed below to Deutsche Leasing Canada Corp. ("**Deutsche**"), or affiliate, as related to the 2022 Liebherr PR776 (s/n 25121) (the "**Dozer**"):

      i) Starr Insurance & Reinsurance Limited insurance policy #1000598040231 (or such other policy # as related to the Dozer);

      ii) Liebherr Canada Ltd. warranty as related to the Dozer;

      iii) ClaimsPro claim #24110-5339; and

      iv) any other insurance policy, warranty or insurance claim related to the Dozer and not specifically mentioned above;

      (collectively the "**Assumed Contracts**"); and

   e) authorizing KMC, upon request of KMC's primary secured lender, the **Syndicate**, and upon review of the Monitor, to make periodic interim distributions from cash in its accounts of up to $3,500,000 in the aggregate ("**Interim Distribution**").

2. On December 5, 2024, KMC filed a Notice of Intention to Make a Proposal ("**NOI**") under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**").

3. On January 10, 2025, an Initial Order pursuant to section 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-26, as amended (the "**CCAA**") was granted by the Honourable Justice M.J. Lema in

respect of KMC, which continued the NOI proceedings into these CCAA proceedings, and which included a Stay Period to and including January 20, 2025. FTI Consulting Canada Inc. ("**FTI**") is the Monitor within the CCAA proceedings ("**Monitor**").

4. The Initial Order also included a declaration that KMC and its collective former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 and are individuals to whom the *Wage Earner Protection Program Act (Canada)*, SC 2005, c 47, s 1 ("**WEPPA**") applies (the "**WEPPA Declaration**").

5. Also on January 10, 2025, the Honourable Justice M.J. Lema also granted an Order approving the sales and investment solicitation process ("**SISP**") (with the Order approving the SISP being the "**Order – Approve SISP**") over substantially all of KMC's assets ("**Property**"). Ernst & Young Orenda Corporate Finance Inc. (the "**Sales Agent**") administered the SISP as Sales Agent, with oversight from the Monitor.

6. On January 20, 2025, the Honourable Justice J.T. Nielson granted, *inter alia*, an amended and restated initial order ("**ARIO**") which, *inter alia*, extended the Stay Period to June 16, 2025. The ARIO included approval of a Key Employee Retention Plan ("**KERP**").

7. Concurrent with the granting of the ARIO, the Court granted an Order establishing a process for the sale or return of KMC's leased equipment (the "**Lease Equipment Return Process Order**").

8. On April 17, 2025, the Honourable Justice D.A. Mah granted, *inter alia*, a Sale Approval and Vesting Order ("**SAVO**") approving a transaction arising from the SISP whereby substantially all of KMC's Property was sold to a third-party purchaser (the "**Transaction**") for proceeds in excess of $100 million. The Transaction closed on May 2, 2025.

9. Concurrent with the granting of the SAVO, the Court granted an Order authorizing and directing the Monitor to make interim distributions of up to 66 2/3% of the net sale proceeds from the Transaction to those secured creditors whose collateral was sold as part of the Transaction.

10. On May 23, 2025, Justice Harris granted KMC's application which extended the Stay Period to and including July 31, 2025 (the "**Second Extension Order**").

11. Concurrent with the granting of the Second Extension Order, the Court granted an Order approving the Monitor's proposed cost allocation among the secured creditors and authorized and directed the Monitor to make a further distribution of the funds held by it to the secured creditors whose collateral was sold as part of the Transaction.

II. FACTS[1]

12. The facts are set out in the Affidavit of Bryn Jones ("**Jones Affidavit #1**") sworn December 31, 2024, Affidavit of Bryn Jones sworn January 14, 2025 ("**Jones Affidavit #2**"), Affidavit of Bryn Jones sworn April 7, 2025 ("**Jones Affidavit #3**"), Affidavit of Daniel Klemke sworn May 9, 2025 ("**Klemke Affidavit**") and Affidavit of Daniel Klemke sworn July 21, 2025 ("**Klemke Affidavit #2**").

13. The salient facts will generally be referred to directly in argument as outlined below. Specific additional facts which are germane to the background of this matter, and updates on the activity of KMC since the last Court appearance on May 23, 2025 follow on a summary basis.

14. As mentioned, on April 17, 2025, the Court granted the SAVO, which approved the Transaction. No party opposed the Transaction. The Transaction had the support of KMC's primary secured creditor (the Syndicate), various equipment lessors whose equipment was included in the Transaction and the Monitor.

15. The Transaction closed on May 2, 2025 and generated sale proceeds in excess of $100 Million.

16. As of April 4, 2025, KMC employed 92 full-time employees or subcontractors, of which 14 were located at its head office in Edmonton, Alberta, 40 on a labour supply project in British Columbia, and 38 field employees working in Fort McMurray or a field office location maintained there.

17. With the Transaction closed, and most of KMC's current operations having been wound down, or are in the process of being wound down, KMC took steps to reduce its workforce.

18. At present time KMC has approximately 6 employees full and part-time in Edmonton and approximately 20 on labour and supply contracts in British Columbia (Hudbay), and in Alberta with the Purchaser.

19. With respect to one labour and supply contract, as mentioned in my prior Affidavit, KMC has in place a purchase order with Hudbay Minerals at its copper mountain mine in British Columbia to supply equipment operators to the site. That purchase order commenced at or around the date of the Initial Order and is for a term which has currently been extended to September 8, 2025, which is the third extension to the Hudbay work. KMC anticipates revenue of approximately $750,000 respecting the remaining work.

[1] Affidavit of Daniel Klemke sworn July 21, 2025 ("**Klemke Affidavit #2**") at paras 14, 16-17, 24-25.

20. As more specifically described within the argument below, chief among the factors necessitating these CCAA proceedings was the sudden and unexpected cancellation of substantial scopes of work under contracts between KMC and its main client, Suncor Energy Inc. ("**Suncor**"). A thorough analysis as to potential claims KMC may have due to those cancellations has commenced.

III. ISSUES

21. The issues to consider in this Application before the Court are:
    a) whether the Stay Period ought to be extended to November 30, 2025. In that regard, the test for making that determination is:
        i) whether circumstances exist that make the Order appropriate; and
        ii) whether KMC has acted, and is acting, in good faith and with due diligence;
    b) whether any of KMC's grieving former employees who are members of the Union are entitled to further pay based on the terms of the Collective Bargaining Agreement, or alternatively, with respect to the WEPPA Declaration, whether KMC, and its grieving former employees who are members of the Union and who are owed eligible wages under WEPPA, fall within the ambit of the WEPPA Declaration;
    c) with respect to the Security Deposit, whether the Landlord ought to return the same to KMC;
    d) in consideration of section 11.3 of the CCAA, whether insurance and warranty claim (and any related policies) ought to be assigned to Deutsche; and
    e) with respect to the Interim Distribution, whether the same should be authorized.

IV. ARGUMENT

A. Extension of the Stay Period

22. It is respectfully submitted that the extension of the stay of proceedings should be granted as the extension of the Stay Period is appropriate and KMC has acted in good faith and with due diligence.

23. Section 11.02(2) of the CCAA provides the jurisdiction for the Court to extend the Stay Period following an Initial Order:

> A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> > (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.[2]

24. Section 11.02(3) of the CCAA further provides the test for an extension:

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

25. The role of this Honourable Court on a subsequent application under section 11.02(2) is not to re-evaluate the initial decision, but rather to consider whether KMC has established that the current circumstances support an extension as being appropriate and that KMC has acted, and is acting, in good faith and with due diligence.[4]

26. The Applicant always has the onus.

Appropriate Circumstance

27. The purpose of the CCAA is set out above. Appropriateness of an extension under the CCAA is assessed by inquiring into whether the extension order sought advances the remedial policy objectives underlying the CCAA. A stay can be lifted if the reorganization is doomed to failure, but where the order sought realistically advances the remedial objectives, a CCAA court has the discretion to grant it.[5]

28. The causes of the insolvency and the financial circumstances of KMC and the prevailing circumstances were thoroughly canvassed at the application for the Initial Order. Those same circumstances continue, and are summarized below.

29. The circumstances necessitating these CCAA proceedings arose due to several factors, though chief among those factors being the sudden and unexpected cancellation of substantial scopes of work under contracts between KMC and Suncor or affiliates.[6]

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[2] CCAA at section 11.02(2) **[TAB 1]**
[3] CCAA at section 11.02(3) **[TAB 1]**
[4] *Re Canada North Group Inc*., 2017 ABQB 508 at para 33 **[TAB 2]**
[5] *Re Canada North Group Inc*., 2017 ABQB 508 at para 34 **[TAB 2]**

[6] Klemke Affidavit #2 at para 26.

30. Prior to these CCAA proceedings, Suncor was KMC's most significant, if not only, customer. KMC had been providing contracting mining services to Suncor for several decades.[7]

31. Suncor's contracting practice generally, and with KMC specifically, utilizes a master Multiple Use Agreement ("**MUA**") which sets out general terms and conditions, and allows for the entering of multiple sub-agreements, contracts or purchase orders under the umbrella of the MUA for any number of different projects or scopes of work.[8]

32. KMC believes it has substantial claims against Suncor which can be broadly characterized as follows:

    a) a claim for the impacts of adverse site conditions and extended hauling distances on the 2024 Fort Hills Overburden scope of work (the "**Condition Impact Claim**");
    b) a claim for demobilization costs as permitted under the MUA and applicable purchase order for the 2024 Fort Hills Overburden scope of work (the "**Demobilization Claim**");
    c) a claim for damages arising from the cancellation of the 2024 Fort Hills Overburden scope of work for convenience (the "**Overburden Cancellation Claim**");
    d) a claim for damages arising from the cancellation of the waste stream and rejects scope of work (the "**Rejects Cancellation Claim**"); and
    e) a claim for damages for the breach of the Settlement and Release Agreement arising from the cancellation of the 2019 Overburden Removal Contract (the "**Breach of Settlement Claim**").[9]

33. KMC's legal counsel has conducted a high-level overview of the potential claims against Suncor for, *inter alia*, the circumstances described above. That evaluation has commenced and is ongoing. The combined damage estimate at this time is in the tens of millions of dollars, with further evaluation ongoing that could materially increase said estimate.[10]

34. KMC is currently in discussions with litigation funders and is assessing its options for pursuit of the claims against Suncor. If successful, even in part, the claims against Suncor, and recovery therefrom, would have a material, positive outcome for KMC's stakeholders.[11]

35. Separately, KMC is also working on numerous other matters, including the following:

    a) working to wind-up its non-union staff's pension plan with Canada Life/London Life;

[7] Klemke Affidavit #2 at para 27.
[8] Klemke Affidavit #2 at para 28.
[9] Klemke Affidavit #2 at para 29.
[10] Klemke Affidavit #2 at para 30.
[11] Klemke Affidavit #2 at para 31.

b) working with the Workers' Compensation Board ("**WCB**") to reconcile 2024 accounts based on a reduced actual payroll than was originally forecasted, reconciliation of premiums paid and credits owed, and to finalize rebates from WCB which KMC estimates to be in excess of $200,000; and

c) KMC is both a Plaintiff and Defendant in actions related to a new Komatsu 830E that KMC rented from SMS Equipment ("**SMS**"), which was destroyed by fire within 10 hours of commencing work. KMC and its counsel are evaluating as to what potential monetary benefit KMC may have, if KMC pursues a claim (whether insurance or litigation). KMC suffered a loss of approximately $600,000 related to loss of KMC property (tires) as well as cost of removing burned materials from the site where the fire occurred.[12]

36. Overall, the maintenance of the Stay Period is appropriate to enable KMC to effectively wind down its operations and develop a plan for its exit from these CCAA proceedings, without regard to having to advance defences and collection efforts respecting claims of creditors.

