COURT FILE NO.	2503 00016	Clerk's Stamp
COURT	Court of King's Bench of Alberta	
JUDICIAL CENTRE	Edmonton	

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 AMENDED AND RESTATED INITIAL ORDER, APPROVAL OF KEY EMPLOYEE RETENTION PLAN ("KERP"), KERP CHARGE, AND LEASED EQUIPMENT RETURN PROCESS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DARREN R. BIEGANEK, KC/ ZACHARY SOPROVICH Barrister & Solicitor Phone: 780.441.4386 Fax: 780.428.9683 Email: dbieganek@dcllp.com	File # 204-213127 **DUNCAN CRAIG LLP** LAWYERS MEDIATORS 2800 Rice Howard Place 10060 Jasper Avenue Edmonton, Alberta Canada T5J 3V9

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I. INTRODUCTION

1. 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 Mining Corporation ("**KMC**" or the "**Applicant**"), which included a stay of proceedings (the "**Stay of Proceedings**") to and including January 20, 2025. FTI Consulting Canada Inc. ("**FTI**") is the Monitor within the CCAA proceedings ("**Monitor**").

2. Also on January 10, 2025, the Honourable Justice M.J. Lema also granted an Order approving a sales and investment solicitation process (the "**SISP**", with the Order approving the SISP being the "**Order – Approve SISP**") over the Applicant's undertaking, property and assets ("**Property**").

3. In this Application, the Applicant seeks:

   a) an amended and restated initial order ("**Amended and Restated Initial Order**" or "**ARIO**"), including, *inter alia*, the following terms of relief:

      i) an extension of the Stay of Proceedings to June 16, 2025; and

      ii) the approval of a key employee retention plan ("**KERP**") and granting a charge up to the amount of $745,000 ("**KERP Charge**") over the Applicant's Property and directing that the KERP Charge constitute a charge on the Property and that such charges shall subsequent to the Administration Charge, Interim Lender's Charge and Directors' Charge (pursuant to paragraph 38 of the Initial Order), but otherwise rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise.

4. The Applicant seeks an Order authorizing a process to return certain leased equipment to respective equipment lessors (the "**Leased Equipment Return Process**"), which process would permit the Applicant, subject to the Monitor's approval, to return certain leased equipment which is unnecessary for current operations and which has little or no equity.

5. Lastly, the Applicant seeks a Sealing Order with respect to the Supplementary Confidential Affidavit of Bryn Jones sworn January 14, 2025 ("**Fourth Confidential Affidavit**") until December 31, 2025.

II. FACTS

6. The facts are set out in the Affidavit of Bryn Jones ("**Jones Affidavit #1**") sworn December 31, 2024 and Affidavit of Bryn Jones sworn January 14, 2025 ("**Jones Affidavit #2**"). 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 follow on a summary basis.

7. The Applicant was founded in 1949. In the ensuing 75 years, the Applicant expanded its operations to include railroads, dams, earthworks and mining operations in Alberta, British Columbia, Saskatchewan, Yukon and the Northwest Territories. Since 1973, the Applicant has derived the majority of its business from large-scale oil sands projects but has also engaged in the extraction of other valuable materials.[1]

8. The Applicant's Property are niche products that require enhanced processes for their marketing and post-sale movement.[2]

9. The Applicant's total outstanding liabilities are in excess of $220,000,000, including to (i) the Applicant's primary secured creditor, a syndicate of lenders led by ATB Financial and including Canadian Western Bank, Export Development Canada and Laurentian Bank of Canada (collectively, the "**Syndicate**") in the amount of $104,316,256 as of October 31, 2024, (ii) the Applicant's other senior secured creditor, The Klemke Foundation, in the approximate amount of $49,290,859, (iii) pursuant to several equipment leases with equipment lessors (collectively, the "**Equipment Lenders**") in the approximate amount of $55,000,000, and (iv) unsecured trade payables and accrued liabilities as at October 31, 2024 were $22,218,366.[3]

10. The Applicant's present circumstances arose due to several factors. Chief among these is the sudden and unexpected cancellation of substantial scopes of work under contracts between the Applicant and Suncor Energy Inc. ("**Suncor**").[4]

11. The Applicant is in default of its obligations to the Syndicate and is unable to make payment of financial obligations as they come due. It is insolvent.[5]

12. On December 5, 2024, the Applicant filed a Notice of Intention to Make a Proposal ("**NOI**") under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**"), being Court Action #24-3162620 (the "**NOI Proceedings**"). FTI was the Proposal Trustee in the NOI Proceedings.

[1] Jones Affidavit #1 at para 11.
[2] Jones Affidavit #1 at para 30.
[3] Jones Affidavit #1 at paras 35-44.
[4] Jones Affidavit #1 at para 45.
[5] Jones Affidavit #1 at para 71.

13. On December 9, 2024, the Applicant made application and was granted an Order by this Honourable Court, *inter alia*, extending the BIA stay of proceedings to February 18, 2025 (the "**First Order**").

14. As part of the First Order, the Applicant was granted an Administration Charge in the amount of $500,000 and an Interim Lender's Charge up to the amount of $6,000,000, with respect to a credit facility from certain members of the Syndicate (the "**Interim Lender**"). Due to the limited time to serve notice of the application for the First Order, the Administration Charge and Interim Lender's Charge were only sought, at that time, to rank in priority to the Applicant's two senior secured creditors: the Syndicate and The Klemke Foundation.

15. The NOI Proceedings were a temporary measure taken given Court availability in December 2024. The Applicant always intended to make this Application in January 2025 to, *inter alia*, have the NOI Proceedings taken up under the CCAA, have the SISP approved and have the Administration Charge, Interim Lender's Charge, Directors' Charge and KERP Charge rank in priority to all secured creditors. Those applications were made on January 10, 2025 (other than with respect to the KERP Charge which is being made at this Application), and as previously noted, the Initial Order and Order – Approve SISP were both granted on January 10, 2025.

16. The SISP is expected to be active and operational prior to this Application for the ARIO and has a final deadline for Phase II bids to be submitted by March 28, 2025, with Court approvals to be sought in April 2025.

III. <u>ISSUES</u>

17. In considering this Application before the Court, the Court must be satisfied that:

    a) with respect to extending the Stay of Proceedings:

        i) whether circumstances exist that make the Order appropriate; and

        ii) whether the Applicants have acted, and are acting, in good faith and with due diligence;

    b) with respect to the KERP and the KERP Charge, that the same are appropriate in the circumstances and that the same should rank in priority to all creditors;

    c) with respect to the Leased Equipment Return Process, that such relief is appropriate in the circumstances; and

    d) with respect to the Sealing Order, whether the importance of protecting sensitive business/ employee information outweigh the deleterious effects of restricting the accessibility of Court proceedings.

IV. ARGUMENT

A. The General Proposition

18. The Supreme Court of Canada in *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60[6] considered the CCAA and articulated several purposes of the legislation. One of the purposes was the creation of conditions for preserving the status quo while attempts were made to find common ground amongst stakeholders for reorganization which is fair to all.

19. The Supreme Court also noted that the CCAA, in modern times, had enjoyed vitality in the context of contemporary practice with the advantage of the flexibility of a judicially supervised reorganization process in the face of increasing complex reorganizations.[7]

20. Appropriateness, good faith, and due diligence are generally considered as required considerations which a Court must always bear in mind when exercising its jurisdiction under the CCAA.[8]

21. With these general propositions at the forefront, this Brief will now address the specific qualifications which make the granting of the relief sought by the Applicant just and appropriate in the circumstances.

B. Relief is Available Under the CCAA, is Consistent with the Purpose and Policy of the CCAA and Circumstances Exist Which Make the Order Appropriate

22. The CCAA is remedial legislation that is to be given a wide and liberal interpretation so as to encourage and facilitate successful restructuring whenever possible. As a result, courts have acknowledged the need to discourage the importation of any statutory provisions, restrictions or requirements that might impede the flexibility or creative use of the CCAA without a demonstrated need or statutory direction.[9]

23. The general aim of the CCAA has long been considered to deal with the existing condition of insolvency in order to enable compromises and arrangements of an insolvent company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy and which are made for the common benefit of the stakeholders. The CCAA scheme in principle does not radically depart from the normal character of bankruptcy legislation. However, the legislation is intended to have a wide scope and allows this Honourable Court to make orders which will effectively maintain the status quo for a period of time while the insolvent company attempts to facilitate compromises and arrangements with its creditors

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[6] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 [*Century Services*] at para 77 **[TAB 1]**.
[7] *Century Services* at para 21 **[TAB 1]**.
[8] *Century Services* at para 70 **[TAB 1]**.
[9] *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 45 CBR (5th) 90, 2008 CanLII 21724 [*Metcalfe*] at paras 41-44 (Sup Ct J) **[TAB 2]**; *Metcalfe & Mansfield Alternative Investments II Corp, (Re)*, 2008 ONCA 587 at para 61, leave to appeal refused **[TAB 3]**; *Royal Bank v Cow Harbour Construction Ltd*, 2012 ABQB 59 at para 42 **[TAB 4]**.

in order to enable the company to remain in operation, as an alternative to bankruptcy, and to maximize value for all stakeholders. Such a resolution has significant benefits for the debtor company, its stakeholders and often broader society as well.[10]

24. The hallmark of the CCAA is its flexibility in terms of process and potential compromises and arrangements. It has been said that a restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring. The courts have developed and continued to be willing to develop new and creative remedies to ensure that the objectives of the CCAA are met.[11]

25. Indeed, the Supreme Court of Canada summarized the general purpose of the CCAA in *Canada v Canada North Group Inc.* and noted the broad discretionary power vested in the supervising court.[12]

26. The overriding and innovative purpose of the CCAA was also artfully articulated by Justice Deschamps writing for the majority of the Supreme Court of Canada in *Century Services* as follows:

> [15] As I will discuss at greater length below, the purpose of the CCAA — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the BIA may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.
>
> [16] Prior to the enactment of the CCAA in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, Creditor Rights and the Public Interest: Restructuring Insolvent Corporations (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The CCAA was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation…[13]

27. As fundamentally insolvency legislation, the CCAA has the simultaneous objectives of maximizing creditor recovery, preservation of going concern value where possible and preservation of jobs and communities affected by the firm's financial distress. In pursuit of those objectives, CCAA proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state.[14]

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[10] *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, 1934 CarswellNat 1 at para 4 (SCC) **[TAB 5]**; *Northland Properties Ltd, Re*, [1989] BCJ No 63 at para 17 (CA) **[TAB 6]**.
[11] *Metcalfe* at para 43 **[TAB 2]**; *Century Services* at paras 21, 61 and 70 **[TAB 1]**.
[12] *Canada v Canada North Group Inc*, 2021 SCC 30 [*Canada North*] at paras 18-21 **[TAB 7]**.
[13] *Century Services* at paras 15-16 **[TAB 1]**.

[14] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 [*Callidus*] at para 42 **[TAB 8]**.

28. Canada's insolvency statutes pursue an array of overarching remedial objectives which reflect wide ranging and potentially catastrophic impacts insolvency can have. The objectives include:

    a) providing for timely, efficient and impartial resolution of a debtor's insolvency;

    b) preserving and maximizing the value of a debtor's assets;

    c) ensuring fair and equitable treatment of the claims against the debtor;

    d) protecting the public interest; and

    e) in the context of commercial insolvency balancing the costs and benefits of restructuring or liquidating the company.[15]

29. Liquidation is not necessarily inconsistent with the remedial objectives of the CCAA.[16] Liquidating CCAAs can themselves take diverse forms.[17]

30. Each case is looked at on its own merit. The relative weight which the different objectives of the CCAA take on in any case may vary based on the factual circumstances, the stage of proceedings and so forth.[18]

31. Indeed, as certain authors note, the utilization of a CCAA plan of arrangement has become the exception rather than the rule in the Canadian restructuring landscape.[19]

32. CCAA's have also been commenced and concluded without any pretext of a plan ever being considered.[20]

33. Indeed, as has been previously noted by courts in CCAA proceedings, "[t]here is, of course, no precise and invariable formula. This is not a "cookie cutter" exercise… the matter must be decided on the basis of credible evidence and common sense, employing a principled, purposive and contextual approach."[21]

34. The general power of the Court to make Initial Orders, and subsequent Orders, in CCAA proceedings is section 11, which empowers the Court to make any order that it considers appropriate in the circumstances.[22]

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[15] *Callidus* at para 40 **[TAB 8]**.
[16] *Callidus* at para 45 **[TAB 8]**.
[17] *Callidus* at para 43 **[TAB 8]**.
[18] *Callidus* at para 46 **[TAB 8**].
[19] Insolvency Institute of Canada, Volume 10, Where's the Plan? The Declining Role of CCAA Plans in the Canadian Restructuring Landscape, and when they still may be needed. **[TAB 9]**
[20] *Target Canada Co (Re)*, 2015 ONSC 303 **[TAB 10]**.
[21] *Lemare Holdings Ltd, Re*, 2012 BCSC 1591 at para 60 **[TAB 11]**.
[22] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA], s 11 **[TAB 12]**.

35. Section 11 grants the Court a very broad discretion in making orders under the legislation in furtherance of the remedial objectives of the CCAA recognizing the baseline consideration which an Applicant bears on an application for an Initial Order, namely that the Order sought is appropriate in the circumstances.[23]

36. With these general propositions at the forefront, this Brief will now address the specific requirements to an extension of the Stay of Proceedings, approval of the KERP and KERP Charge, approval of the Leased Equipment Return Process and the requested Sealing Order.

C. Extension of the Stay of Proceedings

37. The initial stay can only be for 10 days[24] and as such, the Stay of Proceedings from the Initial Order expires on January 20, 2025. It is respectfully submitted that the extension of the Stay of Proceedings should be granted as the extension of the stay is appropriate and the Applicants have acted in good faith and with due diligence.

38. The Courts have held that approval of the creditors is not a prerequisite for extension of a stay. Rather the extension is for the benefit of all the company stakeholders.[25]

39. Section 11.02(2) of the CCAA provides the jurisdiction for the Court to extend the Stay 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.[26]

40. 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

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[23] CCAA, s 11 – considerations of good faith and due diligence apply to subsequent applications to extend a stay although good faith remains at the forefront throughout **[TAB 12];** *Century Services* at para 59 **[TAB 1];** *Callidus* at para 49 **[TAB 8]**.
[24] CCAA, s 11.02(1) **[TAB 12]**.
[25] *Rescue! The Companies' Creditors Arrangement Act, 2nd Edition*, Dr. Janice P. Sarra, pg 77 **[TAB 13]**.
[26] CCAA, s 11.02(2) **[TAB 12]**.

(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.[27]

41. 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 the Applicants have established that the current circumstances support an extension as being appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.[28]

42. The Applicant always has the onus.

i. Appropriate Circumstances

43. The causes of the insolvency and the financial circumstances of the Applicant and the prevailing circumstances were thoroughly canvassed at the application for the Initial Order. Those same circumstances continue.

44. 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.[29]

45. An extension of the Stay of Proceedings and the continued utilization of the insolvency proceedings under the CCAA are appropriate in the circumstances to preserve the asset and business base of the Applicant, impose a stay on the collection or realization of creditors and preserve the existing contracts of the Applicant for the benefit of all stakeholders while allowing the implementation of the SISP, which will broadly market the highly specialized Property of the Applicant with a goal to maximize value for all stakeholders.

46. The SISP has certain key deadlines, namely (i) Marketing Period Launch – January 15, 2025, (ii) Phase I Bid Deadline – February 28, 2025, (iii) Phase II Bid Deadline – March 28, 2025, and (iv) Court Approvals for Sales – April 2025.

47. The overarching goal of the Applicant is to maximize value for all its stakeholders. The Applicant has moved swiftly to develop and implement the SISP. In the Applicant's submission, these CCAA proceedings, and the extension of the Stay of Proceedings, will assist in achieving the goal of maximizing value to stakeholders, and the ARIO ought to be granted as sought.