Good Faith

37. KMC has and continues to act in good faith.

38. The applicable definition of good faith was set out by the Honourable Justice Topolniski in *San Francisco Gifts Ltd., Re*:

> The term "good faith" is not defined in the CCAA and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of "good faith" found in Black's Law Dictionary to support the proposition that good faith encompasses general commercial fairness and honesty:
>
> > A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage.
>
> "Good faith" is defined as "honesty of intention" in the Concise Oxford Dictionary. Regardless of which definition is used, honesty is at the core…[13]

39. Further, the good faith test under the CCAA is properly limited to good faith within the CCAA, and while there has not been any evidence of KMC not acting in good faith with creditors, it is also noted that "good faith" is not in respect of prior conduct with creditors:

[12] Klemke Affidavit #2 at para 51.
[13] *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 at paras 14 - 16 **[TAB 3]**

> While "good faith" in the context of stay applications is generally focused on the debtor's dealings with stakeholders, concern for the broader public interest mandates that a stay not be granted if the result will be to condone wrongdoing.
>
> Although there is a possibility that a debtor company's business practices will be so offensive as to warrant refusal of a stay extension on public policy grounds, this is not such a case. Clearly, San Francisco's sale of knockoff goods was illegal and offensive. Most troubling was its sale to an unwitting public of goods bearing counterfeit safety labels. Allowing the stay to continue in this case is not to minimize the repugnant nature of San Francisco's conduct. However, the company has been condemned for its illegal conduct in the appropriate forum and punishment levied. Denying the stay extension application would be an additional form of punishment. Of greater concern is the effect that it would have on San Francisco's creditors, particularly the unsecured creditors, who would be denied their right to vote on the plan and whatever chance they might have for a small financial recovery, one which they, for the most part, patiently await.
>
> San Francisco has met the prerequisites that it has acted and is acting with due diligence and in good faith in working towards presenting a plan of arrangement to its creditors. Appreciating that the CCAA is to be given a broad and liberal interpretation to give effect to its remedial purpose, I am satisfied that, in the circumstances, extending the stay of proceedings is appropriate.[14]

40. These CCAA proceedings commenced on January 10, 2025. Within approximately six months, the following non-exhaustive list details the good faith and due diligence that KMC has acted with:

    a) KMC has continued the cash flow generating operations which remain;[15]

    b) KMC took steps to return certain assets which were secured to various lessors, pursuant to the Lease Equipment Return Order granted January 20, 2025;[16]

    c) KMC has reduced the number of employees it employs, as necessitated by current downsized operations;[17]

    d) KMC paid in full the interim lending facility under these CCAA proceedings;[18]

    e) the SISP was implemented, with the Property marketed on a worldwide basis by the Sales Agent, and with due diligence undertaken by parties as far away as Australia[19];

    f) pursuant to the SISP, one party made an *en bloc* offer for substantially all the assets of KMC (the Transaction), including the assignment of certain contracts to which KMC was a party;[20]

[14] *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 at paras 30 - 32 **[TAB 3]**
[15] Klemke Affidavit #2 at paras 22-25.
[16] Jones Affidavit #3 at paras 17-21.
[17] Klemke Affidavit #2 at paras 22, 24.
[18] Jones Affidavit #3 at para 16.
[19] Jones Affidavit #3 at para 43.
[20] Klemke Affidavit #2 at para 12.

g) no party opposed the Transaction, and KMC's main secured lender (the Syndicate), the Monitor and lessors whose assets were to be included in the Transaction supported the same[21];

h) the Transaction closed, generating sale proceeds of over $100 million;[22]

i) KMC, through counsel, has undertaken a review and analysis of potential claims against Suncor which would, if successful even in part, have a material positive impact on stakeholders;[23] and

j) KMC has continued to act on various matters as part of its wind down process, including reconciling amounts paid to WCB and evaluation of potential claims which may have monetary benefit to KMC.[24]

41. KMC has acted honestly, and in a forthright and commercially reasonable manner with its stakeholders and this Honourable Court. There is certainly no evidence to suggest otherwise.

Due Diligence

42. As described in the preceding section, in the short period since the Initial Order was granted and thereafter extended by the ARIO, KMC has promptly taken steps to maximize value to all stakeholders. It continues to do so.

43. Further, there is no material prejudice to the creditors that KMC is aware of. While an inability to collect may be considered simple prejudice, in the insolvency context it has been held that prevention of collection does not constitute substantial or considerable prejudice.[25] There is no evidence on which the creditors of KMC can rely to show that they have been, or will be, materially prejudiced by the extension of the Stay Period.

44. KMC has and continues to act with due diligence, and the brief extension of the Stay Period is not materially prejudicial to any creditor.

B. Union Grievances and WEPPA

45. Between January through to June 2025, KMC has received four (4) grievances from the International Union of Operating Engineers (the "**Union**"). The grievances allege that certain Union-members, and

[21] Klemke Affidavit #2 at para 16.
[22] Klemke Affidavit #2 at para 17.
[23] Klemke Affidavit #2 at para 30.
[24] Klemke Affidavit #2 at para 51.
[25] *Cantrail Coach Lines Ltd., Re, 2005 BCSC 351 at para 22* **[TAB 4]**.

former KMC employees, did not receive termination pay pursuant to the *Employment Standard Code* (or in one case, four days' pay).[26]

46. The grievances also claim for "redress", which is the Union's claim for Union dues and other fees otherwise payable to the Union while an employee is paid.[27]

47. Pursuant to the Collective Bargaining Agreement with the Union ("**CBA**") and KMC's history with the Union, at no time was KMC subjected to grievances for payment of termination pay under the *Employment Standards Code*.[28]

48. KMC has always been of the view, backed by historic practices over decades, that it was part of the construction industry, and the CBA is consistent with that view: the Union is the hiring hall. KMC makes a request for workers and the Union dispatches them. When there are layoffs, the workers in effect go back to the hall to seek other work with other employers. There are provisions in the CBA to address this issue. The Union is now taking a different position and has issued the grievances.[29]

49. The CBA does not support the amounts grieved for by the Union. There are no severance or termination pay provisions upon layoff or termination.[30]

50. As part of the Initial Order and ARIO, KMC sought, and this Court granted, the WEPPA Declaration, and confirmed that KMC's collective former employees, meet the criteria prescribed by section 3.2 of the WEPPA Regulation and are individuals to whom the WEPPA applies as of the date of the ARIO.[31]

51. On April 17, 2025, KMC sought and was granted an Order that confirmed the WEPPA Declaration continued to apply to KMC.[32]

[26] Klemke Affidavit #2 at para 32-33.
[27] Klemke Affidavit #2 at para 33.
[28] Klemke Affidavit #2 at para 35.
[29] Klemke Affidavit #2 at para 36.
[30] Klemke Affidavit #2 at Exhibit "A".
[31] ARIO, para 46.
[32] Order – KERP Adjustment, WEPPA, Interim Distribution of Justice D.R. Mah granted April 17, 2025 at para 2.

52. Section 5(5) of WEPPA provides:

> (5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.[33]

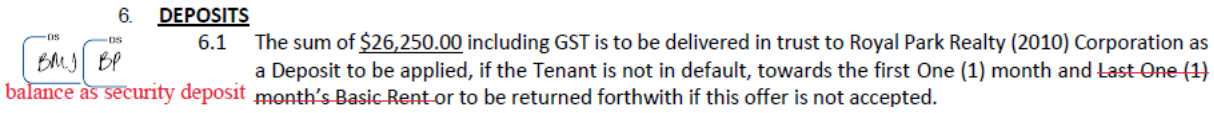
53. While KMC is of the position that the CBA is clear and that there is no entitlement to further pay from the grieving Union employees, in the event KMC is incorrect in that assertion, KMC wishes to clarify that the WEPPA Declaration would apply to grieving Union-members who have been terminated.

C. Security Deposit

54. KMC formerly leased the property at 5809 - 98 Street in Edmonton (the "**Lease**"), a commercial building/shop, from Gellarne Holdings (2001) Ltd. ("**Landlord**"). KMC, with the Monitor's approval, issued a Notice of Disclaimer of the Lease on March 24, 2025. The Landlord did not respond to the Notice of Disclaimer and the Lease is disclaimed.[34]

55. At the time of entering into the Lease and pursuant to section 6.1, KMC provided the Landlord a Deposit in the amount of $26,250.00 (inclusive of GST). One half of that sum ($13,125) was for the first month's rent (being the $12,500 monthly rent plus GST). The remaining half, $13,125, was held as a security deposit (the "**Security Deposit**").[35]

56. Section 6.1 of the Lease[36] reads as follows:



57. KMC has demanded return of the Security Deposit from the Landlord. To date, the Landlord has not responded, nor has the Landlord returned the Security Deposit.[37]

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[33] *Wage Earner Protection Program Act*, SC 2005, c 47, s 1, s 5(5) **[TAB 5]**.
[34] Klemke Affidavit #2 at paras 37-38.
[35] Klemke Affidavit #2 at para 39.
[36] Klemke Affidavit #2 at Exhibit "C".
[37] Klemke Affidavit #2 at para 40.

58. The Court of Appeal in *York Realty Inc v Alignvest Private Debt Ltd.*, 2015 ABCA 355 summarized the differences between a security deposit and prepaid rent.[38] In determining the amount in question was not prepaid rent, the Court also confirmed that said amount was not the property of the landlord.[39]

59. The Lease in the present matter is clear that one-half of the $26,250.00 was a deposit to be applied to rent (prepaid rent), and the other half was a security deposit. The parties in fact directly turned their minds to this by amending the original version of the Lease in section 6.1, and initialling the change, to specify that one-half of the $26,250.00 was a security deposit.

60. KMC paid all amounts owing to the Landlord up to the date of the lease being disclaimed and the premises subject to the Lease were left by KMC in good condition, and substantially the same condition as when KMC first took possession[40]. The Security Deposit ought to be returned to KMC.

D. Assignment of Insurance and Warranty Claim re: 2022 Liebherr Dozer[41]

61. KMC leased a 2022 Liebherr PR776 (s/n 25121) dozer (the "**Dozer**") from Deutsche Leasing Canada Corp. ("**Deutsche**"). The Dozer was subject to a fire in January 2024. An insurance claim was made to KMC's insurer (Starr Insurance) with respect to the Dozer (the "**Policy**").

62. The Dozer also had a warranty from the manufacturer, Liebherr (the "**Warranty**").

63. The current status of the insurance claim is that the insurer and Liebherr are discussing whether the claim is to be covered by the Policy or Warranty. A recent update provided by the insurance adjuster also advised that the Dozer is far from a total loss and should be repairable for a few hundred thousand dollars.

64. The amount KMC owes on the Dozer lease to Deutsche is approximately $997,000. The ultimate outcome of the insurance or warranty claim, best case, is repair of the Dozer (whether through insurance proceeds or manufacturer warranty). Alternatively, if there were insurance proceeds as opposed to repair, the proceeds would not come near covering the amount KMC owes to Deutsche under the Dozer lease, which provides that any insurance proceeds are first to Deutsche's benefit.

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[38] *York Realty Inc v Alignvest Private Debt Ltd.*, 2015 ABCA 355 [*York Realty*] at paras 15-16 **[TAB 6]**.
[39] *York Realty* at para 28 **[TAB 6]**.
[40] Klemke Affidavit #2 at paras 38, 41.
[41] Klemke Affidavit #2 at paras 42 – 50.

65. Deutsche is agreeable to the Policy and Warranty (as related to the Dozer), and any claim under the same, being assigned.

66. There is no monetary benefit to KMC in continuing to spend resources on the Dozer insurance (or warranty) claim.

67. Pursuant to section 11.3 of the CCAA, the Court has the power to assign contracts to which the debtor company is a party.[42]

68. Section 84.1 of the BIA[43] is analogous to section 11.3 of the CCAA, other than the CCAA requiring the debtor (rather than the trustee in bankruptcy) to bring the application and that the Court is to also consider whether the Monitor approves of the proposed assignment.

69. Harmonization of Canada's insolvency and restructuring schemes has been a priority. The Supreme Court of Canada's comments in *Century Services* provide insight into the harmonization of the CCAA and BIA when stating that "with parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes…"[44]

70. With the Supreme Court of Canada outlining the harmony between the BIA and CCAA, and the materially similar wording of sections 84.1 of the BIA and 11.3 of the CCAA, the principles of cases interpreting either section are instructive.

71. In consideration of section 84.1 of the BIA, the Alberta Court of Appeal in *Ford Motor Company of Canada, Limited v Welcome Ford Sales Ltd* noted the basis of the section is to preserve the value of the estate as a whole, even if some contractual rights of some creditors are compromised:

> [30] The effect of s. 84.1 of the BIA is to override the common law unilateral right of the innocent party to the contract to accept the repudiation and end the contract. It has been designed to preserve the value of the estate as a whole, even if the contractual rights of some creditors, such as Ford in this case, are compromised. Therefore, even if Ford otherwise had the right to terminate the dealership agreement for breach of condition, and its assignment clause was not one which survived the termination, s. 84.1 nonetheless allows the trustee to apply to the Court for permission to assign the contract so long as the provisions of the statute are met.[45]

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[42] *CCAA*, s 11.3 **[TAB 1]**.
[43] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 84.1 **[TAB 7]**.
[44] *Century Services Inc v Canada (Attorney General), 2010 SCC 60* at para 24 **[TAB 8]**.
[45] *Ford Motor Company of Canada, Limited v Welcome Ford Sales Ltd.*, 2011 ABCA 158 [*Welcome Ford*] at para 30 **[TAB 9]**.

72. Further, the Alberta Court of Appeal noted that the circumstances in which contracts are not assignable are narrow:

> [52] Parties to a contract cannot insulate it from the effect of s. 84.1 simply by including a clause describing it as creating "personal" obligations where the contract is, in fact, a commercial one which could be performed by many others than the contracting parties.
>
> [53] Ford correctly pointed out that s. 84.1(3) does not speak of a personal contract as being the only type of contract which contains rights and obligations that are not assignable by their nature. It argued that the above terms of the dealership agreement evidence that it is not assignable by reason of its nature even if it is not a personal contract.
>
> [54] However, those express provisions – including those which describe it as personal in nature as well as Ford's reservation of the right to execute dealership agreements with those specifically selected and approved by it – are not sufficient to attract the application of s. 84.1(3) if other circumstances suggest the contrary. Otherwise, s. 84.1(4) would have no meaning, if a simple contractual provision to the effect that it was not "by reason of its nature" capable of unilateral assignment would be enough to make that so.[46]

73. Courts have approved assignments under section 11.3 of the CCAA even when the proposed purchaser of the contract was newly incorporated and highly leveraged:

> [30] It seems to me that a fundamental condition precedent to requiring a contract counterpart to be locked into an involuntary assignment post-insolvency is that the court sanctioning the assignment is able to conclude that the assignee will, in the words of s. 11.3(3)(b) of the CCAA, "be able to perform the obligations". This does not imply iron-clad guarantees. It does not give license to the counterparty to demand the receipt of financial covenants or assurances that it did not previously enjoy under the contract it originally negotiated with the debtor.[47]

74. Parliament made a policy decision that a Court ought to have the discretion to authorize a trustee to assign (sell) the rights and obligations of a bankrupt under such an agreement notwithstanding objections of the counter-party.[48] The analogous section under section 11.3 of the CCAA provides the same authority.

75. Canvassing the consent of the contracting party is not a prerequisite to the application for approval of an assignment of an agreement.[49]

76. None of the exceptions within section 11.3(2) of the CCAA are applicable to these proposed assignments. Further, the factors to be considered under section 11.3(3) all favour assignment as:

    a) the Monitor is expected to be supportive of the assignment;

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[46] *Welcome Ford* at paras 52-54 **[TAB 9]**.
[47] *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 at para 30 **[TAB 10]**.
[48] *Welcome Ford* at para 39 **[TAB 9]**.
[49] *Welcome Ford* at para 66 **[TAB 9]**.

b) Deutsche is willing and able to accept the assignment;

c) the contracts being assigned are not personal in nature. Rather, what is being assigned is effectively an insurance or warranty claim, and the underlying insurance Policy and Warranty related only to the Dozer;

d) in circumstances where KMC is winding down most operations, continuing to spend resources on an insurance or warranty claim, when there is no expected financial benefit for KMC, is not beneficial for KMC, nor any stakeholders; and

e) there are no monetary defaults under the Policy or Warranty by KMC.[50]

77. This is an appropriate circumstance for the Court to exercise its discretion in assigning the Policy and Warranty (as related to the Dozer), and any resulting claim, to Deutsche.

E. Interim Distribution

78. It is common to proceed with interim distributions in insolvency proceedings.[51] In determining whether to authorize an interim distribution, courts may consider the following factors:

a) whether the security is valid and enforceable;

b) whether the amounts owed to the creditors would exceed the interim distribution;

c) whether the interim distribution would generate interest savings; and

d) whether there would be sufficient remaining liquidity after the interim distribution is made.[52]

79. Previously in these proceedings, the Monitor distributed 66 2/3% of the net sale proceeds from the Transaction to respective secured creditors.

80. KMC's projected cash flow supports further, periodic interim distributions up to the aggregate of $3,500,000 to the Syndicate, upon consultation with the Monitor and in consideration, at that time, of the cash position of KMC.

[50] Klemke Affidavit #2 at para 49.
[51] *Re AbitibiBowater Inc*, 2009 QCCS 6461 [*AbitibiBowater*] at para 71 **[TAB 11]**.
[52] *AbitibiBowater* at para 75 **[TAB 11]**.

V. CONCLUSIONS AND RELIEF SOUGHT

81. The extension of the Stay Period to and including November 30, 2025 is just and appropriate, and consistent with the objectives of the CCAA. In all the circumstances this Application ought to be allowed.

DATED this 21st day of July, 2025.

DUNCAN CRAIG LLP
Per:

_____
Darren R. Bieganek, KC/ Zachary Soprovich
Counsel for the Applicant, KMC Mining Corporation

TABLE OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11.02, 11.3
2. *Re Canada North Group Inc*., 2017 ABQB 508
3. *San Francisco Gifts Ltd., Re*, 2005 ABQB 91
4. *Cantrail Coach Lines Ltd., Re*, 2005 BCSC 351
5. *Wage Earner Protection Program Act*, SC 2005, c 47, s 1, s 5(5)
6. *York Realty Inc v Alignvest Private Debt Ltd.*, 2015 ABCA 355
7. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 84.1
8. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
9. *Ford Motor Company of Canada, Limited v Welcome Ford Sales Ltd.*, 2011 ABCA 158
10. *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678
11. *Re AbitibiBowater Inc*, 2009 QCCS 6461

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.02

Canada Statutes

R.S.C. 1985, c. C-36, s. 11.02 | L.R.C. 1985, ch. C-36, art. 11.02

Canada Statutes > Companies' Creditors Arrangement Act [ss. 1-63] > PART II JURISDICTION OF COURTS [ss. 9-18.6]

Notice

Current Version: Effective 01-11-2019

SECTION 11.02

Stays, etc. - initial application

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

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

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

Stays, etc. - other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

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

Burden of proof on application

(3) The court shall not make the order unless

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

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

End of Document

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.3

Canada Statutes

R.S.C. 1985, c. C-36, s. 11.3 | L.R.C. 1985, ch. C-36, art. 11.3

Canada Statutes > Companies' Creditors Arrangement Act [ss. 1-63] > PART II JURISDICTION OF COURTS [ss. 9-18.6]

Notice

Current Version: Effective 18-09-2009

SECTION 11.3

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

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

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) under an eligible financial contract;

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

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

Restriction

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

Copy of order

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

2017 ABQB 508
Alberta Court of Queen's Bench

Re Canada North Group Inc

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

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

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

S.D. Hillier J.

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

Counsel: S.A. Wanke, S. Norris, for Applicants / Cross-Respondents
C.P. Russell, Q.C., for Respondent / Cross-Applicant
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J. Oliver, for Business Development Bank of Canada
T.M. Warner, for ECN Capital Corp.
M.J. McCabe, Q.C., for PricewaterhouseCoopers
R.J. Wasylyshyn, for Weslease Income Growth Fund LP
H.M.B. Ferris, for First Island Financial Services Ltd.
G.F. Body, for Canada Revenue Agency

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Debtors were group of companies involved in work camps in natural resource sector, modular construction manufacturing, camp land rentals, and real estate holdings including golf course — Debtors had used services of secured creditor for significant period of time — Debtors' operations and profitability were significantly impacted by downturn in economy — Debtors issued notices of intention to make proposals under Bankruptcy and Insolvency Act and obtained initial stay of proceedings under s. 11.02(1) of Companies' Creditors Arrangement Act (CCAA) — Debtors brought application for extension of stay under s. 11.02(2) of CCAA, and for ancillary relief — Creditor brought cross-application for order lifting stay and appointing either full or interim receiver — Application granted; cross-application dismissed — Stay was extended with date for review being set; debtor-in-possession (DIP) financing was increased; affiliated company was added as debtor; monitor's first report was approved; and stay was expanded to included third parties involved in debtors' projects — Chief restructuring officer had begun consultations with unsolicited parties who had expressed interest, and structure for plan of arrangement was now important priority — It was not shown that debtors had failed to act in good faith to extent of disentitling extension sought, and extension of stay was in best interest subject to further vigorous review within reasonable period of time — Increase in DIP financing was required to address anticipated cash flow shortage resulting from welcome work during what was typically slower season for debtors — Operations of affiliated company were inextricably linked to those of debtors.

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

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

• expansion of the Stay to include 1919 is reasonable.

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

V Law

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

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

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

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

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

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

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

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

Most Negative Treatment: Distinguished
Most Recent Distinguished: Worldspan Marine Inc., Re | 2011 BCSC 1758, 2011 CarswellBC 3667, 86 C.B.R. (5th) 119, [2012] B.C.W.L.D. 2061, 211 A.C.W.S. (3d) 557 | (B.C. S.C., Dec 21, 2011)

2005 ABQB 91
Alberta Court of Queen's Bench

San Francisco Gifts Ltd., Re

2005 CarswellAlta 174, 2005 ABQB 91, [2005] A.W.L.D. 1426, [2005] A.J. No. 131, 10 C.B.R. (5th) 275, 137 A.C.W.S. (3d) 242, 378 A.R. 361, 42 Alta. L.R. (4th) 377

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

And In the Matter of a Plan of Compromise or Arrangement of San Francisco Gifts Ltd., San Francisco Retail Gifts Incorporated (Previously Called San Francisco Gifts Incorporated), San Francisco Gift Stores Limited, San Francisco Gifts (Atlantic) Limited, San Francisco Stores Ltd., San Francisco Gifts & Novelties Inc., San Francisco Gifts & Novelty Merchandising Corporation (Previously Called San Francisco Gifts and Novelty Corporation), San Francisco (The Rock) Ltd. (Previously Called San Francisco Newfoundland Ltd.) And San Francisco Retail Gifts & Novelties Limited (Previously Called San Francisco Gifts & Novelties Limited)

Topolniski J.

Heard: January 17, 2005
Judgment: February 9, 2005
Docket: Edmonton 0403-00170

Counsel: Richard T.G. Reeson, Q.C., John Bridgadear, Howard J. Sniderman for Companies
Michael McCabe, Q.C. for Monitor, Browning Crocker Inc.
Jeremy H. Hockin for Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc.; 20 Vic Management Ltd.; Morguard Investments Ltd.; Morguard Real Estate Investments Trust; Millwoods Town Centre, Edmonton; Park Place, Lethbridge; Metro Town, Burnaby, B.C.; Northgate Mall, Edmonton; Brandon Shopping Mall, MB; Herongate Mall, Ottawa; Westmount Shopping Centre, London; Village Mall, St. John's NFLD; Kingsway Garden Mall; Westbrook Mall; Bonnie Doon Shopping Centre; Red Deer Centre; Marlborough Mall; Circile Park Mall; Kildonan Place Mall; Cambridge Centre; Oshawa Centre; Tecumseh Mall; Downtown Chatham Centre; Simcoe Town Centre; Niagara Square; Halifax Shopping Centre; RioCan Property Services; 1113443 Ontario Inc.; Shoppers World, Brampton, ON; Tillicum Mall, Victoria, BC; Confederation Mall, Saskatoon, SK; Parkland Mall, Yorkton, SK; Cambrian Mall, Sault Ste. Marie, ON; Northumberland Mall, Cobourg, ON; Orangeville Mall, Orangeville, ON; Renfrew Mall, Renfrew, ON; Orillia Square Mall, Orillia, ON; Elgin Mall, St. Thomas, ON; Lawrence Square, North York, ON; Trinity Conception Square, Carbonear, NFLD; Charlottetown Mall, Charlottetown PEI; Timiskaming Square
Kent Rowan for Locher Evers International, Neuvo Rags, Quality Press
Tim Shelley (Agent Employee) for Lauer Transportation Services

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay

XIX.2.b.vii Extension of order

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Debtor operated national chain of novelty goods stores with some 400 employees — Debtor obtained Companies' Creditors Arrangement Act (CCAA) protection on January 7, 2000 — Stay of proceedings under CCAA was extended three times with expectation that entire CCAA process would be completed by February 7th, 2005 — On December 30, 2004, debtor pleaded guilty to nine counts of wilful copyright infringement and paid $150,000 fine — Debtor had sold lamps with counterfeit safety certification labels and was found to have other counterfeit goods in its possession — Debtor brought application for further extension of time — Application granted — Stay was extended to July 19, 2005 — This was not case where debtor's business practices were so offensive as to warrant refusal of extension on public policy grounds — Debtor's conduct was illegal and offensive, but debtor had already been condemned for its illegal conduct in appropriate forum — Denying extension would be additional form of punishment — Of greater concern was effect on unsecured creditors who would be denied right to vote on plan and any chance for small financial recovery — Debtor met prerequisites of acting with due diligence and in good faith in working towards presenting plan of arrangement to its creditors — Delay was primarily attributable to time required for debtor to seek leave to appeal from prior classification decision — Monitor was satisfied that debtor was financially viable despite payment of fine — Potential adverse effect of debtor's misconduct on business relationships was sheer speculation at this point.

Table of Authorities

Cases considered by *Topolniski J.*:

Agro Pacific Industries Ltd., Re (2000), 2000 BCSC 837, 2000 CarswellBC 1143, 76 B.C.L.R. (3d) 364, 5 B.L.R. (3d) 203 (B.C. S.C.) — considered

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

Associated Investors of Canada Ltd., Re (1988), 60 Alta. L.R. (2d) 242, 89 A.R. 344, 71 C.B.R. (N.S.) 71, 1988 CarswellAlta 310 (Alta. C.A.) — considered

Avery Construction Co., Re (1942), [1942] 4 D.L.R. 558, 24 C.B.R. 17, 1942 CarswellOnt 86 (Ont. S.C.) — referred to

Canadian Cottons Ltd., Re (1951), 33 C.B.R. 38, [1952] Que. S.C. 276, 1951 CarswellQue 27 (C.S. Que.) — referred to

Fracmaster Ltd., Re (1999), 1999 CarswellAlta 461, 245 A.R. 102, 11 C.B.R. (4th) 204 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — referred to

Juniper Lumber Co., Re (2000), 2000 CarswellNB 117 (N.B. Q.B.) — considered

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Meridian Development Inc. v. Toronto Dominion Bank (1984), [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576, 1984 CarswellAlta 259 (Alta. Q.B.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — referred to

Pacific National Lease Holding Corp., Re (August 17, 1992), Doc. A922870 (B.C. S.C.) — referred to

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

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — referred to

Sairex GmbH v. Prudential Steel Ltd. (1991), 8 C.B.R. (3d) 62, 1991 CarswellOnt 215 (Ont. Gen. Div.) — considered

Skeena Cellulose Inc., Re (2001), 2001 BCSC 1423, 2001 CarswellBC 2226, 29 C.B.R. (4th) 157 (B.C. S.C.) — considered

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Companies Act, 1929 (19 & 20 Geo. 5), c. 23
s. 153 — referred to

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

s. 11(6) — referred to

Copyright Act, R.S.C. 1985, c. C-42
Generally — referred to

s. 42 — referred to

APPLICATION by debtor for further extension of stay of proceedings under *Companies' Creditors Arrangement Act*.