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[27] CCAA, s 11.02(3) **[TAB 12]**.
[28] *Re Canada North Group Inc.*, 2017 ABQB 508 at para 33 **[TAB 14]**.
[29] *Ibid.*

ii. Good Faith

48. The Applicant has and continues to act in good faith.

49. 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. 9
>
> "Good faith" is defined as "honesty of intention" in the Concise Oxford Dictionary.
>
> Regardless of which definition is used, honesty is at the core…[30]

50. Further, the good faith test under the CCAA is properly limited to good faith within the CCAA, and not in respect of prior conduct with creditors.[31]

51. The Applicant 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.

iii. Due Diligence

52. In the short time period since the Initial Order was granted, the Applicant have taken steps to maximize value for all stakeholders, namely by moving forward with the SISP. The SISP is and of itself is evidence of the due diligence the Applicant is acting with in this matter, with expediated timelines within the SISP to put the Applicant's Property to market forthwith.

53. The Applicant has acted, and continues to act, with due diligence in this matter.

D. The Key Employee Retention Plan is Necessary and Appropriate

54. As part of the ARIO, the Applicant seeks approval of the KERP. To secure obligations under the KERP, the Applicant also seeks the KERP Charge, being a fourth-priority Court-ordered change on the Applicant's

[30] *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 [*San Francisco Gifts*] at paras 14 - 16 **[TAB 15].**
[31] *San Francisco Gifts* at paras 30 – 32 **[TAB 15]**.

Property in priority to all other charges, other than the Administration Charge, Interim Lending Charge and the Directors' Charge.

55. Courts have the discretion under section 11 of the CCAA to approve a KERP and grant a KERP Charge[32] and Courts across Canada have approved KERP in numerous CCAA proceedings.[33]

56. In *Walter Energy*, the Court noted that factors considered by the court when approving a KERP will vary from case to case, but some factors will generally be present:

    a) is this employee important to the restructuring process?

    b) does the employee have specialized knowledge that cannot be easily replaced?

    c) will the employee consider other employment options if the KERP is not approved?

    d) was the KERP developed through a consultative process involving the Monitor and other professionals?; and

    e) does the Monitor support the KERP and a charge?[34]

57. In *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980, the Court noted that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as discussed in the relevant case law: a) arm's length safeguards, b) necessity, and c) reasonableness of design.[35]

58. The industry in which the Applicant operates is a specialized, niche industry and the equipment which it operates and is proposing to sell through the SISP is also very specialized.[36]

59. Certain employees have specialized knowledge of the business and operations, specialized knowledge of the equipment and its condition and in certain instances a broad depth of knowledge in all aspects of the business of the Applicant.[37]

60. The employees subject to the KERP are employees that have other employment options available to them and are sought after. Due to their specialized knowledge and skills, they are not replaceable in the near term. Given the stringent timelines the Applicant is operating under within these proceedings,

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[32] *US Steel Canada Inc (Re)*, 2014 ONSC 6145 [*US Steel*] at para 27 **[TAB 16]**.
[33] See for example: *US Steel* and *Walter Energy Canada Holdings Inc (Re)*, 2016 BCSC 107 [*Walter Energy*] **[TAB 17]**.
[34] *Walter Energy* at paras 58-59 **[TAB 17]**.
[35] *Aralez Pharmaceuticals Inc (Re)*, 2018 ONSC 6980 at para 30 **[TAB 18]**.
[36] Jones Affidavit #2 at para 16.
[37] Jones Affidavit #2 at para 17.

replacing these employees would be a significant challenge and losing them may have detrimental effects on operations and the SISP process.[38]

61. The KERP was developed in consultation with the Monitor, the Interim Lender, the Syndicate and The Klemke Foundation and is designed to provide payment in three tranches: the first payment would be for select individuals on or before the end of May 2025, the second payment will be for another series of employees if a certain gross sales threshold ($70,000,000) is met through the SISP, and the third and final payment is payable upon final approval of a Plan of Arrangement in these CCAA proceedings.[39]

62. The proposed KERP is with respect to a number of key employees of the Applicant who have specialized knowledge of the industry and the business operations of the Applicant. The loss of these employees, even though the Applicant is commencing a liquidation process as part of its debt reduction strategy, would be detrimental to the business of the Applicant and to the stakeholders.[40]

63. In the circumstances, the KERP and associated KERP Charge are reasonable, appropriate and further the goal of maximizing value to all stakeholders in these CCAA proceedings.

E. The Leased Equipment Return Process is Necessary and Appropriate

64. The general power of the Court to make Initial Orders, and subsequent Orders, in CCAA proceedings is section 11, which empowers the Court to make any order that it considers appropriate in the circumstances.[41]

65. The Leased Equipment Return Process, developed in consultation with the Monitor, is a practical process, which will permit certain equipment leased by the Applicant, at the Applicant's election and with Monitor and Equipment Lessor approval, to be returned to the respective equipment lessor ("**Equipment Lessor**").

66. As set out in the Jones Affidavit #1, the Applicant has entered into several leases with Equipment Lessors for both heavy and light duty equipment (**"Equipment Leases")**. The combined indebtedness owing by the Applicant under those Equipment Leases is approximately $55 million.[42]

[38] Jones Affidavit #2 at para 18.
[39] Jones Affidavit #2 at para 20.
[40] Jones Affidavit #1 at para 90.
[41] CCAA, s 11 **[TAB 12]**.
[42] Jones Affidavit #2 at para 21.

67. The Applicant's intention is to include all the equipment in its possession in the SISP, including equipment subject to Equipment Leases.[43]

68. Notwithstanding the foregoing, the Applicant has reviewed the list of equipment subject to Equipment Leases and has determined that in some instances there may be no available equity in that equipment for the benefit of the Applicant.[44]

69. The Leased Equipment Return Process would, *inter alia*:

    a) require the Applicant to notify an Equipment Lessor of any leased equipment the Applicant proposes to return to the Equipment Lessor;

    b) require the Equipment Lessor to provide a payout statement in respect of each applicable piece of leased equipment to the Applicant and Monitor;

    c) thereafter have the Monitor review the subject lease, complete an independent security review, review the payout statement and compare the same to valuation estimates of the applicable leased equipment;

    d) if approved by the Monitor, the Monitor shall notify the Applicant and Equipment Lessor in writing as to which of the leased equipment the Monitor approves being returned to the Equipment Lessor, and any costs which the Applicant, in consultation with the Monitor, determines may be payable by the Equipment Lessor prior to the release of equipment;

    e) if approved by the Monitor, require the Equipment Lessor to demobilize and remove the leased equipment at the Equipment Lessor's sole cost and expense; and

    f) permit the Equipment Lessor to sell the leased equipment, with the Equipment Lessor to fully account to the Applicant and Monitor of all sale proceeds, and (i) in the event there is a surplus, pay the same to the Applicant or Monitor, to be held in trust, and (ii) in the event there is a deficiency, the same will be an unsecured claim against the Applicant.

70. Notwithstanding the above process, an Equipment Lessor may elect to have any leased equipment remain in the SISP by providing an election ("**SISP Election**") to the Applicant and the Monitor in writing.

71. With respect to costs of leased equipment included in the SISP, whether the subject of a SISP Election to keep the leased equipment in the SISP or otherwise, those would remain subject to the charges authorized

[43] Jones Affidavit #2 at para 22.
[44] Jones Affidavit #2 at para 23.

and continued by the Court in each of the Initial Order and ARIO and, subject to paragraph 47 of the ARIO, would be allocated their share costs of the CCAA proceedings once the SISP is complete based on their pro rata share of gross sale proceeds calculated by the Monitor.

72. The proposed Leased Equipment Return Process is an appropriate and reasonable method of addressing the return of leased equipment and has been reviewed and developed in consultation with the Monitor, the Interim Lender, the Syndicate and The Klemke Foundation.

F. Sealing Order

73. On an application to temporarily seal a court file, or portion of it, this Honourable Court has broad discretion and may make a direction on any matter that the circumstances require, and it may grant the Order notwithstanding the provisions of Division 4 of Part 6 of the *Alberta Rules of Court*.[45]

74. Temporary sealing orders should be granted when:

  a) an Order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and

  b) the salutary effects of the Order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.[46]

75. More recently, the Supreme Court of Canada in *Sherman Estate v Donovan*, restated the test upon which an applicant must satisfy in asking a court to exercise discretion in a way that limits the open court presumption. An applicant must demonstrate (a) court openness poses a serious risk to an important public interest, (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk, and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[47]

76. The Applicant seeks the Sealing Order with respect to the Fourth Confidential Affidavit until December 31, 2025 (or further Order of this Court), which contains detailed information regarding certain of the Applicant's employees and the proposed payments to them under the KERP.[48]

77. The information within the Fourth Confidential Affidavit is sensitive as the Applicant has a legal obligation to keep such information private and confidential and having the information disclosed served no purpose

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[45] *Alberta Rules of Court*, Alta Reg 124-2010, Division 4 of Part 6.
[46] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 45 **[TAB 19]**.
[47] *Sherman Estate v Donovan*, 2021 SCC 25 at para 38 **[TAB 20]**.
[48] Jones Affidavit #2 at para 27.

in these CCAA proceedings. The stakeholders know the total anticipated payments and the timing for such payments, which is the relevant information with respect to the KERP and KERP Charge.[49]

78. Sealing the Fourth Confidential Affidavit is the least restrictive method available to prevent the dissemination of the confidential information. The purpose of the sealing order, being to protect sensitive employee information, far outweigh the deleterious effects of restricting the accessibility of Court proceedings.

79. The Applicant submits that the Sealing Order is appropriate in the circumstances and ought to be granted.

V. CONCLUSIONS AND RELIEF SOUGHT

80. In the circumstances, the relief sought by the Applicant is just and appropriate, and consistent with the objectives of the CCAA. The extension of the Stay of Proceedings in this instance is done for the benefit of all stakeholders and to permit the SISP to run to conclusion.

81. The KERP, and the associated KERP Charge, is with respect to a number of key employees of the Applicant who have specialized knowledge of the industry and the business operations of the Applicant, and said employees are necessary to the success of the SISP and these CCAA proceedings.

82. The Leased Equipment Return Process is appropriate and reasonable.

83. In all the circumstances this Application ought to be allowed.

DATED this 14th day of January, 2025.

DUNCAN CRAIG LLP
Per:

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

[49] Jones Affidavit #2 at para 28.

TABLE OF AUTHORITIES

1. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.
2. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 45 CBR (5th) 90, 2008 CanLII 21724 (ON Sup Ct J).
3. *Metcalfe & Mansfield Alternative Investments II Corp, (Re)*, 2008 ONCA 587.
4. *Royal Bank v Cow Harbour Construction Ltd*, 2012 ABQB 59.
5. *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, 1934 CarswellNat 1 (SCC).
6. *Northland Properties Ltd, Re*, [1989] BCJ No 63 (CA).
7. *Canada v Canada North Group Inc*, 2021 SCC 30.
8. *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10.
9. Insolvency Institute of Canada, Volume 10, Where's the Plan? The Declining Role of CCAA Plans in the Canadian Restructuring Landscape, and when they still may be needed.
10. *Target Canada Co (Re)*, 2015 ONSC 303.
11. *Lemare Holdings Ltd, Re*, 2012 BCSC 1591.
12. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss 11, 11.02.
13. *Rescue! The Companies' Creditors Arrangement Act, 2nd Edition*, Dr. Janice P. Sarra, pg 77
14. *Re Canada North Group Inc.*, 2017 ABQB 508
15. *San Francisco Gifts Ltd., Re*, 2005 ABQB 91
16. *US Steel Canada Inc (Re)*, 2014 ONSC 6145.
17. *Walter Energy Canada Holdings Inc (Re)*, 2016 BCSC 107.
18. *Aralez Pharmaceuticals Inc (Re)*, 2018 ONSC 6980.
19. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.
20. *Sherman Estate v Donovan*, 2021 SCC 25.

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.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

[page380]

Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act*

("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by [page381] Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, [page382] recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions

of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

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Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA.* This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA.*

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the

general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

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Cases Cited

By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *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; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

Statutes and Regulations Cited

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and [page386] the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, ss. 69, 128, 131.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either [page394] the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors [page395] Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953

restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make [page396] the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

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

resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding [page411] the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

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3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282

, at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [page413] staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

[page414]

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against [page415] purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a

hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the [page416] matter, ... subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all [page417] stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment

under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

[page418]

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as [page419] the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be [page420] lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., [2008] O.J. No. 1818

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

C.L. Campbell J.

Heard: March 17, 2008.

Judgment: April 8, 2008.

Court File No. 08-CL-7440

[2008] O.J. No. 1818 | 42 C.B.R. (5th) 90 | 2008 CarswellOnt 2652 | 45 B.L.R. (4th) 201 | 168 A.C.W.S. (3d) 245

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 and Arrangement Involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto Between The Investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-backed Commercial Paper listed in Schedule "B" hereto, Applicants, and Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits listed in Schedule "A" hereto, Respondents

(56 paras.)

Case Summary

Insolvency law — Proposals — Court approval — Application for initial order under the Companies' Creditors Arrangement Act allowed — The applicants were investors holding more than $21 billion of the $32 billion of asset-backed commercial paper (ABCP) issued by the respondents — They sought an initial order as essential to the resolution of an ABCP liquidity crisis — The court found that the application was consistent with the remedial purposes of the Act — It was appropriate to treat holders of ABCP as a single class of creditors, as fragmentation of classes would render it excessively difficult to obtain approval of a plan under the Act — Companies' Creditors Arrangement Act, s. 2.

Corporations, partnerships and associations law — Corporations — Borrowing — Trust indenture — Enforcement — Application for initial order under the Companies' Creditors Arrangement Act allowed — The applicants were investors holding more than $21 billion of the $32 billion of asset-backed commercial paper (ABCP) issued by the respondents — They sought an initial order as essential to the resolution of an ABCP liquidity crisis — The court found that the application was consistent with the remedial purposes of the Act — It was appropriate to treat holders of ABCP as a single class of creditors, as fragmentation of classes would render it excessively difficult to obtain approval of a plan under the Act — Companies' Creditors Arrangement Act, s. 2.

Application by the Investors represented on the Pan-Canadian Investors Committee for Third-Party Structure Asset-backed Commercial Paper (ABCP), for an initial order under the Companies' Creditors Arrangement Act. The

applicants were comprised of investors holding more than $21 billion of the $32 billion of ABCP issued by at least one of the respondents. Each series of ABCP was issued pursuant to a trust indenture. In order to facilitate the within application, the respondents replaced the trust companies under the indentures. Each respondent assumed legal ownership of assets held for each series in the conduit of which it was trustee, and became the debtor with respect to the ABCP issued thereunder. Each ABCP note provided that recourse was limited to the assets of the trust. Since August 2007, the trustees of each conduit had insufficient liquidity to make payments on the ABCP to the applicants and other noteholders. Accordingly, each of the respondents was insolvent. The applicants sought an initial order under the Act as consistent with the underlying statutory policy, and as essential to the resolution of an ABCP liquidity crisis. Nobody challenged the entitlement of the applicants to the initial order sought. At issue was whether the application complied with the Act's requirements, whether the relief sought was consistent with its purpose, and whether the classification of creditors was appropriate for voting and distribution purposes.
HELD: Application allowed.