***Topolniski J.*:**

Introduction

1 The San Francisco group of companies (San Francisco) obtained *Companies' Creditors Arrangement Act*[1] (*CCAA*) protection on January 7, 2000 (Initial Order). Key to that protection was the requisite stay of proceedings that gives a debtor company breathing room to formulate a plan of arrangement. The stay was extended three times thereafter with the expectation that the entire *CCAA* process would be completed by February 7th, 2005. That date was not met. Accordingly, San Francisco now applies to have the stay extended to June 30, 2005.

2 A small group of landlords opposes the motion on the basis of San Francisco's recent guilty plea to *Copyright Act* offenses and the sentencing judge's description of San Francisco's conduct as: "...a despicable fraud on the public. Not only not insignificant but bordering on a massive scale..." The landlords suggest that this precludes any possibility of the company having acted in "good faith" and therefore having met the statutory prerequisite to an extension. Further, they contend that

extending the stay would bring the administration of justice into disrepute.

3 San Francisco acknowledges that its conduct was stupid, offensive and dangerous. That said, it contends that it already has been sanctioned and that it has "paid its debt to society." It argues that subjecting it to another consequence in this proceeding would be akin to double jeopardy. Apart from the obvious consequential harm to the company itself, San Francisco expresses concern that its creditors might be disadvantaged if it is forced into bankruptcy.

4 While there has been some delay in moving this matter forward towards the creditor vote, this delay is primarily attributable to the time it took San Francisco to deal with leave to appeal my classification decision of September 28, 2004. Despite the opposing landlords' mild protestations to the contrary, it is evident that the company has acted with due diligence. The real focus of this application is on the meaning and scope of the term "good faith" as that term is used in s. 11(6) of the *CCAA*, and on whether San Francisco's conduct renders it unworthy of the protective umbrella of the Act in its restructuring efforts. It also raises questions about the role of a supervising court in *CCAA* proceedings.

Background

5 San Francisco operates a national chain of novelty goods stores from its head office in Edmonton, Alberta. It currently has 62 locations and approximately 400 employees.

6 The group of companies is comprised of the operating company, San Francisco Gifts Ltd., and a number of hollow nominee companies. The operating company holds all of the group's assets. It is 100 percent owned by Laurier Investments Corp., which in turn is 100 percent owned by Barry Slawsky (Slawsky), the driving force behind the companies.

7 Apart from typical priority challenges in insolvency matters, this proceeding has been punctuated by a series of challenges to the process and its continuation, led primarily by a group of landlords that includes the opposing landlords.

8 On December 30, 2004, San Francisco pleaded guilty to nine charges under s. 42 of the *Copyright Act*,[2] which creates offences for a variety of conduct constituting wilful copyright infringement. The evidence in that proceeding established that:

> (a) An investigation by the St. John's, Newfoundland, Fire Marshall, arising from a complaint about a faulty lamp sold by San Francisco, led to the discovery that the lamp bore a counterfeit safety certification label commonly called a "UL" label.[3] The R.C.M.P. conducted searches of San Francisco stores across the country, its head office, and a warehouse, which turned up other counterfeit electrical UL labels as well as counterfeit products bearing the symbols of trademark holders of Playboy, Marvel Comics and others.
>
> (b) Counterfeit UL labels were found in the offices of Slawsky and San Francisco's Head of Sales. There was also a fax from "a Chinese location" found in Slawsky's office that threatened that a report to Canadian authorities about the counterfeit safety labels would be made if payment was not forthcoming.
>
> (c) *Copyright Act* charges against Slawsky were withdrawn when San Francisco entered a plea of guilty to the charges;
>
> (d) The sentencing judge accepted counsels' joint submission that a $150,000.00 fine would be appropriate. In passing sentence, he condemned the company's conduct, particularly as it related to the counterfeit labels, expressing grave concern for the safety of unknowing consumers.[4]
>
> (e) San Francisco was co-operative during the R.C.M.P. investigation and the Crown's prosecution of the case.
>
> (f) San Francisco had been convicted of similar offences in 1998.

9 Judge Stevens-Guille's condemnation of San Francisco's conduct was the subject of local and national newspaper coverage.

10 The company paid the $150,000.00 fine from last year's profits.

Analysis

Fundamentals

11 The well established remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business. The premise is that this will result in a benefit to the company, its creditors and employees.[5] The Act is to be given a large and liberal interpretation.[6]

12 The court's jurisdiction under s. 11(6) to extend a stay of proceedings (beyond the initial 30 days of a *CCAA* order) is preconditioned on the applicant satisfying it that:

> (a) circumstances exist that make such an order appropriate; and
>
> (b) the applicant has acted, and is acting, in good faith and with due diligence.

13 Whether it is "appropriate" to make the order is not dependant on finding "due diligence" and "good faith." Indeed, refusal on that basis can be the result of an independent or interconnected finding. Stays of proceedings have been refused where the company is hopelessly insolvent; has acted in bad faith;[7] or where the plan of arrangement is unworkable, impractical or essentially doomed to failure.[8]

Meaning of "Good Faith"

14 The term "good faith" is not defined in the *CCAA* and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of "good faith" found in *Black's Law Dictionary* to support the proposition that good faith encompasses general commercial fairness and honesty:

> A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage.[9] [Emphasis added]

15 "Good faith" is defined as "honesty of intention" in the *Concise Oxford Dictionary*.[10]

16 Regardless of which definition is used, honesty is at the core. Honesty is what the opposing landlords urge is desperately wanting now and, as evidenced by San Francisco's earlier conviction for *Copyright Act* offences, was wanting in the past.

17 Accepting that the duty of "good faith" requires honesty, the question is whether that duty is owed to the court and the stakeholders directly affected by the process, including investors, creditors and employees, or does the *CCAA* cast a broader net by requiring good faith in terms of the company's dealings with the public at large? As will be seen from the following review of the jurisprudence, it usually means the former.

18 *Rio Nevada Energy Inc., Re*[11] and *Skeena Cellulose Inc., Re*[12] both involved opposed stay extension applications. In *Skeena Cellulose Inc.*, one of the company's two major secured creditors argued that the company's failure to carry out certain layoffs in the time recommended by the monitor showed a lack of good faith and due diligence. Brenner C.J.S.C. found that the delay in carrying out the layoffs was not a matter of bad faith. Given the severe consequences of terminating the stay, he granted the extension.

19 Romaine J. rejected a suggestion of lack of good faith arising from a creditor dispute and allegations of debtor

dishonesty in *Rio Nevada Energy Inc.*, finding that: "Rio Nevada has acted and is acting in good faith *with respect to these proceedings*."[13] [Emphasis added]

20 *Sairex GmbH v. Prudential Steel Ltd.*[14] involved an application by a creditor to proceed against a company under *CCAA* protection. Farley J. declined the application despite his sympathy for the creditor's position and his view that the creditor could make out a fairly strong case. He said: "... I would think that public policy also dictates that a company under *CCAA* protection or about to apply for it should not be allowed to engage in very offensive business practices against another and thumb its nose at the world from the safety of the *CCAA*."[15] In the end, he concluded that the dominant purpose behind the company's actions was not to harm the creditor.

21 Inventory suppliers in *Agro Pacific Industries Ltd., Re*[16] sought to set aside a *CCAA* stay on the ground that the company had not been acting in good faith in entering into contracts. The suppliers' contention that the company knew it was in shaky financial circumstances when it ordered goods and that it did so to pay down the secured creditors was rejected by Thackeray J. He was not satisfied that there was any lack of good faith or collusion between the company and its secured creditors to disadvantage the unsecured creditors.

22 *Juniper Lumber Co., Re*[17] addressed a creditor's allegations of bad faith in the context of an application to set aside the *ex parte* Initial Order. Turnbull J. held that, while fraud may not always preclude *CCAA* relief, it was of such a magnitude in that case as to warrant setting aside the order. He commented that: "basic honesty has to be present" in the course of conduct between a bank and its customer.[18] However, his decision was overturned by the Court of Appeal because the necessary evidentiary foundation was wanting.[19]

23 *Nova Metal Products Inc. v. Comiskey (Trustee of)*,[20] although addressing instant trust deeds, which are no longer of concern under the present *CCAA*, offers a useful discussion of "good faith." Doherty J.A., dissenting in part, commented:

> ...A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors.[21]

24 Doherty J.A. referred to an article by L. Crozier, "*Good Faith and the Companies' Creditors Arrangement Act*,"[22] in which the author contends that the possibility of abuse and manipulation by debtors should be checked by implying a requirement of good faith, as American bankruptcy courts routinely do by invoking good faith to dismiss applications under Chapter 11 of the *Bankruptcy Code* where the debtor's conduct in filing for reorganization is found to constitute bad faith.[23] He also suggests that, as a result of the injunctive nature of the stay, the court's power to take into account the debtor's conduct is inherent in its equitable jurisdiction.

25 An obligation of good faith in the context of an application to sanction a plan of arrangement was implied in *Associated Investors of Canada Ltd., Re*[24] While *First Investors* was an atypical *CCAA* proceeding, it is worth discussion. Allegations that fraud had been committed on creditors and consumers/investors led to the additional appointment of both a receiver and an inspector under the Alberta *Business Corporations Act*. The inspector had a broad mandate to investigate the company's affairs and business practices that included inquiring into whether the company had intended to defraud anyone.

26 Berger J. (as he then was) noted that the *CCAA* is derived from s. 153 of the English *Companies Act*, 1929 (19 and 20 Geo. 5) c. 23. Having sought assistance from other legislation with wording similar to the *CCAA* and with a genesis in the British statute,[25] he concluded that the court should not sanction an illegal, improper or unfair plan of arrangement.[26] He emphasized that: "If evidence of fraud, negligence, wrongdoing or illegality emerges, the Court may be called upon by interested parties to draw certain conclusions in fact and in law that bear directly upon the Plans of Arrangement."[27] He also determined that, while it might be expedient to approve the plans, the court was bound to proceed with caution, "so as to ensure that wrongful acts, if any, do not receive judicial sanction."[28]

27 In the end, Berger J. adjourned the application pending receipt of a report by the inspector. His decision was reversed

on appeal[29] on the basis that there was nothing in the plans that sanctioned wrongful acts or omissions. The Court of Appeal remitted the matter back for reconsideration on the merits, stating that while the discretion to be exercised must relate to the merits or propriety of the plans, the court could consider whether approving the plans would sanction possible wrongdoing or otherwise hinder later litigation.

Supervising Court's Role

28 The court's role during the stay period has been described as a supervisory one, meant to: "...preserve the *status quo* and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure."[30] That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.

29 Although the supervising judge's main concern centres on actions affecting stakeholders in the proceeding, she is also responsible for protecting the institutional integrity of the *CCAA* courts, preserving their public esteem, and doing equity.[31] She cannot turn a blind eye to corporate conduct that could affect the public's confidence in the *CCAA* process but must be alive to concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceeding must yield to those of the public at large.

Conclusions

30 While "good faith" in the context of stay applications is generally focused on the debtor's dealings with stakeholders, concern for the broader public interest mandates that a stay not be granted if the result will be to condone wrongdoing.[32]

31 Although there is a possibility that a debtor company's business practices will be so offensive as to warrant refusal of a stay extension on public policy grounds, this is not such a case. Clearly, San Francisco's sale of knockoff goods was illegal and offensive. Most troubling was its sale to an unwitting public of goods bearing counterfeit safety labels. Allowing the stay to continue in this case is not to minimize the repugnant nature of San Francisco's conduct. However, the company has been condemned for its illegal conduct in the appropriate forum and punishment levied. Denying the stay extension application would be an additional form of punishment. Of greater concern is the effect that it would have on San Francisco's creditors, particularly the unsecured creditors, who would be denied their right to vote on the plan and whatever chance they might have for a small financial recovery, one which they, for the most part, patiently await.

32 San Francisco has met the prerequisites that it has acted and is acting with due diligence and in good faith in working towards presenting a plan of arrangement to its creditors. Appreciating that the *CCAA* is to be given a broad and liberal interpretation to give effect to its remedial purpose, I am satisfied that, in the circumstances, extending the stay of proceedings is appropriate. The stay is extended to July 19, 2005. The revised time frame for next steps in the proceedings is set out on the attached Schedule.

33 Although San Francisco has paid the $150,000.00 fine, the Monitor is satisfied that the company's current cash flow statements indicate that it is financially viable. Whether San Francisco can weather any loss of public confidence arising from its actions and resulting conviction is yet to be seen. Its creditors may look more critically at the plan of arrangement, and its customers and business associates may reconsider the value of their continued relationship with the company. However, that is sheer speculation.

Application granted.

Schedule

Time Frames

1. February 14, 2005 Date Monitor posts Notice to Creditors on website

2. February 14, 2005 Date Monitor publishes the advertisement for one day in Globe & Mail or National Post

3. April 1, 2005 Date for receipt of claims from creditors

2005 BCSC 351
British Columbia Supreme Court

Cantrail Coach Lines Ltd., Re

2005 CarswellBC 581, 2005 BCSC 351, [2005] B.C.W.L.D. 2533,
[2005] B.C.J. No. 552, 10 C.B.R. (5th) 164, 138 A.C.W.S. (3d) 1010

IN THE MATTER OF THE PROPOSAL OF CANTRAIL COACH LINES LTD.

Master Groves

Heard: March 1, 2005
Judgment: March 1, 2005
Docket: Vancouver B050363

Counsel: H. Ferris for Petitioner
R. Finlay for Creditor (Volvo)

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Petitioner company was tour bus operation with 25 years experience — Petitioner suffered serious drop-off in business in recent years — Petitioner missed payment to secured creditor in January 2005 — Petitioner filed notice of intention to make bankruptcy proposal — Petitioner brought application for extension of time in filing proposal — Secured creditor opposed application — Application granted — Extension of time would allow petitioner to make viable proposal — It was disingenuous for secured creditor to oppose proposal even before proposal was made — No evidence existed that extension would substantially prejudice secured creditor — Although circumstances of petitioner clearly prejudiced secured creditor to some degree, minor prejudice did not jeopardize their security.

APPLICATION for extension of time for filing bankruptcy proposal.

***Master Groves*:**

1 This is my decision on the matter of the proposal of Cantrail Coach Lines Ltd. who I will refer to as Cantrail.

2 Cantrail applies to the Court pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act* for extension of time for filing a proposal.

3 VFS Canada Inc., who I will refer to as Volvo, a secured creditor of Cantrail, opposes the application and cross-applies for a termination of the proposal period and for an order to substitute the current trustee for a trustee of their choosing, though the substance of the substitution of the trustee application was not argued before me.

4 The facts are that Cantrail is a tour bus operation, a family-owned business, operating in the Lower Mainland of British Columbia, on Vancouver Island and into Washington State. They are a company of some 25 years standing. They have 26 employees and they have 22 buses in their operations and two headquarters, one in Delta, British Columbia and one in Port Alberni.

5 Over one half of their buses, 13 in total, are secured by the secured creditor Volvo. Cantrail appears to have been facing some financial difficulties recently which a number of companies in the travel industry are facing. It is certainly true in this part of the world that there has been a general decline in the travel industry related to what are now historical factors such as

September 11th and SARS. More recently, and more significantly, the decline in the US dollar has made the travel industry generally and the travel industry specifically for Cantrail difficult. It appears to have caused a significant challenge for Cantrail to continue to operate profitably.

6 Cantrail was apparently able to meet its obligations up until the 16th of January 2005. On that date it missed a payment to its secured creditor Volvo. Demand was made by Volvo on the 20th of January 2005 and perhaps in response to that, but in any event, on the 1st of February, 2005 Cantrail issued a Notice of Intention to make a Proposal. There are, I am advised, 81 creditors of Cantrail who have been notified of this application and only Volvo objects.

7 I am satisfied that under the proposal thus far, and this is not contested in the affidavit, Cantrail has been able to meet its obligations to its employees as well as the obligations to statutory authorities. The suggestion in the materials is that Cantrail has been operating within the initial budget set by the trustee under the proposal.

8 As indicated, Cantrail is applying purport to s. 50.4(9) of the *Bankruptcy and Insolvency Act*. That reads and I will take out some of the language that is not necessary:

> The insolvent person may, before the expiration of a 30-day period mentioned in subsection (8), apply to the Court for an extension of that period and the Court may grant such extensions not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiration of the 30-day period mentioned in subsection (8), if satisfied on each application that:
>
> (a) the insolvent person has acted and is acting in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

9 Volvo applies under s. 50.4(11), the section relating to termination of proposals. That section reads, and again I am taking out some unnecessary language:

> The Court may, on application by a creditor, declare terminated before it actually expires the 30-day period mentioned subsection (8) or any extension thereof granted under subsection (9) if the Court is satisfied that:
>
> (a) the insolvent person has not acted or is not acting in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiry of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal before the expiry of the period in question that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected.

Essentially, s. 50.4(11) is the mirror of s.50.4(9).

10 The test that Cantrail has to meet is essentially threefold. The first consideration is, are they acting in good faith? I would say on this point it was not argued nor does it appear to be disputed that they are. Secondly, would they likely make a viable proposal if the extension were granted. Thirdly, they must show no creditor would be materially prejudiced by the extension.

11 I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.), a decision of the Ontario Court of Justice, is authority

for the proposition that the intent of the *Act* and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.

12 I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

13 Considering those factors and considering the remaining two steps of the test under s. 50.4(9), the second aspect of the test is would Cantrail likely be able to make a viable proposal. On this point Volvo says that it has lost faith in Cantrail and intends to vote against the proposal, any proposal, that would be generated.

14 If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.

15 If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.

16 If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

17 Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buyout of this operation, or a merger, and even the possibility of a refinancing. There is a possibility, though as of yet uncertain, that Volvo could be paid out in full. It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. It may be a proposal which gets them out of the picture completely by some form of payout — a proposal which if they voted against they would probably be viewed as irrational businesspeople.

18 In my view, the current attitude of the secured creditor is not determinative of this issue especially in light of the fact that the proposal has not yet been formulated.

19 I note the words in the legislation are "a viable proposal". According to the *Concise Oxford Dictionary* viable means feasible. Viable also means practicable from an economic standpoint.

20 I am impressed thus far with the efforts of Cantrail and with the efforts of the trustee, Patty Wood, in trying to get this matter resolved. I am satisfied that the insolvent company, in my view, would likely be able to make a viable proposal, a proposal that is at least feasible, a proposal that would be practicable from an economic standpoint, if the extension being applied for were granted.

21 Under the third aspect of the test, I must be satisfied that no creditor would be materially prejudiced if extension being applied for were granted. That aspect of the test uses the term "materially prejudiced." There is a difference, in my view, between being prejudiced and being materially prejudiced. Again, consulting the *Concise Oxford Dictionary* materially means substantially or considerably. The creditor here must be substantially or considerably prejudiced if the extension being applied for is granted.

22 There is no doubt that Volvo has been prejudiced by the circumstances which have befallen Cantrail and befallen Volvo as a secured creditor. The *Act* in and of itself, and the possibility of a proposal, does create simple prejudice by staying the obligations of a person attempting to make a proposal during the period of time in which the proposal is being formulated. There is no evidence before me of anything other than normal or perhaps average prejudice to Volvo. There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. There is no worse case scenario for Volvo if the proposal is allowed to run a reasonable course. In my view, there is no evidence on which Volvo can rely to show that it has been materially prejudiced.

23 That being said, I am satisfied that Cantrail has met the test of applying for an extension of time for filing a proposal and I am granting the extension for a further 45 days from the 3rd of March 2004.

24 It stands to reason from this analysis that the applications of Volvo are dismissed.

Application granted.

End of Document

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1, s. 2

Canada Statutes

S.C. 2005, c. 47, s. 1, s. 2 | L.C. 2005, ch. 47, art. 1, art. 2

[Unofficial Chapter No. W-0.8]

INTERPRETATION

SECTION 2.

Definitions
2 (1) The following definitions apply in this Act.

Board means the Canada Industrial Relations Board established by section 9 of the *Canada Labour Code*. (*Conseil*)

eligible wages means

(a) wages other than termination pay and severance pay that were earned during the longer of the following periods:

(i) the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer,

(ii) the period beginning on the day that is six months before one of the following days and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer:

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced; and

(iii) the period beginning on the day that is six months before one of the following days and ending on the day on which a court makes a determination under subsection 5(5):

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced; and

(b) termination pay and severance pay that relate to employment that ended

(i) during the period referred to in paragraph (a), or

(ii) during the period beginning on the day after the day on which the period referred to in paragraph (a) ends and ending on the day on which the trusteeis discharged or the receiver completes their duties, as the case may be. (*salaire admissible*)

wages includes salaries, commissions, compensation for services rendered, vacation pay, termination pay, severance pay and any other amounts prescribed by regulation. (*salaire*)

Precision

(1.1) For the purpose of the definition *eligible wages*, a proposal does not include a proposal for which a certificate is given under section 65.3 of the *Bankruptcy andInsolvency Act* and a notice of intention to make a proposal does not include a notice of intention in respect of a proposal for which such a certificate is given.

Meaning of trustee

(1.2) In this Act, trustee includes a monitor as defined in subsection 2(1) of the *Companies' Creditors Arrangement Act.*

Employers subject to a receivership

(2) For the purposes of this Act, an employer is subject to a receivership when any property of the employer is under the possession or control of a receiver.

Meaning of "receiver"

(3) In this Act, "receiver" means a receiver within the meaning of subsection 243(2) of the Bankruptcy and Insolvency Act.

Words and expressions

(4) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the Bankruptcy and Insolvency Act.

Related persons

(5) Despite subsection 4(5) of the Bankruptcy and Insolvency Act,

(a) for the purposes of paragraph 6(d), an individual is considered to deal at arm's length with a related person if the Minister is satisfied that, having regard to the circumstances - including the terms and conditions of the individual's employment with the former employer, their remuneration and the duration, nature and importance of the work performed for the former employer - it is reasonable to conclude that the individual would have entered into a substantially similar contract of employment with the former employer if they had been dealing with each other at arm's length; and

(b) for the purposes of subsection 21(4), individuals who are related to each other are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length while so related.

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1, s. 5

Canada Statutes

S.C. 2005, c. 47, s. 1, s. 5 | L.C. 2005, ch. 47, art. 1, art. 5

[Unofficial Chapter No. W-0.8]

Canada Statutes > Wage Earner Protection Program Act [ss. 1-42] > ELIGIBILITY FOR PAYMENTS [ss. 5-6]

Notice

Current Version: Effective 20-11-2021

ELIGIBILITY FOR PAYMENTS

SECTION 5.

Conditions of eligibility

5 (1). An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

(d) REPEALED: S.C. 2009, c. 2, s. 343(2), effective March 12, 2009 (R.A.).

Prescribed criteria - foreign proceeding

(2) On application by any person, a court may, in a proceeding under Part XIII of the Bankruptcy and Insolvency Act, determine that the foreign proceeding meets the criteria prescribed by regulation. If the court determines that the foreign proceeding meets the prescribed criteria, the court may appoint a trustee for the purposes of this Act.

Employment in Canada

(3) An individual who is eligible to receive a payment because of subparagraph (1)(b)(iii) is only eligible to receive a payment in respect of eligible wages earned for employment in Canada and termination pay and severance pay that relate to that employment.

Deemed bankruptcy

(4) For the purposes of this Act, if all of the conditions set out in subparagraph (1)(b)(iii) are met, the former employer is deemed to be bankrupt and the date of the bankruptcy is deemed to be the day on which all of those conditions are met.

Prescribed criteria - other proceedings

(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

End of Document

Alignvest Private Debt Ltd. v. Surefire Industries Ltd., [2015] A.J. No. 1234

Alberta Judgments

Alberta Court of Appeal

M.S. Paperny, P.W.L. Martin and P.A. Rowbotham JJ.A.

Heard: November 12, 2015.

Judgment: November 19, 2015.

Docket: 1501-0062-AC

Registry: Calgary

[2015] A.J. No. 1234 | 2015 ABCA 355 | 31 C.B.R. (6th) 98 | 259 A.C.W.S. (3d) 619 | 2015 CarswellAlta 2108 | 391 D.L.R. (4th) 756 | 32 Alta. L.R. (6th) 61 | 4 P.P.S.A.C. (4th) 339 | 609 A.R. 201 | 51 B.L.R. (5th) 33

Between York Realty Inc., Appellant (Applicant/Respondent), and Alignvest Private Debt Ltd., Respondent (Applicant/Respondent/Plaintiff), and Surefire Industries Ltd. (Trustee of), Respondent (Respondent/Defendant)

(34 paras.)

Counsel

R.T.G. Reeson, Q.C. and C.T. Aitken, for the Appellant.

S.F. Collins and P. Kyriakakis, for the Respondent Alignvest Private Debt Ltd.

C. Prophet, for the Respondent Duff and Phelps Canada Restructuring Inc., in its capacity as trustee in bankruptcy of Surefire Industries.

Memorandum of Judgment

The following judgment was delivered by

THE COURT

I. Introduction

1 York Realty Inc. appeals an order made in a bankruptcy proceeding. The order declared that $3,187,500 (Sum) paid pursuant to a commercial lease between York and Surefire Industries Ltd. (bankrupt) was a security deposit, not prepaid rent. In the result the Sum was a part of the estate of the bankrupt, and available for payment to the bankrupt's secured creditor, Alignvest Private Debt Ltd.