The respondents were debtor companies within the meaning of the Act. As trustees, the respondents were the obligors under the trusts' covenants to pay. The respondents were insolvent for the purposes of the Act. That insolvency was not negated by provisions in the notes and trust indentures that limited noteholders' recourse to the trust assets. Practical restructuring of the ABCP claims could only be implemented on a global basis. The claims for relief by the applicants involved common questions of law and fact. Joining of the claims promoted the convenient administration of justice. The application was consistent with the remedial purposes of the Act. It was appropriate to treat holders of ABCP as a single class of creditors, as fragmentation of classes would render it excessively difficult to obtain approval of a plan under the Act.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 2, s. 3(1), s. 4, s. 5, s. 8, s. 11

Ontario Rules of Civil Procedure, Rule 5.01, Rule 5.02

Counsel

B. Zarnett, F. Myers, and B. Empey, for the Applicants.

R.S. Harrison, for Metcalfe & Mansfield Alternative Investments Corps.

Scott Bomhof and John Laskin, for National Bank of Canada.

Peter Howard and William Scott, for Asset Providers/Liquidity Providers.

Jeff Carhart, Joe Marin and Jay Hoffman, for Ad Hoc Committee of ABCP Holders.

T. Sutton, for Securitus.

Jay Swartz and Natasha MacParland, for New Shore Conduits.

Aubrey Kauffman, for 4446372 Canada Inc.

Stuart Brotman, for 6932819 Canada Inc.

Robin B. Schwill and James Rumball, for Coventree Capital Inc., Coventree Administration Corp. and Nereus Financial Inc.

Ian D. Collins, for Desjardins Group.

aggregate of its property is not, at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

31 I am satisfied that on the material filed as of August 13, 2007 and the stoppage of payment by trustees of the Conduits (which continues), the Conduits and now the Respondents remain unable to meet their liabilities at the present time.

32 The Conduits and now trustees in my view meet the test accepted by the Court in *Re Stelco* of being "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring."[4] Indeed, it was that very circumstance that brought about the standstill agreement and the ensuing discussions and negotiations to formulate a Plan.

33 Finally on this point I am satisfied that the insolvency of the Respondents is not affected or negated by contractual provisions in the applicable notes and trust indentures that limit Noteholders' recourse to the trust assets held in the Conduits. This statement should not be taken as a determination of the rights or remedies of any creditor.

34 It was urged and I accept that the applicants are creditors under ss. 4 and 5 of the CCAA and as such are entitled to standing to propose a Plan for restructuring the ABCP.

35 On the return of the motion for the Initial Order, while the proceeding was technically "ex parte," a significant number of interested parties were represented. None of those parties opposed the making of the Initial Order and since then no one has come forward to challenge the entitlement of the Applicants to the Initial Order.

36 S. 8 of the CCAA renders ineffective any provisions in the trust indentures that otherwise purport to restrict, directly or indirectly, the rights of the Applicants to bring this application:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

37 See also the following for the proposition that a trust indenture cannot by its terms restrict recourse to the CCAA.[5]

38 Another feature of this Application is the joining within a single proceeding of claims by many parties against each of the Respondents. Rules 5.01 and 5.02 of the *Rules of Civil Procedure* allow for the joinder of claims by multiple applicants against multiple respondents. It is not necessary that all relief claimed by each applicant be claimed against each respondent. Here the Applicants assert claims for relief against the Respondents involving common questions of law and fact. Joining of the claims in one proceeding promotes the convenient administration of justice.

39 I am satisfied that in the unique circumstances that prevail here, the practical restructuring of the ABCP claims can only be implemented on a global basis; accordingly, if there were separate proceedings, each individual plan would of necessity have been conditional upon approval of all the other plans.

40 One further somewhat unusual aspect of this Application has been the filing of the proposed Plan along with the request for the Initial Order. This is not unusual in what have come to be known as "liquidating" CCAA applications where the creditors are in agreement when the matter first comes to Court. It is more unusual where there are a large number of creditors who are agreed but a significant number of investors who have yet to be consulted.

41 In general terms, besides complying with the technical requirements of the CCAA, this Application is consistent with the purpose and policy underlying the Act. It is well established that the CCAA is remedial legislation, intended

to facilitate compromises and arrangements. The Court should give the statute a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

42 The CCAA is to be broadly interpreted as giving the Court a good deal of power and flexibility. The very brevity of the CCAA and the fact that it is silent on details permits a wide and liberal construction to enable it to serve its remedial purpose.

43 A restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring. The courts have developed new and creative remedies to ensure that the objectives of the CCAA are met.

> [45] The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. ... It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has been made! *Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.* [Emphasis added.][6]

44 Similarly, the courts have acknowledged the need to maintain flexibility in CCAA matters, discouraging importation of any statutory provisions, restrictions or requirements that might impede creative use of the CCAA without a demonstrated need or statutory direction.

45 I am satisfied that a failure of the Plan would cause far-reaching negative consequences to investors, including pension funds, governments, business corporations and individuals.

46 All those involved, particularly the individuals, may not yet appreciate the consequences involved with a Plan failure.

47 In order that those who are affected have an opportunity to consider all the consequences and decide whether or not they are prepared to vote in favour of the proposed or any other Plan, the stay of proceedings sought in favour of those parties integrally involved in the financial management of the Conduits or whose support is essential to the Plan is appropriate.

48 S. 11 of the CCAA provides for stays of proceedings against the debtor companies. It is silent as to the availability of stays in favour of non-parties. The granting of stays in favour of non-parties has been held to be an appropriate exercise of the Court's jurisdiction. A number of authorities have supported the concept of a stay to enable a "global resolution."[7]

49 More recently in *Re Calpine Canada Energy Limited*[8], Romaine J. of the Alberta Court of Queens Bench permitted not only an initial order, but also one that extended after exit from CCAA without a plan so that the process of the CCAA would not be undermined against orders made during an unsuccessful plan.

50 Finally, I am satisfied at this stage of the approval of filing of the Initial Plan that all creditors be placed in a single class. The CCAA provides no statutory guidance to assist the Court in determining the proper classification of creditors. The tests for proper classification of creditors for the purpose of voting on a CCAA plan of arrangement have been developed in the case law.[9]

51 The Plan is, in essence, an offer to all investors that must be accepted by or made binding on all investors. In light of this reality, the Applicants propose that there be a single class of creditors consisting of all ABCP holders. It is urged that all holders of ABCP invested in the Canadian marketplace with its lack of transparency and other common problems. The Plan treats all ABCP holders equitably. While the risks differ as among traditional assets, ineligible assets and synthetic assets, I am advised that the calculation of the differing risks and corresponding interests has been taken into account consistently across all of the ABCP in the Plan.

Metcalfe & Mansfield Alternative Investments II Corp. (Re), 92 O.R. (3d) 513

Ontario Reports

Court of Appeal for Ontario,

Laskin, Cronk and Blair JJ.A.

August 18, 2008

92 O.R. (3d) 513

Case Summary

Debtor and creditor — Companies' Creditors Arrangement Act — Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entrée to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.
Cases referred to

Steinberg Inc. c. Michaud, [1993] J.Q. no 1076, 42 C.B.R. (5th) 1, 1993 CarswellQue 229, 1993 CarswellQue 2055, [1993] R.J.Q. 1684, J.E. 93-1227, 55 Q.A.C. 297, 55 Q.A.C. 298, 41 A.C.W.S. (3d) 317 (C.A.), not folld

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House of Commons Debates (Hansard), (20 April 1933) at 4091 (Hon. C.H. Cahan)

APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" — Counsel for list of counsel.

Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688, [2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T& N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement.[4]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants) would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

Royal Bank of Canada v. Cow Harbour Construction Ltd., [2012] A.J. No. 141

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

K.D. Yamauchi J.

Heard: November 2-3, 2011.

Judgment: January 23, 2012.

Dockets: 1003 11241, 1003 05560; Bkcy Action No.: 24-115359

Registry: Edmonton

[2012] A.J. No. 141 | 2012 ABQB 59 | 75 C.B.R. (5th) 99 | [2012] 8 W.W.R. 209 | 59 Alta. L.R. (5th) 215 | 19 P.P.S.A.C. (3d) 31 | 98 B.L.R. (4th) 236 | 529 A.R. 147 | 211 A.C.W.S. (3d) 265 | 2012 CarswellAlta 198

IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended AND IN THE MATTER OF a Plan of Arrangement of Cow Harbour Construction Ltd. Between Royal Bank of Canada, Plaintiff, and Cow Harbour Construction Ltd. and 1134252 Alberta Ltd., Defendants

(222 paras.)

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Compromises and arrangements — Claims — Eligible financial contract — Application by equipment lessors for proportionate share of funds held by court-appointed receiver allowed in part — Receiver held funds that would have been paid under applicants' leases — Applicants sought order that leases fell under section 11.01(a) of Companies' Creditors Arrangement Act — Factors listed in Re Smith Brothers Contracting Ltd. applied to leases to determine whether true lease or financing lease — True leases included options for fair market value purchases and provided for return of equipment at end of lease — Financing leases occurred where aggregate of rental payments was more than value of leased equipment.

Application by equipment lessors for their proportionate share of funds held by the court-appointed receiver of Cow Harbour Construction Ltd. ("Cow Harbour"). The receiver held funds set aside as monies that would have been paid under the applicants' leases. The applicants applied for an order determining which of their leases fell within subsection 11.01(a) of the Companies' Creditors Arrangement Act (the "CCAA"). There were disputed leases with Scott Capital Group Inc. ("Scott Capital"), Caterpillar Financial Services Limited ("CFSL"), Wajax Industries ("Wajax"), Kempenfelt Vehicle Leasing ("Kempenfelt"), Concentra Financial ("Concentra"), Alter Moneta and Key Equipment Finance Canada Ltd. ("Key Equipment").
HELD: Application allowed in part.

Subsection 11.01(a) of the CCAA was to be narrowly construed. The factors listed in Re Smith Brothers Contracting Ltd. were applied to each of the disputed leases to determine whether they were true leases or financing leases. The Scott Capital, CFSL, Wajax and Concentra leases were true leases. They included options for fair market value purchases, but the equipment had to be returned at the end of the lease or contained no obligation to exercise the purchase option. The Kempenfelt, Alter Moneta and Key Equipment leases were financing leases.

The aggregate of rental payments was more than the original cost of the equipment. The Key Equipment lease guaranteed a below market option price.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178(1) (d)

Companies' Creditors Arrangement Act, RSC 1985, c C-36, s. 11, s. 11.01(a), s. 11.02, s. 11.3

Conditional Sales Act, RSA 1970, c 61,

Income Tax Act, RSC 1985, c one (5th Supp.),

Counsel

Walker W. MacLeod, for GE.

Joseph J. Bellissimo, for Scott Capital.

Kentigern A. Rowan, Q.C. and Stephanie A. Wanke, for Wajax.

Ryan Zahara, for Caterpillar Financial.

Jeremy H. Hockin, for Kempenfelt Vehicle Leasing (a Division of Equirex Vehicle Leasing 2007 Inc.), Alter Moneta Corporation, Concentra Financial, and Key Equipment.

Reasons for Judgment

K.D. YAMAUCHI J.

I. Nature of the Matter

1 Various equipment lessors (collectively, the Applicants) have applied for what they claim to be their proportionate share of funds that PricewaterhouseCoopers Inc. (PWC) currently holds, pending this Court's determination of whether their leases were subject to section 11.01(a) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*). PWC is the court-appointed receiver and manager of the assets, property and undertaking of Cow Harbour Construction Ltd. (Cow Harbour).

II. Procedural History

2 On April 7, 2010, Cow Harbour obtained a stay of proceedings against it (Initial Order) under *CCAA* s. 11.02. This Court extended the Initial Order from time to time by a number of subsequent court orders. Pursuant to the Initial Order, this Court appointed Deloitte LLP as monitor under the *CCAA* (Monitor).

3 Cow Harbour's primary business consisted of overburden removal and general contracting services for oil extraction companies in Fort McMurray, Alberta. Its assets consisted mainly of earth moving and hauling equipment. Much of the equipment that Cow Harbour used in its operations was leased from various parties.

4 On May 21, 2010, this Court directed the Monitor to provide all interested parties with a list of those leases which it had classified as ones entitling the respective lessors to receive ongoing monthly payments pursuant to *CCAA* s. 11.01. This Court gave any party who claimed to have such a lease, but whose claim was not included in the

payments. This would be in keeping with judicial interpretation of the balance of *CCAA* s. 11.01(a). For example, a supplier may provide goods or services to the debtor corporation post-stay on the basis of "cash on delivery."

40 This type of interpretation would not be unusual, as Canadian courts, including the Alberta Court of Appeal, have taken such a grammatical-interpretative approach when they have considered, for example, *BIA* s. 178(1)(d). That section provides:

> 178(1) An order of discharge does not release the bankrupt from
>
> ...
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity ...

41 The question has arisen whether the words "while acting in a fiduciary capacity" qualify only the word "defalcation" or whether they qualify all of the listed factors, including fraud, embezzlement, misappropriation and defalcation. Courts have held that the latter is the proper interpretation (see *e.g.* ***Confederation Life Insurance Co. v. Waselenak***, [1998] 5 WWR 712, 57 Alta LR (3d) 3 (QB), affd 2000 ABCA 136; ***166404 Canada Inc. v. Coulter*** (1998), 4 CBR (4th) 1 (Ont CA), leave to appeal to SCC refused, [1998] S.C.C.A. No. 231, (1998), 223 NR 395 (note); ***Ross & Associates v. Palmer***, 2001 MBCA 17, 22 CBR (4th) 140; ***Re Brant*** (1984), 52 CBR (NS) 317 (Ont SC)).

42 Including all pre-stay leases in the stay of proceedings would be in keeping with the broad and liberal interpretation that courts have given to the *CCAA*, which is to provide the debtor corporation with "breathing space" in which to determine whether it is in a position to restructure its affairs and to facilitate its survival. Including only post-stay leases under *CCAA* s. 11.01(a) also would be in keeping with the narrow interpretation of transactions that are excepted from the stay of proceedings. It would simplify *CCAA* proceedings involving equipment leases.

43 This interpretation, however, does not give weight to the word "use" in *CCAA* s. 11.01(a). In making the true lease/financing lease distinction, Bauman J. in ***Smith Brothers*** and courts in subsequent cases have sought to do just that. They have read the section as stating, "No order made under section 11 or 11.02 has the effect of prohibiting a person from requiring immediate payment for ... use of leased ... property ... provided after the order is made" (emphasis added). In other words, it is "use" of the leased property which is provided after a court makes the initial order.

44 A true lease, in essence, is a bailment contract such that ownership of the leased goods remains with the bailor/lessor and the bailee/lessee pays for "use" of those goods. In ***Punch v. Savoy's Jewellers Ltd.*** (1986), 54 OR (2d) 383 at para 17 (CA), the court defined bailment as follows:

> ... Bailment has been defined as the delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form as soon as the time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor and bailee can exist independently of a contract. It is created by the voluntary taking into custody of goods which are the property of another.

(See also ***Visscher v. Triple Broek Holdings Ltd.***, 2006 ABQB 259, 399 AR 184 at paras 27-28; ***Letourneau v. Otto Mobiles Edmonton (1984) Ltd***., 2002 ABQB 609, 315 AR 232 at para 23).

45 The central character of a true lease is "payment for use." Bauman J. in ***Smith Brothers*** at para 48 adopted the following statement in Professor Cuming's above-referenced article to expand on this principle:

> Under a true lease, the lessor surrenders his possessory right in chattels to the lessee in return for an undertaking by the lessee to perform certain acts which usually involve the payment of money to the lessor. The lessee has obligations, but the transaction cannot be characterized as a security agreement because the interest of the lessor is not related to those obligations. In other words, the lessor does not remain owner merely to ensure or to induce performance of the lessee's obligations. He remains owner because a bailment contract does not involve the transfer of ownership to the bailee.

Reference re: Constitutional Creditor Arrangement Act (Canada), [1934] S.C.R. 659

Supreme Court Reports

Supreme Court of Canada

Present: Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

1934: March 27, 28, 29 / 1934: June 6.

[1934] S.C.R. 659

IN THE MATTER OF A Reference concerning the Constitutional validity of the Companies' Creditors Arrangement Act.