2 The bankruptcy judge did not err in characterizing the Sum as a security deposit. Because a security deposit becomes part of the estate of the bankrupt, it is unnecessary to address the second ground of appeal regarding registration of a "security interest" under the *Personal Property Security Act*, RSA 2000, c P-7 (*PPSA*), and whether the exceptions in section 4 (f) and (g) apply. We do not endorse the bankruptcy judge's reasons on this issue, nor were they necessary to the decision she was called upon to make.

3 The appeal is dismissed. The quantum of set-off is returned to the Court of Queen's Bench for determination.

II. Background

4 On February 15, 2013, Surefire sold its manufacturing facility and 40 acres of surrounding land to York. The final statement of adjustments for the property's sale shows a $3,187,500 credit to York for "Security Deposit to be paid to Purchaser by Vendor". The credit reduced the amount of cash York was required to pay Surefire for the property.

5 The lease was executed at the same time as the sale and provided that Surefire would lease the premises from York at a minimum rent of $3,150,000 per year for the first five years.

6 After a short time in *CCAA* protection, Surefire was declared bankrupt in December 2013. Alignvest is a secured creditor with a March 27, 2013 General Security Agreement over Surefire's assets.

7 When the Trustee disclaimed the lease on January 2, 2014, no rent was owing.

III. Decision on Appeal - Alignvest Private Debt Ltd v Surefire Industries Ltd, 2015 ABQB 148

8 While Surefire was in receivership, York applied for an order that it was entitled to retain the Sum. Alignvest applied for an order directing York to pay the Sum to the Trustee. Alignvest also applied for an order declaring the Sum to be an unregistered security interest under the *PPSA* and subordinate to Alignvest's perfected secured claim. The Trustee took the position that the Sum was intangible personal property as defined in the *PPSA* in which Surefire had an interest and to which Alignvest's security attached.

9 York argued that the Sum was prepaid rent and became its property upon execution of the lease.

10 The bankruptcy judge looked primarily at the wording of the lease and concluded that the Sum was a security deposit. She held:

> [23] I am satisfied by the provisions of the lease that the deposit cannot be characterized as prepaid rent, that it is not non-refundable in any scenario and that it is properly characterized as security to guarantee the performance by Surefire of its obligations under the lease, similar to the deposit described in *Re Champion [Re Champion Machine and Tool Co Limited* (1971), 15 CBR (NS) 136 (Ont SC)].

11 The bankruptcy judge also concluded that although the lease contemplated that York would retain the Sum upon Surefire becoming subject to an insolvency statute, the *CCAA* and receivership proceedings stayed that remedy.

12 The bankruptcy judge also found that the Sum was subject to the provisions of the *PPSA* and not excluded by section 4(g), which provides that the *PPSA* regime does not apply to "the creation of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land, but not including a right to payment evidenced by investment property or an instrument". She found that the Sum was not a "right to payment" but security for Surefire's performance of its obligations under the lease. Consequently, she concluded that the Sum is a "security interest" subject to the *PPSA* and subordinate to Alignvest's perfected security interest, and other interests with priority over an unperfected security interest.

IV. Grounds of Appeal and Standards of Review

13 The appellant raises three grounds of appeal:

i. The bankrupcty judge erred in characterizing the Sum as a security deposit rather than prepaid rent.

ii. If the Sum is a "security interest", the bankruptcy judge erred in concluding that ss 4(f) and 4(g) of the *PPSA* did not apply, so as to exclude the Sum from registration under that *Act*.

iii. If ss 4(f) and 4(g) of the *PPSA* did not apply, then the bankruptcy judge erred in not permitting York to exercise a right of set off, either legal or equitable, against the amount claimed to the extent of the amount of rent and other damages it is entitled to claim in the bankruptcy of Surefire.

14 Interpretation of the lease involves issues of mixed fact and law. Absent an extricable error of law, the standard of review is palpable and overriding error. Extricable errors of law include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 49-55, [2014] 2 SCR 633. "The interpretation of the lease is reviewed on a standard of reasonableness ...": *AMT Finance Inc v Saujani*, 2014 ABCA 385 at para 14.

V. Analysis

Security Deposit or Prepaid Rent

15 The appellant argues that it was the parties' intention that the Sum was a rental credit. It is common for lessors to demand the prepayment of rent for the last month or months of a lease's term: The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz and Dr. Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Carswell) at Gs.129 Prepaid Rent [*Houlden and Morawetz*]. Prepaid rent is never repayable to the tenant and an assignee has no greater right than the tenant: *Re Bradley* (1921), 2 CBR 147, 1921 CarswellOnt 31 (Ont SC (Bank)); *Re Abraham* [1926] 3 D.L.R. 971, 7 CBR 180 at 191 (ONCA). Prepaid rent is consideration for future occupation, see generally *North American Life Assurance Company v 312486 Alberta Ltd* (1986), 47 Alta LR (2d) 303 at paras 15-19 (QB).

16 By contrast, a security deposit is held by the lessor as security to guarantee the performance of covenants in the lease: *Re Champion Machine & Tool Co* (1971), 15 CBR (NS) 136, 1971 CarswellOnt 59 (Ont SC (Bank)). A security deposit is intended to "secure the landlord against a tenant who steals away without paying the rent for the final period of his tenancy, and it is to be returned to the tenant upon his payment of that last month's rent": *Gallant v Veltrusy Enterprises Ltd* (1980), 28 OR (2d) 349, 110 DLR (3d) 100 (Ont Co Ct, Waterloo); overturned for different reasons, (1981), 32 OR (2d) 716, 123 DLR (3d) 391 (Ont CA).

17 *Sattva* instructs that "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": para 47.

18 The relevant provisions of the lease are Articles 6 and 10 (with emphasis):

6. SECURITY DEPOSIT/RENT CREDIT

(a) The Tenant will pay to the Landlord on or before the commencement of the Term of this Lease **a deposit of Three Million One Hundred Eighty Seven Thousand Five Hundred ($3,187,500.00) Dollars plus goods and services tax (the "Security Deposit"), which Security Deposit is to be held without interest by the Landlord as security for the performance by the Tenant of its obligations under this Lease.** The Landlord, in its sole discretion, may apply any portion or all of the Security Deposit during the Term on account of any sums outstanding or owing by the Tenant under this Lease, including, without limitation, Minimum Rent or Additional Rent or such sums resulting from the Tenant's breach or breaches of this Lease. After the Landlord has applied any portion of the Security Deposit as set out above, the Tenant, on demand, will pay such further money to the Landlord so that the Landlord is again holding the same amount in relation to the Security Deposit as the Landlord was holding immediately prior to the Landlord applying such sums against such defaults or breaches. Subject to the foregoing, the Security Deposit will, provided that the Tenant has paid all amounts due to the Landlord under this Lease and is not otherwise in default under the terms of the Lease, be applied during the Term, as follows ...

[$262,500 plus GST towards rent for the 13th, 14th, 28th, 29th and 60th months of the term]

(b) The Tenant shall be credited Five Hundred Thousand ($500,000.00) Dollars towards its Rent obligations during the first two (2) months of the term.

[...]

10. DEFAULT AND REMEDIES

In the event that:

a) the Tenant fails to pay any Rent or any other amount owing under this Lease when due, whether or not demanded by the Landlord; or

b) the Tenant defaults or fails to observe or perform any of its non-financial obligations under this Lease ...; or

c) **the Tenant makes a general assignment for the benefit of creditors, becomes bankrupt or insolvent**, or takes the benefit of or becomes subject to any statute that may be in force relating to bankrupt or insolvent debtors; or

d) any creditor seizes of takes control of the Tenant's property; ...

the Landlord, immediately and without prior notice being required, and without in any way restricting any of its other rights or remedies, may:

a) retain the Security Deposit and advance rent (if any) for its own use absolutely;

b) terminate this Lease and re-enter into possession of the Leased Premises; and

c) claim greater damages for breach of this Lease ...

In addition to payment of the then current Rent, and without prejudice to the Landlord's right to claim greater damages, the Rent for the next ensuing three months shall immediately become due and payable and be deemed to be in arrears upon such default, general assignment, bankruptcy, insolvency or other event of default.

19 The lease contains some indicia of an intention to treat the Sum as prepaid rent. The appellant's main submission is that, unlike a security deposit, at the end of lease term, there is nothing left to return to the tenant. Notably, Articles 6(a)(i) through (vi) state that specific amounts shall be credited for the 13th, 14th, 25th, 49th, 60th and 175-180th months' rent if the tenant is "not otherwise in default". To this extent, Article 6 supports the appellant's contention that the Sum could be characterized as prepaid rent. But, critically, the condition precedent to a rental credit is that the tenant must have met all its obligations under the lease before such credit would apply.

20 The appellant contends that there is no possible event in which the Sum could be returned to the tenant. The bankruptcy judge posited at least one scenario: termination by the landlord in the event of the premises being destroyed by fire (Clause 23).

21 The appellant also contends that the payment of GST is inconsistent with the Sum constituting a security deposit. It says that security for an obligation to be performed is not a good or service which gives rise to the payment of GST.

22 Other indicia support an intention that the Sum be treated as a security deposit. First, Article 6 defines the Sum as a "Security Deposit" and states it "is to be held as ... by the Landlord as security for performance by the Tenant of its obligations under this Lease". Second, the lease makes a distinction between the "Security Deposit" in Article 6(a) and the "Rent Credit" in Article 6(b), indicating an intention to treat the concepts differently. This is supported by the Statement of Adjustments, prepared for the closing of the sale, which describes the $500,000 as "prepaid rent" and the $3,187,500 as a security deposit. Thirdly, in the event the landlord is required to apply any portion of the Sum towards rent arrears or other defaults, the tenant is required to make a payment such that the landlord was "again holding the same amount in relation to the Security Deposit ...". The notion of replenishing the Sum is

inconsistent with the concept of prepaid rent. Prepaid rent is generally a set sum to which the landlord is entitled upon execution of the lease, and not an account that requires replenishment.

23 Parts of Article 10 are also relevant. It speaks of the right to retain the "Security Deposit and advance rent (if any)". Again, the wording appears to draw a distinction between the two concepts. Article 10(a), (b) and (e) permit the landlord to retain the "Security Deposit" if the tenant fails to pay rent or other amounts owing, defaults or fails to perform its non-financial obligations or abandons or threatens to abandon the premises. In other words, the primary purpose evidenced by this Article is that the Sum was intended to "secure the landlord against a tenant who steals away", to borrow from *Gallant*.

24 In summary, while there are arguably some aspects of the lease that suggest prepaid rent, those provisions are expressly subject to the condition that the tenant cannot be in default of its obligations. It is reasonable to conclude that the characterization of the Sum as a security deposit reflects the parties' dominant intention.

25 Cases which have considered this issue are helpful but not determinative as each lease is worded differently. The appellant submits that we ought to apply two Ontario Court of Appeal decisions: *Re Abraham*, [1926] 3 D.L.R. 971, 1926 CarswellOnt 257; and *Re Sills; Tidy v Merkur et al* (1956), 4 D.L.R. (2d) 432, 1956 CarswellOnt 424. The bankruptcy judge stated that the terms of this lease were similar to those in the more recent decision in *Re Champion* and distinguishable from those *Re Abraham,* in part because of *Re Abraham*'s lease terms and because *Re Abraham* predated the statutory ability of the trustee to disclaim the lease. The appellant contends that this is an extricable error of law because the bankruptcy provisions regarding disclaimer were enacted in 1921, in advance of the 1923 lease at issue in *Re Abraham.* Although the bankruptcy judge was in error when she concluded that *Re Abraham* predated the statutory ability of a trustee to disclaim the lease, this is not an error which affected the result of her decision. The lease at issue in *Re Abraham* provided that the $1000 deposit could be used as a rebate of rent at the end of the term or that if the tenant was in default, the landlord had the option to declare the deposit forfeit and retain entire amount as liquidated damages. In either event the tenant would not and could not receive any portion of the deposit. The wording of the lease in *Re Sills* is similar. In this case Article 10 provides that, upon default, York is only entitled to retain a certain amount of the deposit and advance rent "if any". In addition to the "then Current Rent, and without prejudice to the Landlord's right to claim greater damages, the Rent for the next ensuing three months shall immediately become due and payable." Moreover there is no indication that the lease in *Re Abraham* contained language similar to that in the present lease for which the deposit is to "secure the performance of the tenant's obligations."

26 In contrast the lease in *Re Champion* provided that the sum "shall be held by the Lessor as security to guarantee the due performance of each and all covenants herein contained on the part of the Lessee; and said deposit shall be retained by the Lessor and become the property of the Lessor in the event of a breach by the Lessee of any of the covenants herein contained; in the absence of any such breach or default by the Lessee, the deposit money shall be applied to rent for the last month of the term herein.". Although the language of the lease in *Re Champion* is not identical to this lease, the wording certainly bears a greater similarity. In any event, the bankruptcy judge's decision focussed primarily on the wording of the lease at issue and not on leases considered in other cases. We find no reviewable error in her consideration of *Re Champion.*

27 In conclusion on this issue, there were some indicia in support of each of the proposed characterizations; security deposit and prepaid rent. Reading the lease as a whole, the bankruptcy judge determined that the Sum ought to be characterized as a security deposit. Our role is to determine whether there was palpable and overriding error in the bankruptcy judge's conclusion. No reviewable error has been demonstrated.

28 Given the conclusion that the Sum is not prepaid rent and therefore not the property of the appellant, it is unnecessary to address the second ground of appeal regarding registration of a "security interest" under the *PPSA*, and whether the exceptions in section 4 (f) and (g) apply. That said, however, we do not endorse the bankruptcy judge's decision on this issue, nor was it necessary to the decision she was called upon to make.

York's Entitlement in the Bankruptcy - Set-Off

29 The appellant's third ground of appeal contends that the bankruptcy judge erred in failing to consider its right of set-off. This argument was not raised in the court below. However, the parties made written and oral submissions on appeal, and invited us to address the issue. We do so.

30 Disclaimer of a lease by a trustee extinguishes all rights and obligations under the lease to pay rent. After a lease is disclaimed, a landlord cannot claim damages for the rent for the balance of the term: *Principal Plaza Leaseholds Ltd v Principal Group Ltd (Trustee of)* (1996), 188 AR 187, 9 WWR 539 (QB). Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt are applied in priority of payment: *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 136.

31 The right to disclaim arose on December 16, 2013 when by court order Surefire was adjudged bankrupt. When the Trustee disclaimed the lease on January 2, 2014, there were no rent arrears. Consequently, as of January 2, 2014 there were no rent obligations (beyond accelerated rent).

32 The nature and extent of a landlord's claim for rent and damages for the unexpired term of a lease are determined by the law of the province in which the leased premises are situated: *Bankruptcy and Insolvency Act*, s 146; *Houlden and Morawetz* at Gs.141. The preferential claim of the landlord is determined by section 136(1)(f) of the *Bankruptcy and Insolvency Act* in association with sections 3 and 4 of the *Landlord's Rights on Bankruptcy Act*, RSA 2000, c L-5. Those sections provide that a landlord is limited to accelerated rent, arrears of rent three months immediately preceding the bankruptcy, and no right to claim as a debt any unexpired term of the lease. As the appellant had not exercised its rights under Article 10 before the order was made, the statutory remedies set out above limit the appellant's ability to enforce Article 10(c). In the result the claim is limited to three months accelerated rent.

33 In addition, the landlord is entitled to damages incurred to repair the property. The parties expressed a preference for having the bankruptcy court determine the amount of set-off and we so direct.

VI. Conclusion

34 The appeal is dismissed. The appellant's set-off claim is to be determined in accordance with our direction in the preceding paragraph.

Memorandum filed at Calgary, Alberta this 19th day of November, 2015

M.S. PAPERNY J.A.
P.W.L. MARTIN J.A.
P.A. ROWBOTHAM J.A.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 84.1

Canada Statutes

R.S.C. 1985, c. B-3, s. 84.1 | L.R.C. 1985, ch. B-3, art. 84.1

Notice

Current Version: Effective 15-12-2009

SECTION 84.1

Assignment of agreements

84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only rights and obligations in relation to the business may be assigned.

Exceptions

(3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the date of the bankruptcy;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

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

(b) whether it is appropriate to assign the rights and obligations to that person.

Restriction

(5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement - other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a nonmonetary obligation - will be remedied on or before the day fixed by the court.

Copy of order

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

Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: May 11, 2010;

Judgment: December 16, 2010.

File No.: 33239.

[2010] 3 S.C.R. 379 | [2010] 3 R.C.S. 379 | [2010] S.C.J. No. 60 | [2010] A.C.S. no 60 | 2010 SCC 60 | 2010 CarswellBC 3419 | 72 C.B.R. (5th) 170 | 12 B.C.L.R. (5th) 1 | 296 B.C.A.C. 1 | 326 D.L.R. (4th) 577 | 409 N.R. 201 | [2011] 2 W.W.R. 383

Century Services Inc. Appellant; v. Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada Respondent.

(136 paras.)

Counsel

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

DESCHAMPS J.

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency [page389] Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but

unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

[page390]

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and [page391] that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a [page397] flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, [page398] rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

[page399]

3.2 *GST Deemed Trust Under the CCAA*

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so

Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd., [2011] A.J. No. 592

Alberta Judgments

Alberta Court of Appeal

Edmonton, Alberta

K.G. Ritter, P.W.L. Martin and M.B. Bielby JJ.A.

Heard: March 4, 2011.

Judgment: May 27, 2011.

Dockets: 1003-0089-AC, 1003-0362-AC

Registry: Edmonton

[2011] A.J. No. 592 | 2011 ABCA 158 | [2011] 8 W.W.R. 221 | 77 C.B.R. (5th) 278 | 505 A.R. 146 | 2011 CarswellAlta 883 | 44 Alta. L.R. (5th) 81

Between Ford Motor Company of Canada, Limited, Appellant, (Applicant), and Welcome Ford Sales Ltd. and Royle Smith, Respondents, (Respondents) And between Ford Motor Company of Canada, Limited, Appellant, (Applicant), and Welcome Ford Sales Ltd., by its Receiver, Manager and Trustee in Bankruptcy, Myers Norris Penny Ltd. and Bank of Montreal, Respondents, (Respondents)

(73 paras.)

Counsel

K.B. Mills, K.J. Bourassa, for the Appellant.

J.H. Hockin, B.P. Maruyama, for the Respondents, Welcome Ford Sales Ltd., Royle Smith and Welcome Ford Sales Ltd., by its Receiver, Manager and Trustee in Bankruptcy, Meyers Norris Penny Ltd.

R.C. Rutman, A.L. Murray, for the Respondent, Bank of Montreal.

Memorandum of Judgment

The following judgment was delivered by

THE COURT

INTRODUCTION

1 This appeal was dismissed from the bench with reasons to follow.

2 This was an appeal from a decision granting permission to a bankruptcy trustee to sell an auto dealership agreement to a third party over the objections of the other party to the agreement, an auto manufacturer, pursuant to the provisions of the relatively new s. 84.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

3 Welcome Ford, owned by Royale Smith ("Smith"), operated a franchise dealership with the Appellant, Ford Motor Company of Canada, Limited ("Ford") in Fort Saskatchewan, Alberta pursuant to the terms of a written dealership agreement. The dealership ceased operations on January 13, 2010 after Ford Credit Canada Ltd. ("Ford Credit"), while conducting a physical audit on its premises, discovered a large defalcation apparently made by a senior

agreement who refused performance rather than the Receiver. He found that it was Ford which was blocking the breach from being remedied by refusing to cooperate with the reopening of the business by the Receiver.

24 In ***Guild***, it was not clear when, if ever, the buildings which were the subject of the leases in question would be completed (i.e., when the tenants would obtain the commercial benefit they were intended to receive under the leases). Here, Ford would obtain the commercial benefit under the dealership agreement immediately upon its consenting to the Receiver operating it or, alternately, to its sale to a party who could operate it. Ford's refusal to cooperate was the only reason the agreement could not be performed. It, as franchisee, was capable of carrying on the commercial purpose of the dealership agreement; it simply chose not to do so, which falls far short of meeting the test for fundamental breach established in ***Shelanu***.

25 In relation to the argument that Smith failed to properly supervise his employees with the result that the defalcation occurred, Ford tendered a Statement of Claim which maintained that a Welcome Ford manager misappropriated over $1.2 million by way of fraud. The chambers judge noted the lack of evidence that Smith was involved in the fraud or any convincing evidence of resulting damage to Ford's reputation. Needless to say, the manager in question was no longer employed by the time the sale was approved. There was no evidence before the chambers judge to support the suggestion that the manager's alleged prior activities would cast a pall over the operation of a Ford dealership in Fort Saskatchewan in the future.

26 The ultimate purchaser stood ready to reopen the dealership for business upon receiving court approval of the purchase. Any deficiencies in Smith's supervision disappeared with his removal from the business. Upon the reopening of the dealership, there is nothing to suggest that Ford would not be able to carry on the commercial purpose of the dealership agreement. It would not be deprived of the benefits it was intended to receive; indeed, the sooner the sale was effected, the sooner the flow of those benefits would resume.

27 The chambers judge concluded at para. 95 of the December decision: "I am comfortable that the proposed sale of the Welcome Ford dealership will substantially cure the breaches of the [dealership agreement], of which Ford Motor complains". The proposed sale cured the effect of those breaches in that it put a financially sound, experienced person in charge of the resumed operation in the form of a new business operating outside of the receivership. The chambers judge also expressly observed that Ford's rights and remedies will continue unchanged, including the right of first refusal and the right to take steps to terminate the dealership agreement if the purchaser defaults in the future.

28 The standard of review in relation to the chambers judge's findings of fact and application of facts to the law are subject to deference absent clear and palpable error. The application of deference is amplified when, as noted above, the judge is a case management judge whose decision is part of a series of decisions. His decision that no fundamental breach of the dealership agreement had occurred was reasonable and is entitled to our deference. Indeed, had we been required to consider the issue of correctness, we would have concluded his decision to be correct. The ultimate purchaser will be able to perform the dealers obligations under the agreement such that its commercial purpose will be effected. Ford will receive the benefit the parties intended it to receive when that agreement was created.

(B) How is s. 84.1 of the BIA to be interpreted?

29 The position at common law was always that if one party breached a condition (and not a mere warranty) in a contract, the other party to that contract had an election, either to treat the contract as continuing and insist on future performance, or to accept the repudiation and bring the contract to an end. In the latter case certain obligations survived the termination depending upon the construction of the contract.

30 The effect of s. 84.1 of the BIA is to override the common law unilateral right of the innocent party to the contract to accept the repudiation and end the contract. It has been designed to preserve the value of the estate as a whole, even if the contractual rights of some creditors, such as Ford in this case, are compromised. Therefore, even if Ford otherwise had the right to terminate the dealership agreement for breach of condition, and its

assignment clause was not one which survived the termination, s. 84.1 nonetheless allows the trustee to apply to the Court for permission to assign the contract so long as the provisions of the statute are met.

31 Ford argues that the provisions of s. 84.1 which are prerequisite to granting permission to assign have not been met.

32 Section 84.1 reads in part:

> (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.
>
> ...
>
> (3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature ...
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and
>
> (b) whether it is appropriate to assign the rights and obligations to that person.

33 The Appellant did not argue, nor did the chambers judge find, that s. 84.1 expressly excludes auto dealership agreements from its operation. Indeed, the word "agreement" found in that section is wide enough to cover this type of agreement. The chambers judge correctly concluded, therefore, that he had jurisdiction under s. 84.1 to order the assignment (sale) in the proper circumstances.

34 Ford argued, rather, that those proper circumstances did not exist, as discussed below.

(i) Is s. 84.1(3) to be interpreted without reference to s. 84.1(4)?

35 Ford argued that whether the rights and obligations of an agreement are assignable "by reason of their nature" pursuant to s. 84.1(3) must be decided before, and independently of, any consideration under s. 84.1(4) as to whether the proposed assignee is capable of performing the obligations and it is appropriate to assign the rights and obligations. If so, it is irrelevant that the ultimate purchaser is an otherwise approved dealer and a proven performer. The issue of whether the nature of the agreement precludes its assignment would thus have to be resolved independently of any consideration of whether the agreement's commercial purpose would be achieved in the hands of the proposed assignee.

36 This interpretation is not supported by the literal words found in s. 84.1 which do not make a determination under s. 84.1(3) an independent precondition to a determination under s. 84.1(4). Legislative intent may be taken into account as an aide to interpretation only in the case of ambiguity in the words of the statute. Even if such an ambiguity existed here, and one is not apparent, Parliament's intent does not support Ford's interpretation. The chambers judge concluded that s. 84.1 should be interpreted in light of Parliament's intention that the provision be used to protect and enhance the assets of the estate of a bankrupt by permitting the sale/assignment of existing agreements to third parties for value: see Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada,* 4th ed., looseleaf (Toronto: Carswell, 2009) vol. 2 at 3-499. He purported to interpret s. 84.1 in the context of its role as remedial legislation.

37 Prior to the coming into force of s. 84.1 in 2009, a trustee in bankruptcy could not assign (sell) a contract to a third party where the counter-party to that contract opposed the assignment. As a result, a bankrupt estate was

Dundee Oil and Gas Ltd. (Re), [2018] O.J. No. 3277

Ontario Judgments

Ontario Superior Court of Justice

Commercial List - Toronto, Ontario

S.F. Dunphy J.

Heard: June 11, 2018.

Judgment: June 13, 2018.

Court File No.: CV-18-591908-00CL

[2018] O.J. No. 3277 | 2018 ONSC 3678 | 293 A.C.W.S. (3d) 475 | 61 C.B.R. (6th) 68 | 2018 CarswellOnt 9960

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 Dundee Oil & Gas Limited

(40 paras.)

Counsel

E. Patrick Shea and B. Arnold for the Applicants.

Grant Moffat and Rachel Bengino, for the Monitor FTI Consulting Canada Inc.

J. Wallace for purchaser Lagasco Inc.

S. Kromkamp and B. McPherson for HMQ in right of Ontario.

Aubrey E. Kauffman for the National Bank of Canada.

M.P. Gottlieb for Canadian Overseas Petroleum Limited.