Case Summary

Constitutional law — The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36 (Dom.) — Constitutional validity — "Bankruptcy and Insolvency" (B.N.A. Act, s. 91(21)).

The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36, is intra vires of the Parliament of Canada. The matters dealt with come within the domain of "bankruptcy and insolvency" within the intendment of s. 91(21) of the B.N.A. Act.

The Act discussed with regard to its aim, its features, its comparison with existing bankruptcy or insolvency legislation, and the history of bankruptcy and insolvency law.

REFERENCE to the Supreme Court of Canada for hearing and consideration pursuant to the authority of s. 55 of the Supreme Court Act (R.S.C., 1927, c. 35) of the following question:

Is The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, chapter 36, ultra vires of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?
L.E. Beaulieu K.C. and F.P. Varcoe K.C., for the Attorney-General for Canada. C. Lanctôt K.C. and L. St. Laurent K.C., for the Attorney-General for Quebec. I.A. Humphries K.C., for the Attorney-General for Ontario.

Solicitor for the Attorney-General of Canada: W. Stuart Edwards. Solicitor for the Attorney-General of Quebec: Charles Lanctôt. Solicitor for the Attorney-General of Ontario: I.A. Humphries.

The judgment of Duff C.J. and Rinfret, Crocket and Hughes JJ. was delivered by

DUFF C.J.

DUFF C.J.:— The history of the law seems to show clearly enough that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

Under the Bankruptcy Act, as it now exists, proposals for compositions and arrangements cannot be dealt with before a receiving order or assignment has been made. This, however, was not always the case. Under the Bankruptcy Act of 1919, a proposal for composition or arrangement could be made prior to an assignment or receiving order.

The Winding-up Act contains brief provisions, in sections 65 and 66, which, in substance, differ very little indeed from the legislation now before us; although this, no doubt, is subject to the important qualification, that the provisions of the Winding-up Act apply only in the case of a company which is in course of being wound up. Similar

provisions affecting the subject matter of this legislation are to be found in Canadian legislation before and after Confederation.

The powers conferred upon the court under the Companies' Creditors Arrangement Act, 1933, come into operation when a compromise or arrangement is proposed between a "company which is bankrupt or insolvent or which has committed an act of bankruptcy within the meaning of the Bankruptcy Act or which is deemed insolvent within the meaning of the Winding-up Act," and its "unsecured creditors or any class of them." The important difference, as already observed, between the provisions of the Companies' Creditors Arrangement Act and those of the Bankruptcy Act itself in relation to compromises and arrangements is that the powers of the first named Act may be exercised notwithstanding the fact that no proceedings have been taken under the Bankruptcy Act or the Winding-up Act. The Act, however, creates powers, which can be exercised in case, and only in case, of insolvency.

Furthermore, the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. Ex facie it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation. As Lord Cave impliedly states in Royal Bank of Canada v. Larue [[1928] A.C. 187], "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament."

Matters normally constituting part of a bankruptcy scheme, but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

The argument mainly pressed upon us in opposition to the validity of the legislation was that

> It does not endeavour to treat equally all contracts of debts between the debtor and his creditors but allows the interest of some of them to be sacrificed in the interest of the company and of other classes of creditors.

We think an adequate answer to this objection is put forward in the argument on behalf of the Attorney-General for the Dominion. Apart altogether from the judicial control over the proceedings, there is the circumstance that the legislation applies to insolvent companies only; and, consequently, that it is within the power of any creditor to apply for a winding-up order or a receiving order. It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interests of a single creditor or of a single class of creditors and having no relation to the benefit of the creditors as a whole. The ultimate purpose would appear to be enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders. We think it is not unimportant to note the circumstance to which our attention was called by counsel for the Attorney-General for the Dominion that the court may order shareholders to be summoned although they are not authorized to vote.

The judgment of Lamont and Cannon JJ. was delivered by

CANNON J.

CANNON J.:-- This is a reference by the Governor General in Council submitting for hearing and consideration of this Court the following question:

> Is The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, chapter 36, ultra vires of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

This Act is designed to apply to insolvent or bankrupt companies; and it is contended on behalf of the Dominion that Parliament could pass this legislation under section 91, par. 21, which gives it paramount jurisdiction to make laws concerning bankruptcy and insolvency. The provinces represent that in enacting it Parliament disregarded their exclusive jurisdiction under section 92, par. 13, in relation to property and civil rights in the province.

The whole argument before us was finally directed to one point: Are the proceedings contemplated by the Act, in pith and substance, bankruptcy or insolvency enactments within the fair and ordinary meaning of these words? One of the features which distinguishes this Act from the Bankruptcy Act now in force is that, under the latter, a

composition or arrangement cannot be proceeded with before a receiving order or assignment has been made. Another difference is that under the Bankruptcy Act the secured creditor is dealt with on the footing that he may realize his security or value or surrender the same; it is only in respect of what he claims apart from the security that he is affected by the composition or arrangement. It was pointed out also that similar provisions giving binding effect to this approval by a certain majority of creditors are found in our legislation before and after Confederation.

The Insolvent Act of 1864, 27-28 Vict., ch. 17, sec. 9;

The Insolvent Act of 1869, Canada, 32-33 Vict., ch. 16, secs. 94 et seq.;

The Insolvent Act of 1875, Canada, 38 Vict., c. 16, secs. 54 et seq.

As far as Lower Canada is concerned, it may be of interest to note that chapter 87 of the Consolidated Statutes of Lower Canada, 1859, allowed the issue of a capias if the debtor "had refused to compromise or arrange with his creditors, or to make a cession de biens," and provides that the debtor may be discharged if, when the affidavit for capias was made, he had "not refused to compromise or arrange with his creditors."

Moreover, I find that, before and since Confederation, arrangements with the creditors have always been of the very essence of any system of bankruptcy or insolvency legislation. Civil rights and the sanctity of contracts are certainly affected by clause 5 under which a minority of creditors would be bound by the vote of a majority in number representing three-fourths in value of creditors present and voting, either in person or by proxy, if the agreement or compromise to which they agreed be sanctioned by the court. I find that this feature existed long before Confederation and was at that time generally accepted.

Pardessus, Droit Commercial, vol. 3,]d. 1843, p. 92, no. 1232, says:

> 1232. Les créanciers d'un failli ont presque toujours intérêt à faire avec lui un arrangement quelconque, plutôt que d'éprouver les lenteurs et les embarrass d'une union qui finit souvent par consumer la fortune du débiteur. Mais, comme rarement tous sont d'accord, et qu'il est naturel de présumer qu'un grand nombre prendra les arrangements les plus convenables a l'intérêt commun, on a cru devoir faire céder la volonté de la minorité à celle de la majorité; les créanciers présents ont donc été admis à décider pour les absents.
>
> Cette minorité, ces absents, doivent au moins avoir l'assurance que de mûres réflexions ont dirigé ceux dont le voeu doit devenir une loi pour eux. Tel est l'objet des règles prescrites pour la validité du concordat.

Under number 1236, classes or categories having different interests are already recognized by this author, and he adds (No. 1237):

> Le concordat est valablement consenti par la majorité des créanciers présents, pourvu que les sommes dues aux personnes qui forment cette majorité égalent les trois quarts de la totalité des créances vérifiées et affirmées, ou admises par provision, dues à des créanciers ayant droit de prendre part à la délibération du concordat.

Therefore, the very clause objected to in our Act of 1933 seems to be copied from the law of bankruptcy as it existed in France in 1843, when this work was published.

Under our system and the English Bankruptcy Act of 1914, bankruptcy legislation deals with the proceedings necessary for the distribution, under judicial authority, of the property of an insolvent person among his creditors. It assumes the commission of an "act of bankruptcy" followed by a petition to the court for a receiving order for the protection of the estate. The property of the debtor then vests in an official receiver. The debtor must submit a statement of affairs to the official receiver who calls a meeting of the creditors. The debtor is examined; and if no composition or scheme of arrangement is approved, he is adjudged bankrupt; and his property becomes divisible among his creditors and vests in a trustee.

Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation and were incorporated in our Insolvent Act of 1864; and such a deed of composition and discharge could be validly made either before, pending or after

proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent. What was considered as being within the scope of the word "insolvency" when it was used in section 91 of the B.N.A. Act is to be found in the preamble of the 1864 Insolvency Act, which reads:

> Whereas it is expedient that provision be made for the settlement of the estates of insolvent debtors, for giving effect to arrangements between them and their creditors, and for the punishment of fraud.

See also: Cushing v. Dupuy [(1880) 5 App. Cas. 409]; Royal Bank of Canada v. Larue [[1928] A.C. 187].

I therefore reach the conclusion that arrangements as provided for by this Act are and have been, before and since Confederation, an essential component part of any system devised to protect the creditors of insolvents and, at the same time, help the honest debtor to rehabilitate himself and obtain a discharge.

I would, therefore, answer the question submitted to us in the negative.

The question submitted is answered in the negative.

End of Document

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada (B.C.C.A.), [1989] B.C.J. No. 63

British Columbia Judgments

British Columbia Court of Appeal

McEachern C.J.B.C., Esson and Wallace JJ.A.

January 5, 1989

Vancouver Registry: CA010238, CA010198 and CA010271

[1989] B.C.J. No. 63 | [1989] 3 W.W.R. 363 | 34 B.C.L.R. (2d) 122 | 73 C.B.R. (N.S.) 195 | 13 A.C.W.S. (3d) 303 | 1989 CanLII 2672

Between Northland Properties Limited, Sandman Inns Ltd., Sandman Four Ltd., Unity Investment Company, Limited, B & W Development Co. (1986) Ltd., T N Developments Ltd., Petitioners, (Respondents), and Excelsior Life Insurance Company of Canada, Respondents, (Appellants), and Guardian Insurance Co. of Canada, Respondents, (Appellants)

(42 paras.)

Case Summary

Company Act — Companies' Creditors Arrangement Act.

The guardian had a first mortgage on a building owned by Unity which was the only asset of Unity. Unity is one of a number of companies that successfully petitioned under the Companies' Creditors Arrangement Act for an order consolidating all the companies. Per McEachern CJBC: There would be considerable merit for the submission that there is no jurisdiction under the Companies' Creditors Arrangement Act to entertain a consolidation proposal except for the fact that the applications were made not just under the Companies' Creditors Arrangement Act, but also under ss. 276-278 of the B.C. Company Act. Section 20 of the Companies' Creditors Arrangement Act provides that: "The provisions of this Act may be applied conjointly with the provisions of any Act...of any province...". Therefore there is jurisdiction to entertain a consolidation proposal. To hold otherwise would mean that it would be necessary to propose separate plans for each company and those plans might become seriously fragmented. [B.C. Recent Decisions, vol. 9, no. 11.]
Counsel for the Appellants Excelsior Life Insurance Company of Canada and National Life Assurance Company of Canada: Frederick H. Herbert and Nick Kambas. Counsel for the Appellant Guardian: Alan P. Czepil. Counsel for the Respondent Companies: H.C. Ritchie Clark and R.D. Ellis. Counsel for the Respondent Bank of Montreal: G.W. Ghikas and C.S. Bird.

MCEACHERN C.J.B.C. (for the Court, orally, dismissing the appeal)

1 We are giving an oral judgment this morning because of the commercial urgency of these appeals and because counsel's helpful arguments have narrowed the issues substantially. We are indebted to counsel for their useful submissions.

2 The Petitioners (Respondents on these appeals) are a number of companies (which I shall call "the companies") who have outstanding issues of secured bonds and are all engaged in real estate investment and development in Western North America and who collectively own and operate a number of office buildings and the Sandman Inn chain of hotels and motels. The appellants, Excelsior Life and National Life and Guardian Trust, are creditors of the

Petitioners who hold mortgages over specific properties owned by certain of the Companies. They, along with eleven other lenders, are called "priority mortgagees".

3 The Companies ran into financial problems starting in 1981 and by spring of 1988, the Companies owed approximately $200 million against assets of $100 million. The major creditor, the Bank of Montreal (which I shall sometimes call the "Bank"), was owed approximately $117 million by the Companies and the Bank authorized the commencement of a receivership action. The Bank holds security in all of the assets of the Companies by way of trust deeds and bonds ranking second in priority to the security held by the priority mortgagees. Before decision in the receivership proceedings, the companies petitioned under the Companies' Creditors Arrangement Act R.S.C. 1970, c. C-25 (which I shall sometimes refer to as "C.C.A.A.") for an order directing meetings of the secured and unsecured creditors to consider a proposed compromise or arrangement plan.

4 Mr. Justice Trainor, on April 7, 1988 granted the petition authorizing the companies to file a reorganization plan with the court, and that in the meantime, the Companies would continue to carry on business and remain in possession of their undertaking, property and assets. Further, all proceedings against the Companies were stayed. The original reorganization plan was filed on August 25, 1988. It provided that each priority mortgagee holding security over the property of the individual petitioners would constitute a separate class.

5 The Petitioners obtained an order to hold a creditors' meeting on October 31, 1988 and November 1, 1988. The order provided that in addition to meetings of individual classes of creditors, there should be a later general meeting of all creditors to consider the plan. In addition, the petitioners obtained an order to file and serve the amended plan seven days before the creditors' meeting along with their information circular. Other applications were brought which dealt with notices, proxies, proof of claim forms, exchange rates, and directions for the calling of meetings.

6 The amended plan was based on the following classes of creditors (descriptions of which are contained in the reasons for judgment of Trainor, J. at pp. 6-7) namely:

Shareholder Creditors

A Bond Holders

Put Debt Claimants and C Bond Holders

Priority Mortgagees

Government Creditors

Property Tax Creditors

General Creditors

7 The amended plan also proposed consolidation of all the petitioner companies. The amended plan provided that all priority mortgagees would be grouped into one class for voting purposes. There were fifteen priority mortgagees in total, eleven of which were fully secured while the remaining four (including the appellants) faced deficiencies. The amended plan also authorized the Companies to negotiate with creditors in order, if possible, to reach as much agreement as possible so that the plan would have a better chance of gaining the requisite majorities.

8 The companies and the Bank of Montreal reached a settlement agreement on October 20, 1988, dealing with (a) the amounts owing to the Bank by the Companies; (b) claims by the Companies and others against the Bank in relation to a lender liability lawsuit; and (c) the terms of a compromise between the Bank and the Companies. The Bank of Montreal, according to the Information circular, would only realize $32,859,005 upon liquidation. The settlement agreement between the Bank of Montreal and the Companies, which is incorporated as part of the plan, provides that as of January 17, 1989, the Bank is to receive the sum of $41,650,000 in either cash or in cash plus properties. A copy of this agreement was provided to creditors, along with such other documents including a notice of the meetings, the reorganization plan, and an extensive Information Circular.

9 The class meetings and the general meetings of creditors were held in Vancouver on October 31 and November

1, 1988. All classes of creditors voted unanimously in favour of the plan except the priority mortgagee class. This class approved the plan by the requisite majority pursuant to the provisions of the C.C.A.A., that is, a simple majority of creditors in the class holding at least 75% of the debt voting in favour of the plan. 73.3% of the priority mortgagees holding 78.35% of the debt voted in favour of the plan.

10 Relax Development Corporation Ltd., a priority mortgagee facing a deficiency, voted in favour of the plan. If Relax had not voted in favour of the plan, the Companies would not have obtained the requisite majority from the priority mortgagee class. Prior to the settlement with the Bank, Relax struck an agreement with the Companies on the value of its security amounting to about $900,000 over an appraisal value which was in dispute. Relax agreed in the settlement to vote in favour of the plan. More about that later.