REASONS FOR DECISION

S.F. DUNPHY J.

1 Dundee Oil and Gas Limited brought an application, supported by the Monitor, seeking approval of a sale of substantially all of its assets before me on May 23, 2018. I approved the proposed sale subject to requiring further evidence regarding the requested assignment of executory contracts under s. 11.3 of the *Companies' Creditors Arrangement Act* on June 11, 2018.

2 The matter came back before me on June 11, 2018 where, based upon the new evidence filed, I approved the transaction including the assignment of the executory contracts with reasons to follow. These are those reasons.

Background facts

3 Dundee entered into an Asset Purchase Agreement subject to court approval dated April 4, 2018. The sale was

the result of a long process that began in August 2017 when Dundee was operating under the protection of the proposal provisions of the *Bankruptcy and Insolvency Act*. Those proceedings were continued under the CCAA on February 13, 2018.

4 Dundee's assets consist primarily of a large number of petroleum and natural gas leases as well as associated equipment, gathering pipelines, etc. Many of the assets are in fact leased or are otherwise the subject of contractual arrangements between Dundee and the owner of the affected land. Accordingly, a significant aspect of the proposed sale transaction was a requirement that an assignment of the underlying contracts be accomplished by an order pursuant to s. 11.3 of the CCAA.

5 On May 23, 2018 I indicated to the parties that I was satisfied with the necessity and advisability of ordering the requested relief and the process leading up to it save and except one aspect. In approving an assignment using the authority vested in me by s. 11.3 of the CCAA, I am required to inquire into a number of matters about which I found the record before me that day to be deficient. One landowner, Mr. Whittle, had made a formal objection and availed himself of the opportunity to express his concerns by telephone. He raised a number of objections to what he perceived to be concerns regarding the operational stability of the purchaser and their ability to see to eventual remediation obligations.

6 During the course of the hearing, the Applicant indicated that the purchaser was prepared to proceed without an order compelling the assignment of agreements between Dundee and Mr. Whittle. The Applicant's position was that the form of agreements used in the case of Mr. Whittle's contracts at least required no consent for a valid assignment. The Purchaser was prepared to run the risk of that assessment proving accurate in Mr. Whittle's case.

7 In the result, I adjourned the hearing until June 11, 2018 in order to grant the applicant additional time to address the concerns raised by me regarding s. 11.3 of the CCAA. I indicated that there were no other issues.

8 The specific concerns raised by me were these:

a. The operation of a natural resource extraction business such as an oil and gas business is one that entails a degree of environmental risk that, in the event of insolvency of the lessee/contract holder may visit the remediation or well-capping costs upon the landowner, a factor that makes the capacity and ability of the proposed assignee to manage those responsibilities a matter of concern when assessing the suitability of the proposed assignee; and

b. The affidavit material at the motion provided no solid evidence of the expected financial stability or durability of the purchaser post-closing, a rather critical factor to assess in considering the suitability of a proposed assignee.

9 Three things happened during the intervening delay, two planned one unexpected.

10 Firstly, the Monitor arranged to notify the landowners of the delay. No further objections were received from that front. Mr. Whittle maintained his objection despite the Applicant's concession that it was not seeking to compel assignment of his agreements.

11 Secondly, the Applicant filed a Supplementary Affidavit of Jane Lowrie, President and Chief Executive Officer of Lagasco Inc, the purchaser sworn June 5, 2018. This affidavit provided further details regarding the financial status of the purchaser.

12 Lastly, one of the "runner-up" bidders (Canadian Overseas Petroleum Limited) sent a letter to the Monitor on June 7, 2018 which letter COPL decided to send directly to the court on June 8, 2018 when the Monitor did not agree to bring the letter to my attention directly.

13 This intervention generated a flurry of reaction or overreaction, depending upon your point of view. It was, in the final analysis, a tempest in a teacup.

14 The Applicant and National Bank (who strongly supports the sale and, despite the sale, will end up with a significant shortfall on its secured claim) were understandably taken aback by a last-second threat to a transaction they have worked very hard to bring to the threshold of completion and that, from their perspective at least, is clearly the best option available. They asked me not to consider the submissions of a mere "bitter bidder".

15 They needn't have had so little faith in the editorial judgment of the court. COPL had experienced counsel who was well aware of the stiff currents flowing against any attempt of an unsuccessful bidder to gain standing to upset a transaction. There was no request for standing. The principal message of the communication was an opportunistic one perhaps, but not unfair. In light of the issues raised on May 23, 2018, COPL wanted to remind the Monitor and eventually the court that it remains ready willing and able to move forward with a transaction should Lagasco drop the ball. Of course, COPL did not resist ensuring that a few helpful bits of analysis/argument that might serve to persuade the court to think about moving in that direction also managed to find their way into the communication. It was not an attempt to introduce fresh evidence through the back door.

16 As I remarked during the hearing, I did not fall off the turnip truck yesterday. The motivation behind the communication was not cloaked nor was its simple object.

17 A few take-away admonitions from this:

a. Communications directly with the judge are to be discouraged generally;

b. Where necessary, such communications should be copied to the service list generally absent some very compelling reason not to do so; but

18 I would have preferred that this course of conduct had been followed here. The Monitor was copied and the integrity of the process was in no way compromised.

19 The substantive question before me was whether I ought to approve the provisions of the requested approval and vesting order that would compel the assignment of certain executory contracts under s. 11.3 of the CCAA.

20 Section 11.3 of the CCAA authorizes the court to assign "the rights and obligations of the company" to an agreement to any person specified in the court order that is willing to accept the assignment. Post-filing contracts, eligible financial contracts and collective agreements may not be assigned in this fashion.

21 There was no issue in this case with the technical aspects of the case. Proper notice was given. No prohibited categories of contracts were proposed to be assigned. The terms of the proposed assignment were designed to ensure the payment of cure costs would be made. A procedure for resolving any disputes about cure costs was designed to avoid compromising the rights of affected parties.

22 The issue to be decided was whether this was an appropriate case for me to exercise my jurisdiction to make the order under s. 11.3. Section 11.3 does not provide an exhaustive code of the factors for me to consider. Rather, s. 11.3(3) lists three factors that, among others, I am to consider:

(a) whether the monitor approved the proposed assignment;

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

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

23 In the present case, the Monitor has approved the proposed assignments and has made detailed and thoughtful submissions to me outlining the basis of that approval. The concerns expressed by me on May 23, 2018 did not fall on deaf ears.

24 The purchaser Lagasco is largely a shell company for the time being. It will own the business being purchased.

The evidence before me indicates that substantially all of the purchase price is to be debt financed -- partly through financing secured by the equipment to be purchased and party through a credit facility. On day one there will be little to no equity in the purchaser and the significant leverage will have to be serviced entirely from cash flow.

25 Taken in isolation, this factor raised grave concerns in my mind as to whether the assignee would be able to perform the obligations or whether, in light of the potential fragility of the assignee, it would be appropriate to compel the contract counterparties to accept the assignee.

26 I still have those concerns. I think it helpful that I should elaborate somewhat on what the concerns are and how I have resolved them. The Monitor's dispassionate and frank analysis of the issues has been very helpful in this process.

27 Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page.

28 Of course, insolvency is not always a catastrophe for such counterparties. Sometimes it is a godsend. Assets locked into long-term contracts at advantageous prices may be freed up to allow the counterparty to re-price to current market. In such cases, the creditors are at risk of seeing the debtor lose critical assets while the counterparty receives an unexpected windfall. The business and value of the debtor's assets may evaporate in the process -- be it from one large contract lost or many smaller ones.

29 Bankruptcy and insolvency always involves a balancing of a number of such competing interests. Creditors, contract counterparties - all of these have rights arising under agreements with the debtor that are either actually compromised or at risk of being compromised by insolvency. The CCAA and BIA regimes are predicated on facilitating a pragmatic approach to minimize the damage arising from insolvency more than they are concerned to advance the interests of one stakeholder over another.

30 It seems to me that a fundamental condition precedent to requiring a contract counterpart to be locked into an involuntary assignment post-insolvency is that the court sanctioning the assignment is able to conclude that the assignee will, in the words of s. 11.3(3)(b) of the CCAA, "be able to perform the obligations". This does not imply iron-clad guarantees. It does not give license to the counterparty to demand the receipt of financial covenants or assurances that it did not previously enjoy under the contract it originally negotiated with the debtor.

31 A proposed purchaser starting life with close to 100% leverage gives this judge a considerable degree of heartburn when it comes to answering the question of whether the assignee is a person who will be able to perform the obligations. That concern is amplified when one adds the prospect of landowners being made liable for environmental remediation caused by lessees and others on their land.

32 So, if that is my concern, by what process have I allayed it?

33 Firstly, the financial information before me is that cash flow from these operations has been quite solid. Dundee's insolvency has not been a result of operating losses.

34 Secondly, while any projection of future business results will always be subject to a number of contingencies and imponderables outside of the control of the parties, the forecast reserves prepared by Deloitte in this case have been prepared under NI 51.01 which means at the very least that they have been prepared to reviewable standards of reasonableness. The forecasts, such as they are, justify the inference that there is a *reasonable basis* to

conclude that the cash flow from the acquired assets will sustain operations and the acquisition debt. It will be a while before an equity cushion will be built though.

35 Thirdly, the purchaser has a plan to reduce G&A and operating costs to provide a further margin of safety and a level of institutional experience to make such a plan credible.

36 Fourthly, the environmental risk is mitigated somewhat by the fact that Ontario's regulatory model operates on a "pay as you play" basis requiring the building of reserves to handle capping costs as wells move past their expected lives. Dundee has had no trouble in the past funding capping expenses from operations and these expenses are accounted for in the cash flow forecasts used.

37 Finally, the MNR has agreed to a voluntary assignment of its leases (off-shore) while no on-shore landowners have seen fit to object to the proposed assignments despite quite adequate notice being given.

38 I must also be mindful that contract counterparties are not expected to *improve* their situation by reason of an assignment. A counterpart to an executory contract that is subject to involuntary assignment under s. 11.3 of the CCAA has managed to find itself contractually bound to an insolvent debtor notwithstanding whatever contractual safeguards were negotiated to avoid that outcome. The debtor is now insolvent. The desire to ensure the assignee is a reasonably fit and proper one should not morph into an exercise in patching up contracts previously negotiated by requiring financial covenants and safeguards never before required.

39 In all the circumstances, I was led to the conclusion that it would be appropriate to assign Dundee's rights and obligations to the purchaser and that the purchaser is someone who will be able to perform the obligations assigned. I have carefully reviewed the proposed order and am satisfied that the method of ascertaining cure costs and, if needs be, resolving disputes arising about the quantum satisfies the requirements of s. 11.3(4) and s. 11.3(3)(c). There is a fair process to resolve disputes about quantum should they arise.

40 In the result, I approved the transaction and the form of Approval and Vesting Order presented to me subject to minor amendments made at the hearing.

S.F. DUNPHY J.

AbitibiBowater inc. (Arrangement relatif à), [2009] Q.J. No. 19125

Jugements du Québec

Quebec Superior Court

District of Montreal

The Honourable Clément Gascon, J.S.C.

Heard: November 9, 2009.

Judgment: November 16, 2009.

No.: 500-11-036133-094

[2009] Q.J. No. 19125 | 2009 QCCS 6461 | 190 A.C.W.S. (3d) 678 | 2009 CarswellQue 14224 | EYB 2009-171231

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF: ABITIBIBOWATER INC. and ABITIBI-CONSOLIDATED INC., BOWATER CANADIAN HOLDINGS INC., The other Petitioners listed on Schedules "A", "B" and "C", Petitioners and ERNST & YOUNG INC., Monitor

(109 paras.)

Counsel

Me Sean Dunphy, Me Joseph Reynaud, Attorneys for Petitioners.

Me Robert Thornton, Attorney for the Monitor.

Me Jason Dolman, Attorney for the Monitor.

Me Alain Riendeau, Attorney for Wells Fargo Bank, N.A., Administrative Agent under the Credit and Guarantee Agreement Dated April 1, 2008.

Me Marc Duchesne, Attorney for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders.

Me Frederick L. Myers, Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates.

[Editor's note: A Corrected Judgment was released by the Court on November 23, 2009. The corrections have been made to the text and the text of the Corrected Judgment is appended to this document].

JUDGMENT

ON RE-AMENDED MOTION FOR THE APPROVAL OF A

SECOND DIP FINANCING AND FOR DISTRIBUTION OF

CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION

TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

67 [67] Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN$230M for the ULC DIP Facility funding.

68 [68] It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

69 [69] The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN$173.9 million. Accordingly, out of a CDN$200 million distribution to the SSNs, only CDN$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN$200 million at issue.

70 [70] Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN$200 million to the SSNs will create at the same time interest savings of approximately CDN$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

71 [71] Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a *CCAA* reorganization. Nothing in the *CCAA* prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada[7].

72 [72] While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present *CCAA* reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

73 [73] In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN$200 million.

74 [74] In *Windsor Machine & Stamping Ltd.* (Re)[8], Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

> 13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

75 [75] Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;

b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;

c) The proposed distribution entails an economy of CDN$27 million per year in interest savings; and

d) Even taking into consideration the CDN$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.