11 The appellants on these appeals voted against the plan, and raised objections that the plan improperly put all priority mortgagees into one class, and also that the plan preferred some creditors over others. They allege that the net effect of the plan on the fully secured priority mortgagees is different than that on the mortgagees facing deficiencies, in that the plan reduces the amount of debt owed to the mortgagees facing deficiencies to the market value of the subject property of their respective security, and required assignment of the deficiency for $1.00. They lose the right to obtain an order absolute of foreclosure pursuant to their security. On the other hand, the fully secured priority mortgagees recover the entire amount of their indebtedness.

12 The appellants Excelsior and National are secured creditors of the petitioner, Northland Properties Ltd., one of the Companies. They hold a first mortgage jointly over an office tower in calgary adjacent to the Calgary Sandman Inn. Both buildings share common facilities. The principle amount of the debt owing to Excelsior and National as of October 26, 1988, is $15,874,533 plus interest of $311,901. The market value of the office tower as of May 13, 1988, was stated to be $11,675,000. They, therefore, face a potential deficiency of $4,512,434.

13 Guardian Trust is a secured creditor of the petitioner, Unity Investment Company Limited, and holds a first mortgage over a small office building in Nelson, B.C. The amount owing to Guardian is $409,198.46 and the estimated deficiency is approximately $150,000 exclusive of transaction costs.

14 Mr. Justice Trainor, on December 12, 1988, found that the Companies had complied with the provisions of the C.C.A.A., and, therefore, the court could exercise its discretion and sanction the reorganization plan. Excelsior and National and Guardian appeal against that decision.

15 Mr. Justice Trainor had the carriage of this matter almost from the beginning and he heard several preliminary applications. In a careful and thorough judgment, he set out the facts distinctly, reviewed the authorities and approved the plan. I do not propose to review the authorities again because they are extensively quoted in nearly every judgment on this subject. It will be sufficient to say that they include Attorney General of Canada v. Attorney General of Quebec [1943) S.C.R. 659; Meredian Investments Inc. v. Toronto Dominion Bank (1984), 52 C.B.R. 109; Re Associated Investments of Canada [1988 2 W.W.R. 211; Re Alabama. New Orleans and Pacific Junction Railway Company [1891] 1 Ch. 213; Re Dairy Corporation of Canada Ltd., [1934] O.R. 436; Re Wellington Building Corporation Limited (1934), 16 C.B.R. 48; British American Nickel Corporation Limited v. M.J. O'Brien Limited, [1927] A.C. 369; Sovereign Life Assurance Co. v. Dodd (1982), 2 Q.B.D. 573 and others.

16 The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:

(1) There must be strict compliance with all statutory requirements (it was not suggested in this case that the statutory requirements had not been satisfied);

(2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;

(3) The plan must be fair and reasonable.

17 Similarly, there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for

the commmon benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

18 There were really four issues argued on this appeal but, as is so often the case, there is some overlapping. I shall attempt to deal with them individually.

19 First it was alleged, principally by Mr. Czepil, that the Act does not authorize a plan whereby the creditors of other companies can vote on the question of whether the creditors of another company may compromise his claim. He called this the cross-company issue.

20 This argument arises out of the particular facts that Mr. Czepil's client found itself in where it had a first mortgage, that is, Guardian had a first mortgage on a building owned by Unity which was the only asset of Unity, and he says the C.C.A.A. does not permit creditors of other companies to vote on the disposition of Guardian's security. I think there would be considerable merit in this submission except for the fact that the plan contemplates the consolidation of all the petitioner companies and the applications are made in this case, not just under the C.C.A.A., but also under ss. 276-278 of the B.C. Companies Act, R.S.B.C. 1979 c. 59. In this respect, it is necessary to mention s. 20 of the C.C.A.A. which provides:

> 20. The provisions of this Act may be applied conjointly with the provisions of any Act of Canada or of any province authorizing or making provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

21 During the argument of these appeals, we were treated to a review of the history of this matter in the court below. In reasons for judgment dated July 5, 1988, Mr. Justice Trainor recited that he had been asked by some of the parties to approve a consolidation plan, but he declined to do so as the plan was not then before him in final form. It is implicit that Trainor, J. thought he had authority to approve a consolidation plan and he referred to American authorities particularly, Baker and Getty Financial Services Inc., U.S. Bankruptcy Court N.D. Ohio (1987) B.R. 139 and in Re Snider Bros., U.S. Bankruptcy Court, D. Mass. (1982) 18 B.R. 320, and he said that he accepted the analysis of Snider, which proposes the test between economic prejudice of continued debtor separateness versus the economic prejudice of consolidation, and holds that consolidation is preferable if its economic prejudice is less than separateness prejudice.

22 I think Mr. Justice Trainor was right for the reasons described in the American authorities and because to hold otherwise would be to deny much meaning to s. 20 of the C.C.A.A. and would mean that when a group of companies operated conjointly, as these companies did (all were liable on the Bank of Montreal bonds) it would be necessary to propose separate plans for each company and those plans might become fragmented seriously.

23 I am satisfied there is jurisdiction to entertain a consolidation proposal.

24 Secondly, it was agreed that the composition of the class of priority creditors was unfair by reason of including all priority mortgagees without regard to the fact that some of them face a deficiency and some did not. The appellants were each in the latter difficulty and they argue that they should have been placed in a different class because the other eleven priority mortgagees were going to get paid in full whether the plan was approved or not. This argument would have more merit if the plan were only for the benefit of the undersecured priority mortgagee. But the plan was also for the benefit of the company and the other creditors who, by their votes, indicated that they thought the plan was in their best interest. The learned chambers judge considered this question carefully. At page 25 of his reasons he said this:

> An examination of the relationship between the Companies and the priority mortgagees satisfies me that they are properly in the same class. The points of similarity are:
>
> 1. The nature of the debt is the same, that is, money advanced as a loan.
> 2. It is a corporate loan by a sophisticated lender who is in the business and aware of the gains and risks possible.

Canada v. Canada North Group Inc., [2021] S.C.J. No. 30

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, S. Côté, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.

Heard: December 1, 2020;

Judgment: July 28, 2021.

File No.: 38871.

[2021] S.C.J. No. 30 | [2021] A.C.S. no 30 | 2021 SCC 30 | 2021EXP-1919 | EYB 2021-397318 | 2021 CarswellAlta 1780 | [2021] 10 W.W.R. 1 | [2021] 5 C.T.C. 111 | 19 B.L.R. (6th) 1 | 2021 D.T.C. 5080 | 28 Alta. L.R. (7th) 1 | 333 A.C.W.S. (3d) 23 | 460 D.L.R. (4th) 309 | 91 C.B.R. (6th) 1

Her Majesty The Queen in Right of Canada, Appellant; v. Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada, Respondents, and Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals, Interveners

(265 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Compromises and arrangements — Claims — Priority — Crown claims — Where Crown affected — Effect of related legislation — Appeal by Crown from dismissal of its appeal by Court of Appeal of Alberta from dismissal of its motion to vary Initial Order dismissed — Respondents initiated restructuring proceedings under Companies' Creditors Arrangement Act ("CCAA") — Initial Order granted priority to priming charges in favour of interim lender, monitor and directors over all other security interests — Respondents owed Crown for unremitted source deductions — Priming charges prevailed over deemed trust created by s. 227(4.1) of Income Tax Act ("ITA") for unremitted source deductions — Section 227(4.1) of ITA did not create proprietary interest in debtor's property — There was no conflict between s. 227(4.1) of ITA and Initial Order or between ITA and s. 11 of CCAA — Companies' Creditors Arrangement Act, s. 11 — Income Tax Act, ss. 224(1.3), 227(4.1).

Bankruptcy and insolvency law — Proceedings — Practice and procedure — General principles — Legislation — Interpretation — Statutes — Appeal by Crown from dismissal of its appeal by Court of Appeal of Alberta from dismissal of its motion to vary Initial Order dismissed — Respondents initiated restructuring proceedings under Companies' Creditors Arrangement Act ("CCAA") — Initial Order granted priority to priming charges in favour of interim lender, monitor and directors over all other security interests — Respondents owed Crown for unremitted source deductions — Priming charges prevailed over deemed trust created by s. 227(4.1) of Income Tax Act ("ITA") for unremitted source deductions — Section 227(4.1) of ITA did not create proprietary interest in debtor's property — There was no conflict between s. 227(4.1) of ITA and Initial Order or between ITA and s. 11 of CCAA — Companies' Creditors Arrangement Act, s. 11 — Income Tax Act, ss. 224(1.3), 227(4.1).

Statutory interpretation — Statutes — Construction — Effect of — Appeal by Crown from dismissal of its appeal by Court of Appeal of Alberta from dismissal of its motion to vary Initial Order dismissed — Respondents initiated restructuring proceedings under Companies' Creditors Arrangement Act ("CCAA") — Initial Order granted priority to priming charges in favour of interim lender, monitor and directors over all other security interests — Respondents owed Crown for unremitted source deductions — Priming charges prevailed over deemed trust created by s. 227(4.1) of Income Tax Act ("ITA") for unremitted source deductions — Section 227(4.1) of ITA did not create proprietary interest in debtor's property — There was no conflict between s. 227(4.1) of ITA and Initial Order or between ITA and s. 11 of CCAA — Companies' Creditors Arrangement Act, s. 11 — Income Tax Act, ss. 224(1.3), 227(4.1).

Appeal by the Crown from the dismissal of its appeal by the Court of Appeal of Alberta from the dismissal of its motion to vary an Initial Order. The respondent Canada North Group and six related corporations initiated restructuring proceedings under the Companies' Creditors Arrangement Act ("CCAA"). They requested the creation of three priming charges that included an administration charge in favour of counsel, a monitor and a chief restructuring officer, a financing charge in favour of an interim lender, and a directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The respondents' debt included unremitted employee source deductions and GST. The CCAA judge made an Initial Order that the priming charges were to rank in priority to all other security interests and were not to be limited or impaired in any way by the provisions of any federal or provincial statutes. The Crown applied to vary the Initial Order on the basis that the priming charges should not take priority over the deemed trust created by s. 227(4.1) of the Income Tax Act ("ITA") for unremitted source deductions. The motion judge dismissed the Crown's motion on the basis that the security interest created by s. 227(4.1) of the ITA could be subordinated to court-ordered super-priority charges. The majority of the Court of Appeal agreed.
HELD: Appeal dismissed.

The priming charges prevailed over the Crown's deemed trust. Section 227(4.1) of the ITA did not create a proprietary or ownership interest in the debtor's property as the Crown's claim did not attach to any specific asset. It also did not create a security interest that had statutory priority over all other security interests, including super-priority charges. The interest created by s. 227(4.1) was inadequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the CCAA. A court-ordered super-priority charge under the CCAA was not a security interest within the meaning of s. 224(1.3) of the ITA. There was no conflict between s. 227(4.1) of the ITA and the Initial Order or between the ITA and s. 11 of the CCAA. Giving super priority to priming charges in favour of the professionals who provided assistance in CCAA restructuring was required to derive the most value for the stakeholders. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to subsequently discover that a deemed trust superseded all claims would be unfair and not make commercial sense. Concurring and dissenting reasons were provided.

Statutes, Regulations and Rules Cited:

Bank Act, S.C. 1991, c. 46

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 43(1), s. 50.4(1), s. 67, s. 81.1, s. 81.2, s. 86(3)

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23(3), s. 23(4)

Civil Code of Quebec, Article 1260, Article 1261, Article 1278, Article 1306, Article 1313

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 3(1), s. 6(3), s. 10(2)(c), s. 11, s. 11.09, s. 11.2, s. 11.2(1), s. 11.2(2), s. 11.4, s. 11.4(4), s. 11.51, s. 11.51(2), s. 11.52, s. 11.52(2), s. 36, s. 37, s. 37(1), s. 37(2), s. 39

Employment Insurance Act, S.C. 1996, c. 23, s. 23(4), s. 86(2), s. 86(2.1)

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3)

Income Tax Act, R.S.C. 1985, c. 1(5th Supp.), s. 18(5), s. 116, s. 153(1), s. 22, s. 223(1), s. 223(3), s. 223(5), s. 223(6), s. 224(1), s. 224(1.2), s. 224(1.3), s. 227(4), s. 227(4.1), s. 227(4.2), s. 227(9), s. 227(9.2), s. 227(9.3), s. 227(9.4), s. 227(10.1), s. 227(10.2)

Income Tax Regulations, C.R.C., c. 945, s. 2201

Income War Tax Act, R.S.C. 1927, c. 97, s. 92(6), s. 92(7)

Interpretation Act, R.S.C. 1985, c. I-21, s. 8.1, s. 8.2

Personal Property Security Act, RS.O. 1990, c. P.10, s. 30(7)

Regulatory Impact Analysis Statement, SOR/99-322, Canada Gazette, Part II, vol. 133, No. 17, August 18, 1999, Para. 2041, Para. 2042

Rules of the Supreme Court of Canada, SOR/2002-156

Social Service Tax Act, R.S.B.C. 1979, c. 388

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 6(1)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Bankruptcy and insolvency -- Priority -- Source deductions -- Priming charges -- Employee source deductions not remitted to Crown by companies in receivership -- Judge supervising restructuring proceedings under Companies' Creditors Arrangement Act ordering priming charges over debtor companies' assets in favour of interim lender, monitor and directors -- Order giving priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or provincial statute -- Property of debtor companies subject to deemed trust in favour of Crown for unremitted source deductions under Income Tax Act -- Whether court has authority to rank priming charges ahead of Crown's deemed trust for unremitted source deductions - - Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4.1) -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2, 11.51, 11.52.

Court Summary:

Canada North Group and six related corporations initiated restructuring proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). In their initial *CCAA* application, they requested a package of relief including the creation of three priming charges (or court-ordered super-priority charges): an administration charge in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred, a financing charge in favour of an interim lender, and a directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The application included an affidavit from one of their directors attesting to a debt to Her Majesty The Queen for unremitted employee source deductions and GST. The *CCAA* judge made an order ("Initial Order") that the priming charges were to "rank in priority to all other security interests, ... charges and encumbrances, claims of secured creditors, statutory or otherwise", and that they were not to be "otherwise ... limited or impaired in any way by ... the provisions of any federal or provincial statutes" ("Priming Charges"). The

Crown subsequently filed a motion for variance, arguing that the Priming Charges could not take priority over the deemed trust created by s. 227(4.1) of the *Income Tax Act* ("*ITA*") for unremitted source deductions. The motion to vary was dismissed, and the Crown's appeal to the Court of Appeal was also dismissed.

Held (Abella, Moldaver, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Côté** and Kasirer JJ.: The Priming Charges prevail over the deemed trust. Section 227(4.1) does not create a proprietary interest in the debtor's property. Further, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case, or between the *ITA* and s. 11 of the *CCAA*.

In general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. The most important feature of the *CCAA* is the broad discretionary power it vests in the supervising court: s. 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This jurisdiction is constrained only by restrictions set out in the *CCAA* itself and the requirement that the order made be appropriate in the circumstances -- its general language is not restricted by the availability of more specific orders in ss. 11.2, 11.4, 11.51 and 11.52. As restructuring under the *CCAA* often requires the assistance of many professionals, giving super priority to priming charges in favour of those professionals is required to derive the most value for the stakeholders. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, would defy fairness and common sense.

Her Majesty does not have a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it. Section 227(4.1) does not create a beneficial interest that can be considered a proprietary interest, and it does not give the Crown the same property interest a common law trust would. Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner.

Furthermore, under Quebec civil law, it is clear that s. 227(4.1) does not establish a legal trust as it does not meet the three requirements set out in arts. 1260 and 1261 of the *Civil Code of Québec*. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): no specific property is transferred to a trust patrimony, and there is no autonomous patrimony to which specific property is transferred.

Section 227(4.1) states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3), but court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are not security interests within the meaning of s. 224(1.3). Section 224(1.3) defines "security interest" as meaning "any interest in, or for civil law any right in, property that secures payment or performance of an obligation" and including "an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for". The grammatical structure of this provision evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. Court-ordered super-priority charges are utterly different from any of the interests listed in s. 227(4.1) because they were not made for the sole benefit of the holder of the charge, nor were they made by consensual agreement or by operation of law. Instead, they were ordered by the *CCAA* judge to facilitate the restructuring in furtherance of the interests of all stakeholders. This interpretation is consistent with the presumption against tautology, which suggests that Parliament intended interpretive weight to be placed on the examples, and with the *ejusdem generis* principle, which limits the generality of the final words on the basis of the narrow enumeration that precedes them.

Preserving the deemed trusts under s. 37(2) of the *CCAA* does not modify the characteristics of these trusts. They

continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Similarly, granting Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full under s. 6(3) does not modify the deemed trust created by s. 227(4.1) in any way. In any event, s. 6(3) comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise.

Finally, whether Her Majesty is a "secured creditor" under the *CCAA* or not, the supervising court's power in s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders. Although ss. 11.2, 11.51 and 11.52 of the *CCAA* may attach only to the property of the debtor's company, there is no such restriction in s. 11. That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary.

*Per***Karakatsanis** and Martin JJ.: There is no conflict between the *ITA* and *CCAA* provisions at issue in this appeal. The broad discretionary power under s. 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

Section 227(4.1) of the *ITA* provides that a deemed trust attaches to property of the employer to the extent of unremitted source deductions "notwithstanding any security interest in such property" or "any other enactment of Canada". Although this provision clearly specifies that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown, but there is no settled doctrinal meaning of the term "beneficial ownership", and s. 227(4.1) modifies even those features of beneficial ownership that are widely associated with it under the common law.

As a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law. In the case of the deemed trust in s. 227(4.1), there is no identifiable trust property and therefore no certainty of subject matter. Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278. As a result, s. 227(4.1) traces the value of the unremitted source deductions, capping the Crown's right at that value, and the specific property that constitutes the debtor's estate remains unchanged, with the debtor continuing to have control over it.

The *Bankruptcy and Insolvency Act* ("*BIA*") and the *CCAA* each give the deemed trust meaning for their own purposes. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. To realize these goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process. In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides an exception for deemed trusts that are not true trusts. Section 67(3) provides a further exception by stating that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA* and other statutes. The result of this scheme is that the debtor's estate -- to the extent of the unremitted source deductions -- is not "property of a bankrupt divisible among his creditors", as required by s. 67(1) of the *BIA*. Section 67 therefore gives content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

In contrast, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies. Due to its remedial nature, the *CCAA* is famously skeletal in nature and there is no rigid formula for the division of assets. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender -- a new and necessary player who is absent from the liquidation scheme under the *BIA*.

The Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3)

of the *CCAA*. Section 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall ... be regarded as being held in trust for Her Majesty". Although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. Section 6(3) gives specific effect to the Crown's right by requiring that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. As such, the Crown can demand to be paid in full in priority to all "security interests", including priming charges. The remedial goal of the *CCAA* is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*. The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is consistent with the different schemes and purposes of the *BIA* and *CCAA*.

Sections 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property, do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. Instead, that authority comes from s. 11 of the *CCAA*. Section 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the requirements of good faith and due diligence on the part of the applicant. It can be used to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions for two reasons. First, ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. Second, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. Interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could further the *CCAA*'s remedial goals. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

Per Abella, **Brown** and **Rowe** JJ. (dissenting): The appeal should be allowed. The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) and the related deemed trust provisions under the the *ITA*, the *CPP*, and the *EIA* (collectively, the "Fiscal Statutes") bear only one plausible interpretation: the Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and 227(4.1) of the *ITA* was clear and unmistakable: it granted this unassailable priority by employing the unequivocal language of "notwithstanding any ... enactment of Canada". This is a blanket paramountcy clause; it prevails over all other statutes. No similar "notwithstanding" provision appears in the *CCAA*. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) preserves the deemed trusts of the Fiscal Statutes.

The Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*, and the priming charges provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* fall under the definition of "security interest", because they are "interests in the debtor's property securing payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. As the definition of "security interest" in the *ITA* includes "encumbrances of any kind, whatever, however or whenever arising, created, deemed to arise or otherwise provided for", there is no reason that the definition would preclude the inclusion of an interest that is designed to operate to the benefit of all creditors. This is sufficient to decide the appeal.

This finding does not leave the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*. Section 11 of the *CCAA* contains a grant of broad supervisory discretion and the power to "make any order that it considers appropriate in the circumstances", but that grant of authority is not unlimited. Parliament avoided any conflict between the *CCAA* and the *ITA* by imposing three restrictions that are significant here. First, although s. 37(1) of the *CCAA* provides that "property of the debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision", s. 37(2) provides for the

continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding. In addition, while the deemed trusts are not "true trusts" and the commingling of assets renders the money subject to the deemed trusts untraceable, tracing has no application to s. 227(4.1). Second, the unremitted source deductions are deemed not to form part of the property of the debtor's company. If there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. However, priming charges can attach only to the debtor's property, so the Crown's interest under the deemed trust is not subject to the Priming Charges. Third, under the definition of "secured creditor" in s. 2 of the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes. That definition must be read as "secured creditor means ... a holder of any bond of the debtor company secured by ... a trust in respect of, all or any property of the debtor company", which makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes.

Giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 of the *CCAA* meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*. Section 6(3) of the *CCAA*, which protects the Crown's claims under the deemed trusts as well as claims not subject to the deemed trusts under the Fiscal Statutes, operates only where there is an arrangement or compromise put to the court. In contrast, the deemed trusts arise immediately and operate continuously from the time the amount was deducted or withheld from employee's remuneration, and apply to only unremitted source deductions. Without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*, because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*. However, s. 6(3) does not explain the survival of the deemed trust or the rights conferred on the Crown under the deemed trust. Their survival is explained by s. 37(2), which continues the operation of s. 227(4.1), or by s. 227(4.1), which provides that the proceeds of the trust property "shall be paid to the Receiver General in priority to all such security interests". Finally, s. 6(3) protects different interests than those captured by the deemed trusts, and the right not to have to compromise under s. 6(3) is a right independent of the Crown's right under deemed trusts.

Section 11.09 of the *CCAA*, which permits the court to stay the Crown's enforcement of its claims under the deemed trust claims, can apply to the Crown's deemed trust claims, but it does not remove the priority granted by the deemed trusts.

Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. The deemed trust is not a "true" trust and it does not confer an ownership interest or the rights of a beneficiary to the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec*. The requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust as the deemed trust is a legal fiction with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*.

Finally, concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges would not lead to absurd consequences. The conclusion that interim financing would simply end was not supported by the record, and there are usually enough funds available to satisfy both the Crown claim and the court-ordered priming charges. Equally unfounded is the claim that confirming the priority of the deemed trusts would inject an unacceptable level of uncertainty into the insolvency process. Interim lenders can rely on the company's financial statements to evaluate the risk of providing financing.

Per **Moldaver** J. (dissenting): There is substantial agreement with the analysis and conclusions of Brown and Rowe JJ. However, there are two points to be addressed. First, the question of the nature of the Crown's interest should be left to another day. This is because, properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest under s. 227(4.1) of the *ITA* -- in whatever form it takes -- must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

Second, while there is agreement that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, if

this interpretation is mistaken, s. 11 is nonetheless restricted by s. 227(4.1), as Parliament has expressly indicated the supremacy of s. 227(4.1) over the provisions of the *CCAA*. The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority. A necessary consequence of the absolute supremacy of the Crown's deemed trust claim is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Unlike s. 227(4.1), which is focused on ensuring the priority of the Crown's claim, s. 6(3) merely establishes a six-month timeframe for payment to the Crown in the event that the debtor company succeeds in staying viable as a going concern. Accordingly, if s. 6(3) gave effect to the Crown's interest, the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim. Further, as s. 6(3) does not apply where a liquidation occurs under the *CCAA*, the Crown would be deprived of its priority over security interests in such circumstances.

It cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

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By Côté J.

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By Karakatsanis J.

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By Brown and Rowe JJ. (dissenting)

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By Moldaver J. (dissenting)

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15 Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor's property, and these amounts must be paid to Her Majesty notwithstanding any type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the *CCAA* cannot permit discretion to be exercised without regard for s. 227(4.1) of the *ITA*, nor can ss. 11.2, 11.51 and 11.52 of the *CCAA* be used, as they only allow a court to make orders regarding "all or part of the company's property" (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty's claims to super-priority charges.

IV. Issue

16 The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the *ITA*. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the *ITA* to determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

V. Analysis

17 In order to determine whether the *CCAA* empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the *ITA*, we must understand both the *CCAA* regime and the nature of the interest created by s. 227(4.1).

A. *CCAA Regime*

18 The *CCAA* is part of Canada's system of insolvency law, which also includes the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations" (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

19 The *CCAA* works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the *CCAA* process as a going concern (*Century Services*, at para. 18).

20 The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios (*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (*9354-9186 Québec inc. v. Callidus Capital*

Corp., 2020 SCC 10, at para. 42, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

21 The most important feature of the *CCAA* -- and the feature that enables it to be adapted so readily to each reorganization -- is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

22 On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

23 In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

24 As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

25 In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), to protect employee pensions. Justice Deschamps wrote for a unanimous Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

26 Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there

was no alternative but to make the order. Financing secured by a super priority was necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

27 After determining that the order was necessary, she turned to the statute creating the deemed trust's priority. Section 30(7) of the *PPSA* provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

28 There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings ... . The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing" (*Callidus Capital*, at para. 52, quoting *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

29 This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, at para. 51 (CanLII)).

30 Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality ... that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

31 It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (*Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.* [*v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.)] ... Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the *Bank Act*, S.C. 1991, c. 46, were to be interpreted as being immune from the provisions of the *CCAA*, then the benefits of *CCAA*

9354-9186 Québec inc. v. Callidus Capital Corp., [2020] 1 S.C.R. 522

Supreme Court Reports

Supreme Court of Canada

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

Heard: January 23, 2020;

Judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

File No.: 38594.

[2020] 1 S.C.R. 522 | [2020] 1 R.C.S. 522 | [2020] S.C.J. No. 100 | [2020] A.C.S. no 100 | 2020 SCC 10

9354-9186 Québec inc. and 9354-9178 Québec inc. Appellants; v. Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan François Vigneault, Philippe Millette, Francis Proulx and François Pelletier Respondents, and Ernst & Young Inc. IMF Bentham Limited (now known as Omni Bridgeway Limited) Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals Interveners And IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) Appellants; v. Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier Respondents, and Ernst & Young Inc. 9354-9186 Québec inc. 9354-9178 Québec inc. Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals Interveners

(117 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency ? Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act ? Appellate review of decisions of supervising judge ? Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose ? Whether supervising judge can approve third party litigation funding as interim financing ? Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the [page523] same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success

and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

[page524]

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* ? that is, acting for an improper purpose ? s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately [page525] familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured

creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive. [page526] Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

Case Summary

Cases Cited

By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; [page527] *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor*

(1) The Evolving Nature of *CCAA* Proceedings

[12]

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[page542]

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state - that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[page543]

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The

ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor [page544] company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, [page545] in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[13]

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing 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. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme [page546] (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith - powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or [page547] position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

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IIC-ART Vol. 10-16
Insolvency Institute of Canada (Articles)

— Where's the Plan? The Declining Role of CCAA Plans in the Canadian Restructuring Landscape, and When They Still May be Needed

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——*Chris Armstrong*[*]

I. INTRODUCTION

Based on its long title, the *Companies' Creditors Arrangement Act* is ostensibly focused on one core objective: "to facilitate compromises and arrangements between companies and their creditors."[1] Having a plan of compromise or arrangement that is voted on by creditors — what the Supreme Court recently termed "creditor democracy" — as the centrepiece of a consensual restructuring under the CCAA reflects one of the key theoretical underpinnings of restructuring and insolvency law: that those with the economic interest in the debtor ought to decide how their interests are addressed and resolved, *i.e.*, through a consensual restructuring or through a liquidation.[2] However, in recent years a debtor proposing and consummating a CCAA plan with its creditors has become an increasingly rare means of completing a debt restructuring. This shift in restructuring practice has been driven by a variety of factors: some relating to drawbacks inherent in pursuing a CCAA plan, but also from the willingness of Canadian courts to facilitate efficient and effective restructuring alternatives, including by ordering CCAA plan-style relief in a non-plan context. This flexible approach has generally served to advance the overarching goal of the CCAA to promote the successful restructuring of a company and avoid the multitude of harms caused by business collapse.

This paper examines the recent trends in restructuring practice that have resulted in the move away from CCAA plans, including the availability of (and potential limitations on) plan-style relief outside of the CCAA plan context, as well as scenarios where a CCAA plan may still be the preferred or only means of completing a debt restructuring in Canada.

2. WHAT'S THE PLAN?

At its core, a CCAA plan represents a proposed contract between a debtor and its creditors to compromise the debt that is owing to creditors and restructure the affairs of the debtor company.[3] That contract will typically provide for the grouping of creditors into classes (*e.g.*, secured and unsecured), the proposed consideration to be distributed under the plan in connection with the compromise of claims (*e.g.*, a cash distribution or an exchange of indebtedness for new debt or other securities), the conditions precedent to implementing the plan (*e.g.*, requisite creditor and court approvals, requirements for new financing, etc.) and other covenants in connection with the plan (*e.g.*, the release and enjoining of claims that are compromised). There are relatively few statutory limitations in the CCAA that prescribe or otherwise restrict the terms of a plan.[4] Subject to these limited exceptions, a plan can contain any terms that may lawfully be contained in a contract at law, which creates significant flexibility for a debtor and its stakeholders in tailoring their arrangement to the facts at hand.[5]

After the court authorizes a plan for filing, it may be presented to one or mores classes of creditors for approval at a meeting of creditors.[6] Approval of a CCAA plan by a class of creditors requires that a majority of voting creditors in that class representing two thirds in value of the class (the so-called "double majority") vote to accept the plan.[7] It is this act — the presentation and approval or rejection of a plan by a class or classes of creditors — that represents "creditor democracy" at work. While a CCAA plan must also be sanctioned by the supervising court as, among other things, fair and reasonable to become effective and binding on all creditors (including, importantly, creditors who did not vote or voted to reject the plan), courts have consistently indicated that they will show significant deference to the business judgement of creditors:

> One important measure of whether a Plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given. As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting

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my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

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The effectiveness of the CCAA plan as a restructuring tool in large part turns on its ability (through the associated sanction order) to bind not only those creditors who vote to accept the plan, but also those who rejected it or failed to vote.[9] It is through this means that the CCAA addresses and resolves the fundamental collective action that is at the heart of every insolvency: assuming the requisite votes are obtained, it compels all creditors of an approving class to accept the proposed compromise, negating any hold outs. Not only are dissenting creditors forced to accept the compromise proposed in the plan, they may also be subject to other relief contemplated by the plan, including the release and enjoining of claims not only against the debtor, but also against related parties, such as current and former directors and officers, and potentially third parties.

Notwithstanding that plans and creditor democracy lie at the heart of the legislative scheme of the CCAA, in recent years relatively few CCAA cases have actually concluded with a CCAA plan. In a review of CCAA filings in 2012 and 2013, Professor Alfonso Nocilla found that only 16% (in 2012) and 27% (in 2013) concluded with "traditional reorganizations".[10] Consistent with this analysis, Professor Janis Sarra found that only 22% of CCAA cases commenced between January 1, 2014, and November 1, 2016, concluded with a reorganization of the pre-filing structure.[11] This trend has continued: based on a review of CCAA cases commenced between November 1, 2016, through the end of 2019, only approximately 29% of those cases involved a CCAA plan.

3. THE TREND AWAY FROM CCAA PLANS

(a) Rise of the SISP and the Liquidating CCAA

The decline in CCAA plans is in large part a story of the expansion of restructuring alternatives available to debtors, their stakeholders and practitioners over the past 20 years, and the potential benefits of those alternatives relative to negotiating and implementing a CCAA plan.

Principal among the alternatives is the "liquidating CCAA" or CCAA asset sale, whereby a debtor, pursuant to an order of the CCAA court, sells its assets "free and clear" of its liabilities to a buyer.[12] Typically, such a sale would follow a court-approved sale and investment solicitation process ("SISP") whereby the debtor's assets would be marketed by its professional advisors with the assistance of the court-appointed monitor to identify the highest or otherwise best offer available for those assets.[13] Any refinancing of the business can be implemented at the closing as a "buyer matter" outside of the CCAA process (although the supervising court may have reason to consider the availability of such financing in considering the overall viability of the proposed transaction and its impact on stakeholders).[14]

One of the principal benefits of a sale-based restructuring relative to pursuing a plan process is that in most cases it can be completed on a more expedited timeline. This is a significant practical benefit for a distressed business looking to put an insolvency filing behind it and implement a quick turn-around. The typical restructuring through a CCAA plan process would involve completing a claims process, seeking a plan filing and meeting order, convening a meeting of creditors to vote on the plan, and then returning to court for the plan to be sanctioned. In total, this process would typically take at least six months (potentially significantly longer) and involve a number of court attendances, including requisite CCAA stay extensions while the process progressed.[15] By comparison, a typical SISP takes approximately 60 days to complete, and requires only two court attendances to approve the SISP and the ultimate transaction identified as the highest and best offer.[16] This quicker restructuring should lead to reduced restructuring costs to the benefit of the debtor, its business and stakeholders.

In addition, a plan process may entail greater uncertainty for a debtor and its stakeholders relative to pursuing a SISP and CCAA sale. The CCAA contains no analog to section 1129(b) of Chapter 11 of the U.S. *Bankruptcy Code*, the so-called "cram down" provision that permits a Chapter 11 plan to be confirmed over the objection of a dissenting class of creditors so long as the plan does not discriminate unfairly and is fair and equitable with respect to the dissenting class.[17] As such, even if a senior class of creditors support and vote to approve a plan, it is possible it may be blocked by junior creditors who may have little or no economic interest in the debtor. This risk can be mitigated through entering into support agreements with the requisite creditors necessary to carry a class, or through other features that incentivize a junior class to support a plan (e.g., a

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convenience class feature that provides enhanced recoveries for smaller creditors). However, depending on the diversity and quantum of creditor claims, it may be impossible to achieve certainty with respect to the outcome of a creditor vote before proposing a CCAA plan.

In addition to the potentially catastrophic business risk and expense of a CCAA plan "falling down" mid-stream, uncertainty around the outcome of a plan process can compound the significant business pressure already facing an insolvent company. Customers and suppliers, uncertain about the outcome of a restructuring, may begin to explore other options and otherwise take actions that impair the debtor's ability to restructure at the operational level, as well as its go-forward prospects.

Because it does not require a creditor vote, a SISP and sale transaction would typically offer greater certainty from an execution standpoint. This may be particularly important not only to the debtor but also to senior lenders who may be concerned about their collateral becoming impaired through a lengthy restructuring process with an uncertain outcome. An even higher degree of certainty can be obtained where a stalking-horse agreement is entered into and approved at the outset of the SISP. Stalking-horses are now a common-place feature in Canadian restructurings having been borrowed from U.S. Chapter 11 section 363 sales and widely adopted in CCAA restructurings over the past 15 years.[18] By entering into an executable going-concern sale agreement at the outset of the case, the debtor can demonstrate to its stakeholders and the market that its business will continue. This helps to increase stakeholder confidence in a successful restructuring, mitigating many of the negative business consequences, such as employee departures and customer attrition, that can accompany a CCAA filing.

Where a CCAA sale transaction is pursued, it is the sale itself that largely determines the outcome of the restructuring for stakeholders. For instance, through negotiation the debtor and the buyer determine which liabilities and contracts will be assumed, and which will be "stranded" and left to look for recovery from the debtor's "estate", how many employees will transfer to the buyer and how many will be laid off, and, of course, what consideration will be obtained from the buyer for the benefit of creditors.[19]

In this way, the debtor's business is successfully restructured without ever pursuing a plan process, with the buyer operating the debtor's deleveraged and recapitalized business on a go-forward basis, and the debtor being left with the proceeds of sale to be distributed amongst its creditors. While a CCAA plan is one possible means of distributing those proceeds, where sale proceeds will simply be distributed to creditors in accordance with relevant and uncontested legal priorities, many debtors have opted to forgo the time and expense of a plan process and simply distributed the proceeds to creditors pursuant to a distribution order, or have assigned themselves into bankruptcy so that a trustee can administer claims and distributions in accordance with the statutory regime established under the *Bankruptcy and Insolvency Act*.[20]

The significant impact of a sale on the outcome for stakeholders in a restructuring gives rise to the question of whether a proposed sale ought to first be put to a creditors' vote. Although a long-accepted feature of CCAA proceedings in Ontario, the ability of a debtor to sell its assets without a CCAA plan was confirmed in 2009 in the *Nortel* CCAA proceedings.[21] That case ultimately saw the successful going concern sale of six of Nortel's lines of business, along with an en bloc sale of its patent assets through a series of court-approved sales that took place over several years.[22] In the midst of those ongoing sale processes, the British Columbia Court of Appeal released a decision in *Cliffs Over Maple Bay* which questioned, in *obiter*, whether a sale should (and could) be authorized by a CCAA court absent a creditor vote.[23] In finding that a CCAA judge had jurisdiction to authorize a sale under the CCAA outside of the plan context, Justice Morawetz (as he then was) adopted a four-part test (the "*Nortel* Test") to determine whether approval of a CCAA sale was appropriate in the absence of a plan:

1. Is a sale transaction warranted at this time?

2. Will the sale benefit the whole "economic community"?

3. Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

4. Is there a better viable alternative?[24]

Contrasting the facts of *Cliffs Over Maple Bay* (a failed real estate development with no operating business whereby a debtor sought to stay and prime its objecting secured creditors with a view to completing and selling the project) with *Nortel* (going concern business sales that would preserve significant employment and supplier relationships, generate significant value and enjoyed broad stakeholder support), Morawetz J. found that approving a sale process and related stalking-horse bid outside of

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a CCAA plan was appropriate insofar as it facilitated the preservation of a going concern business in furtherance of the objectives of the CCAA.[25]

The subsequent 2009 amendments to the CCAA expressly codified a CCAA court's jurisdiction to approve the sale of a debtor's assets outside of the ordinary course of its business.[26] To a degree, the statutory test enacted in section 36 reflected the existing common law *Soundair* test that had been relied on in both the receivership and CCAA context to approve a sale.[27] The *Soundair* test includes significant emphasis on the integrity and efficacy of the process leading to the proposed sale and the recommendation of the monitor or other court officer. Some commentators have criticized the statutory test for its failure to provide any specific guidance to CCAA judges on whether to approve a liquidating CCAA.[28] However, echoing portions of the Nortel Test, section 36 also emphasizes consideration of the extent to which creditors were consulted, and the effects of the proposed sale on creditors and other stakeholders, providing scope for a court to consider whether a sale is an appropriate means of advancing a restructuring.[29] In any event, the Nortel Test remains a valuable analytical framework for courts to consider the appropriateness of a liquidating CCAA alongside the statutory test in section 36.

Perhaps lost in this debate is the fact that there have been few, if any, public disputes regarding whether a debtor pursuing a SISP and ultimately a sale is, in fact, the best restructuring path. Although the Nortel Test has been cited in at least 28 reported decisions, in none of those cases does it appear that a creditor or other stakeholder was contending that pursuing a SISP or completing some form of sale was not the appropriate course of action.[30] This likely reflects the economic practicality that underpins most restructuring cases and is neatly reflected in the fourth prong of the *Nortel* Test: *what's the better viable alternative*?

The reality is that in many cases where a SISP is pursued, it is likely because existing participants in the debtors' capital structure are unable or unwilling to fund a stand-alone restructuring and recapitalization (or at least want to explore what other options exist to them, or demonstrate that no better transaction is available). This means that a public marketing process pursuant to a SISP reflects the most, and perhaps only, viable course of action available to the debtor and its stakeholders, the alternative being an immediate liquidation, which, while certainly "viable" in some sense, is unlikely to be a popular option except perhaps to a secured creditor who believes that conducting a SISP would impair its collateral. Moreover, given the nature of a SISP (*i.e.*, a public market check), if the SISP has been properly designed and conducted and a proposed sale is identified as the highest and best offer, there is little reason to expect that a better viable alternative in fact exists.[31]

In these circumstances, requiring a creditor vote to approve a sale would represent an unnecessary and inefficient step in a CCAA case, and at worst may create hold-out leverage for creditors with little or no economic interest in the debtor. The *Nortel* Test — and in particular its consideration of the impact of a proposed sale on stakeholders as well as the availability of other viable restructuring options — ensures creditors will have an opportunity to articulate why a proposed sale may not be in their best interest and advocate for any available alternatives.

(b) Reverse Vesting Transactions

Historically, one of the potential drawbacks of pursuing a CCAA sale was that it necessitated the transfer of assets out of the debtor corporate group. Depending on the nature of the debtor's business, the impact of this could range from relatively minor inconveniences and expenses (*e.g.*, having to assign contracts either via consent or pursuant to section 11.3 of the CCAA, effecting the transfer of registered assets such as real property or intellectual property, paying transfer taxes and registration fees, and incorporating new entities to serve as purchaser vehicles) to significant, and in some cases existential, business and/or financial issues (*e.g.*, the loss of significant tax attributes stranded in the debtor corporate group and, perhaps most significantly, the thorny question of how to address potentially non-transferrable regulatory licenses or permits for a debtor operating in a heavily regulated industry, such as telecom or cannabis).

Traditionally, in cases where these issues were of significance, a debtor and its key stakeholders were incentivized to pursue a CCAA plan as a means of maintaining the debtor corporate form so as to preserve the value of the business and/or avoid unnecessary transaction costs. This dynamic could sometimes create leverage for junior creditors by allowing them to extract additional concessions from the debtor and its senior stakeholders as the price of supporting a plan. Although there are strategies to address this dynamic (for instance, convenience class elections and support agreements providing early consent consideration), there is no sure fire way to ensure a plan can be implemented over the objection of a junior creditor class in the absence of cram-down style relief being available under the CCAA.[32]

Recently, however, another option has emerged: the **reverse vesting** transaction ("RVT").[33] At its core, a RVT is simply a

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share sale whereby the shares, rather than the assets, of a debtor are transferred to a purchaser.[34] Given the sale-based nature of an RVT, it has all of the same efficiency, timing and certainty attributes as a regular CCAA asset sale. However, by virtue of the shares being transferred in a RVT, the existing corporate form is maintained, avoiding the transfer of assets from one entity to another and maintaining tax attributes and regulatory licenses and permits in place.

The "magic" of the RVT is that, by virtue of the court order authorizing the transaction, "excluded" liabilities of the debtor (*i.e.*, those liabilities the purchaser does not wish to assume) are **vested** out and transferred to a newly formed corporation ("ExcludedCo") and the debtor is simultaneously released from those liabilities such that the purchaser acquires a de-levered corporate entity, free and clear of the historic liabilities that led to its insolvency. Upon closing, the cleansed debtor entity emerges from the CCAA proceeding, and any remaining restructuring activities (*e.g.*, claims process and distributions) are carried on through ExcludedCo or other remaining debtors. In other words, by virtue of the RVT, the debtor company is released and discharged from its liabilities in much the same way it could compromise and be released from its liabilities pursuant to a CCAA plan and sanction order.

The jurisdiction of a CCAA court to grant **reverse** **vesting** relief, either pursuant to the free and clear sale provisions of section 36 of the CCAA or the broad discretionary authority of the court to make any order it considers appropriate under section 11 of the CCAA, has been subject to relatively limited judicial consideration to date, and no appellate consideration beyond the leave to appeal stage.[35] Given that a RVT results in an outcome similar to a CCAA plan (*i.e.*, the release of claims and the emergence of a cleansed debtor entity from CCAA), as with CCAA asset sales before it, the question of whether RVTs ought to be subject to a creditor vote has come to the fore. While most RVTs to date have been approved with significant stakeholder support and no creditor opposition, both the Québec and B.C. courts recently considered contested RVTs in the *Nemaska* and *Quest* cases, respectively, including arguments that the courts were being asked to grant plan like relief in a circumstance where creditors had not been afforded the opportunity to vote on the transaction. In both cases, the objections were dismissed and the RVTs approved. Leave to appeal both decisions was also denied.[36]

Although not cited in either decision, the courts' reasoning in both *Nemaska* and *Quest* closely followed the factors identified in the *Nortel* Test. Key to both courts' determinations were findings that: (i) the proposed RVT was the result of a robust and comprehensive SISP, and represented the only viable transaction available in the circumstances; and (ii) a failure to approve the proposed RVT would likely lead to receivership or bankruptcy, and resulting catastrophic effects for the debtor's stakeholders. In addition, in both cases the CCAA supervising judges were of the view that objections to the RVT were being advanced tactically to secure leverage in negotiations between the debtor and the objecting stakeholders, and that the relative prejudice to the objectors in approving the RVT paled in comparison to the prejudice faced by a broad array of stakeholders if the restructurings were to fail.[37] Although the courts in both *Nemaska* and *Quest* emphasized that approval of the proposed RVT was highly fact specific and not an open invitation to circumvent creditors seeking to exert leverage through their control over a plan vote, it is clear the RVT represents a viable strategic alternative for a debtor to pursue a plan style outcome, even in circumstances where it may not enjoy the support of all of its creditors.[38]

(c) Corporate Plans of Arrangement

Another factor explaining the decline in the use of CCAA plans is the increasing use of plans of arrangement pursuant to the *Canada Business Corporations Act* ("CBCA")[39] or its provincial analogs to restructure debt obligations in the insolvency or near-insolvency context.[40] Principal among the benefits of pursuing a CBCA plan relative to a CCAA plan is the ability to avoid a formal insolvency filing.[41] Further, although a vote of affected security holders is likely required, a CBCA plan process can typically be completed in a more expedited timeframe relative to a CCAA plan, and only two court attendances are generally required.[42]

These benefits, however, come at a price relative to pursuing a CCAA restructuring, namely less flexibility in the types of liabilities that can be addressed and resolved under the plan, as well as with respect to the ancillary relief that may be granted.[43] That said, on both these fronts, there has been incremental progress in recent years as practitioners — for the most part with approval from the judiciary — continue to push the limits of what can be accomplished through a CBCA plan.

With respect to the nature of liabilities that can be addressed under a CBCA plan, most debt restructurings are effected pursuant to subsection 192(f) of the CBCA, which provides that an arrangement includes "an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate."[44] "Securities" is defined in the CBCA to include "debt obligations", which in turn is defined as "a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured."[45] To date,

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CBCA plans have been limited to balance sheet restructurings, typically targeted at exchanging bond or note indebtedness in particular, and have not been used to attempt a comprehensive restructuring of the full range of liabilities a company may face (*e.g.*, trade debt, employee and pension obligations, tort liabilities, etc.).[46] However, in *Re Sherritt International Corporation*, a 2020 decision of the Ontario Superior Court of Justice, it was confirmed that, consistent with a broad and liberal interpretation aimed at facilitating the restructuring of corporations, a "debt obligation" as defined in the CBCA includes a term loan.[47] This decision confirms that the CBCA arrangement provisions may apply to a broader array of bank and lender obligations, increasing the application and utility of corporate plans of arrangement.

As the use of CBCA plans has grown as a debt restructuring tool, so too has the ancillary relief courts have been prepared to grant to aid an attempted restructuring under them. Like the CCAA, the CBCA and certain of its provincial analogs provide broad authority to the court to make any order it thinks fit or appropriate in connection with an arrangement application, facilitating the granting of ancillary relief.[48] As such, stay relief is now common place in CBCA restructurings, in particular to prevent the acceleration or enforcement of the debt obligations that are proposed to be arranged pending completion of the arrangement, although in some cases broader stays of unaffected securities and other obligations have also been authorized so long as the proposed stay can be demonstrated to be in furtherance of facilitating the arrangement.[49] In addition, "preliminary" stays (granted in advance of proposing a plan) have also been authorized in some cases.[50]
With respect to post-plan waiver and injunctive relief, in the recent *Calfrac* proceedings, both the Alberta Court of Queen's Bench and the Alberta Court of Appeal confirmed the court's jurisdiction under the CBCA to grant relief waiving and precluding the exercise of any rights or remedies by any person in respect of defaults arising from a CBCA plan and related proceedings, including as against unaffected senior noteholders under the plan who had not been afforded an opportunity to vote.[51] In the circumstances of *Calfrac*, the granting of the waiver and injunctive relief precluded the objecting senior noteholders from asserting that the CBCA plan, which did not purport to compromise the indebtedness owing to them, constituted an "affiliate transaction" under the governing indenture, leading to an event of default which would have permitted an acceleration of their notes. Both the supervising court and the Alberta Court of Appeal found that the granting of waiver and injunctive relief in the circumstances was appropriate insofar as it ensured the plan would not be subject to collateral attack following its completion, and because the alleged breach was, at its highest, of a technical nature and there was no substantive harm to the senior noteholders.[52] Of note, in responding to the objecting senior noteholders' argument that the plan compromised their legal rights without affording them a vote, the Alberta Court of Appeal stated:[53]

> [E]ven if any legal rights were compromised by the waiver provision, the absence of a vote would not be determinative . . . I do not interpret *Doman* to require that all persons who might have default provisions that exist prior to or arising during restructuring must have a vote.

(d) Third-Party Releases Outside of a CCAA Plan

As alluded to previously, the availability of ancillary relief, both during and following a debt restructuring, may be critical to its success. One of the most exceptional forms of relief available under the CCAA is the ability to obtain a release of claims again non-debtor parties, such as current and former directors and officers as well as others who contribute value to a restructuring. For instance, section 5.1 of the CCAA contemplates that, subject to certain restrictions, a CCAA plan may include "provision for the compromise of claims against directors of the company that arose before the commencement of the [CCAA] proceedings . . . and that relate to the obligation of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."[54]

Case law has expanded this relatively narrow express statutory authority, both as to the scope of the parties that may be released under a CCAA plan, as well as the types of claims that may be released. For instance, in addition to current and former directors, CCAA plan releases now also typically include the debtor's officers and employees, the plan sponsor and other supporting stakeholders, and the monitor and other professionals involved in the case.

Of most significance in this respect, following the seminal *ABCP* decision, it was confirmed that CCAA plan releases could extend to third parties, such as auditors, market intermediaries and other third parties linked to a debtor's restructuring or the events giving rise to it, so long as, among other factors, the third parties to be released are necessary and essential to the restructuring, the claims to be released are rationally related to the purpose of the plan and necessary for it, and the parties being released are contributing in a tangible and realistic way to the plan.[55] Central to the Ontario Court of Appeal's reasoning in *ABCP* was the breadth of the term "compromise or arrangement" under the CCAA, that a debtor and creditor could agree to release a third party as a term of a contract, and that such a provision would be binding upon them contractually. Accordingly, a third-party release could be incorporated into a CCAA plan and bind all creditors by virtue of

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the double majority approval threshold set forth in subsection 6(1) of the CCAA.[56]

This heavy reliance on creditor consent to the giving of a third-party release raises the question of whether such a release can be obtained under the CCAA in a non-plan context, in particular in the context of a CCAA sale. While third-party releases have been granted in the context of CCAA sales as well as CCAA discharge orders, they have typically been granted without any opposition and no significant judicial consideration.[57] However, in the recent *Green Relief* CCAA proceedings involving a RVT, the debtor sought approval of a comprehensive third-party release in favour of, amongst others, its current directors, officers, legal counsel and the monitor and its legal counsel for all claims based in whole or in part on any act or omission taking place before implementation of the RVT and that related in any manner whatsoever to (among other things) the debtor, its business or affairs, or the CCAA proceedings.[58] The debtor indicated that the release was a "condition precedent" to the proposed RVT for which approval was being sought. Certain shareholders objected to the release, arguing, among other things, that the court lacked jurisdiction to grant the release outside the plan context.[59]

In approving the release, Justice Koehnen found that while the presence of a plan was relevant to the approval of a third-party release, he did not agree that the absence of one deprived the court of jurisdiction to approve such a release. In particular, consistent with the Ontario Court of Appeal's reasoning in *ABCP*, he concluded that section 5.1 of the CCAA (which permits director releases in the plan context) did not preclude the ability of a CCAA court to order a third-party release pursuant to its broad authority under section 11.[60] In addition to citing the usual test for a third-party release based on *ABCP*, the court in *Green Relief* articulated an additional factor to consider: the quality of the claims the objectors wished to maintain, opining that "[t]he stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release."[61] Applying these considerations to the facts at hand, the court approved the proposed release.

Four factors appear critical to the court's reasoning in *Green Relief*. First, no creditor objected to the release. Second, although the release had potentially broad applicability by its terms, because its beneficiaries were limited to current directors and officers and professionals involved in the restructuring, in large part it served to insulate the releasees from claims relating to the conduct of the restructuring proceedings themselves, the material steps in which had been overseen and approved by the court and subject to submissions from a wide array of stakeholders. Third, the objectors' alleged claims were *prima facie* "weak", prefaced in a loss of chance claim as a result of the debtor pursuing a potential transaction in the CCAA proceedings that ultimately could not be consummated. Fourth, shareholders were significantly out of the money, and by granting the third-party release, the court was facilitating distributions to creditors by reducing the likelihood of indemnity claims by the releasees against the pool of funds available to creditors.[62]

The court in *Green Relief* also relied on *Nemaska* — another case in which third-party releases had been granted in the face of opposition and absent a CCAA plan. Although leave to appeal was denied on *Nemaska* with the result that the third-party releases remained in place, the Québec Court of Appeal cast some doubt on the correctness of the underlying decision and well as the enforceability of the releases, indicating:

> As far as [one of the applicants] is concerned, while the issues that he proposes to raise with respect to overreaching third party releases are not devoid of merit, granting leave is likely to seriously prejudice creditors, with limited gains to be had on the part of shareholders whose rights remain entirely subordinated to those of the creditors. *If the manner of constituting the releases makes them invalid or unopposable, then [the applicant], and any other party with a claim against directors, may still have a recourse*.[63] [emphasis added]

A similar sentiment was expressed by the Ontario Court of Appeal in denying leave to appeal on *Green Relief*, with the court indicating that: "[w]hile the appropriateness of granting third-party releases in a CCAA proceeding in the absence of a plan of compromise or arrangement may be an issue of potential significance to the practice . . . this is not an appropriate case in which to address that issue." However, the Court of Appeal also stated that the proposed appeal was not *prima facie* meritorious as the CCAA judge had applied the proper legal test (*i.e*., the *ABCP* factors), indicating that they concurred with the view that, as a baseline consideration, a CCAA court has jurisdiction to grant a third-party release outside of the plan context.[64]

Third-party releases have also gained traction in CBCA restructurings, although as with CCAA sale transactions, their availability in a given fact scenario and breadth remains subject to continuing uncertainty. In *Re Concordia International Corp.*,[65] the court, citing *ABCP* among other CCAA and CBCA precedents, granted broad third-party releases pertaining to the subject debt and the restructuring proceedings, as well as a release of all claims by equity holders except for certain

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existing shareholder class actions which were channelled to available insurance. The court was satisfied the releases and related relief were appropriate, including because they enhanced the viability of the arrangement, the arrangement had received the overwhelming support of stakeholders (including from existing shareholders who would retain a small equity interest in the restructured company) and, in the case of the release of equity claims, because creditors were not recovering in full, with the result that no value would be available for shareholders if the CBCA arrangement was unsuccessful and a CCAA filing ensued.[66]

In the recent *iAnthus* arrangement proceedings under the British Columbia *Business Corporations Act* (BCA), the company sought approval of a similar third-party release to that approved in *Concordia*, including of all equity-related claims. The British Columbia Supreme Court, however, declined to follow *Concordia*, finding that it was inappropriate to rely on CCAA authority as arrangements under the BCA were narrower in scope than CCAA restructurings, and that while the court had jurisdiction to interfere with or impinge upon the rights of third parties to the arrangement:

> . . . such an order can only be justified where it is truly ancillary and the substantive positions of third parties are protected. Put another way, s. 291(4) does not afford the court a roving commission to limit the rights of third parties who are strangers to the arrangement in order that the company may be substantively protected from claims that were already in existence before the arrangement was proposed.

[67]

The court expressed particular concern about the rights of parties who were "not at the table" being impaired by the release, including historical shareholders of the company.[68]

In light of its concerns with the release, the court in *iAnthus* declined to approve the plan as originally presented, although it gave leave to the company to amend the plan to refine the release and related injunctions and return to seek approval, which the company did.[69] The amended release made two key changes. The first was to limit the beneficiaries of the release to only those directors and officers who served in such capacity in the period following the commencement of the company's strategic review process, along with noteholders and the various professional advisors to the parties to the arrangement. Second, it limited the equity claim release to bind only those shareholders and equity holders who had an opportunity to vote on the plan or who were released parties under the plan, both of whom benefited from the plan. In summary, while the amended plan retained a broad release of all claims by any person in respect of plan related matters, it generally preserved pre-plan related claims, except by those parties who benefitted under the plan and had been "given a say" in its development and/or approval (*i.e.*, current equity holders and released parties under the plan).[70] The court held that this release was an appropriate use of its ancillary order power under the BCA given it operated to preclude claims in respect of a process that was supervised by the court and a plan that had been determined to be fair and reasonable.

4. DEATH KNELL FOR THE CCAA PLAN?

With the expansion of restructuring alternatives over the past 20 years, CCAA plans have become an increasingly rare phenomenon. Within the context of CCAA cases, their prevalence has been reduced by the courts' willingness to facilitate plan-like outcomes and relief absent a creditor vote in furtherance of the overarching policy goals of the CCAA, as well as by the timing, expense and certainty benefits that come from pursuing a SISP and CCAA sale versus a plan. Coupled with the rise of corporate plans of arrangement as an efficient and effective means of pursuing a debt restructuring and a similar willingness on the part of courts to grant the ancillary relief necessary to ensure those arrangements can be successfully implemented even where there is opposition, the "territory" of the CCAA plan is being encroached upon from both sides. In what circumstances then, might a CCAA plan still represent the best or perhaps only viable restructuring option? A consideration of the themes that arise from recent cases provides some guidance.

A creditor vote and CCAA plan may still be most appropriate where there are competing viable restructuring proposals, or where an objecting party can otherwise mount a credible objection under the Nortel Test. A recent example of this occurred in the *Bluberi* CCAA proceedings where, following the debtor's business being sold to the senior creditor, the senior creditor and the debtor presented competing plans. Under the senior creditor plan, unsecured creditors would receive a cash distribution in exchange for a release of claims against the senior creditor. Under the debtor's plan, financing would be obtained to pursue claims against the senior creditor and unsecured creditors would be entitled to a portion of the net recoveries above a certain amount. The CCAA supervising judge ordered that both plans be put to a vote, although ultimately only the creditor-sponsored plan proceeded.[71] While perhaps factually rare, in these types of cases where more than one

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viable restructuring path is presented to impacted creditors and there is no clear favoured option, a creditor vote on the "duelling" options as incorporated into CCAA plans may be appropriate. Similarly, in a circumstance where a monitor's analysis discloses that creditors would achieve a higher recovery under a liquidation versus a proposed transaction, it may be appropriate to put the proposed transaction to a vote to ensure that creditors are prepared to endorse an outcome that would be less economically beneficial to them.

Another scenario where CCAA plans will likely be required are cases that involve significant disputes between the debtor and its creditors, or amongst stakeholders with respect to their relative entitlements. Where there is a proposed global resolution of those disputes, a CCAA plan incorporating those settlements that is voted on and approved by creditors may be a preferred means of proceeding. By way of recent examples, in both the *Nortel* and *Sears Canada* cases, the settlements of various significant claim and creditor disputes that were central to the outcome of both cases and the amounts available for distribution to creditors were incorporated into CCAA plans that were voted on and approved by creditors, and sanctioned by the respective supervising courts.[72] Incorporating the various settlement agreements into a CCAA plan presented to creditors for a vote represented both an efficient means of proceeding, as well as a direct means of assessing creditor support for the proposed settlements and ensuring overall certainty and finality of the proposed resolutions, including obtaining plan releases.

A CCAA plan may also be required or appropriate where there is significant fulcrum creditor opposition to a debtor's proposed restructuring path or relief sought. It is noteworthy, of course, that in most of the cases canvassed in this paper where courts were prepared to grant CCAA plan-style relief outside of the plan context, there was little or no creditor opposition (and generally significant senior and fulcrum creditor support). In *Quest*, the only case where there was material creditor opposition, the court was mindful to carefully analyze the significant benefits of the RVT to a broad array of stakeholders, the lack of other viable alternatives, and the relative prejudice that would be experienced by the objecting creditors relative to all stakeholders if the proposed RVT was not approved. The court ultimately concluded that the objectors were working against the remedial purpose of the CCAA in attempting to utilize their potential plan veto leverage to obtain further concessions from the debtor and its other stakeholders, and concluded that in these "unique and exceptional" circumstances it was appropriate to approve the RVT.[73] The court was careful, however, to note that this may not be the appropriate result in all cases:[74]

> I do not consider that an [RVT] structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an [RVT] structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.

While strictly applicable to RVTs, this cautionary note has broad applicability to any circumstance where a debtor seeks expansive plan-style relief over the objection of its significant creditors: just as a creditor may seek to use the leverage of a plan veto to secure concessions, so too may a debtor use the threat of seeking plan-style relief outside of a plan to opposite effect.

A CCAA plan is also still likely the preferred route to the extent comprehensive releases, waivers, and injunctions are required, particularly in respect of third parties. In both *Green Relief* and *iAnthus*, the courts' discussion evidences concern in granting releases that impact claims unrelated to the subject restructuring, particularly the claims of those parties who are "not at the table" and do not stand to benefit from the restructuring.[75] As such, while CCAA courts in the non-plan context and courts overseeing CBCA arrangements may have the jurisdictional authority to grant releases and related relief, there is little doubt that such authority is narrower in scope relative to the CCAA plan context. As such, to the extent comprehensive releases are required, particularly in respect of third parties, pre-restructuring matters or where there is evidence of viable causes of action, a CCAA plan may be the most appropriate or only means of obtaining those releases.

Finally, at the risk of stating the obvious, restructurings come in all different shapes and sizes — the combination of business, economic, social, legal and jurisdictional issues that can arise in a given case are limitless, as is the range of relief that may be required to facilitate a successful restructuring. This gives rise to two observations. First, depending on the facts of a given case, a CCAA plan may be the only viable option. For instance, where a debtor's underlying business or assets are not saleable, or saleable only at a price that would not be acceptable to any stakeholder, the only realistic option may be for a debtor and its creditors to pursue negotiations on a CCAA plan. Second, the CCAA plan remains the most dynamic and flexible restructuring tool available in Canada. While Canadian courts have been willing to authorize expansive relief to

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facilitate alternative restructuring options in the name of both efficiency and to promote successful restructurings, this has largely been a process of testing their willingness to grant CCAA plan-style relief in the absence of a CCAA plan, relying in large part on jurisprudence developed in the CCAA plan context. What we have not seen, and are unlikely to see, are cases where truly novel relief is being sought outside the CCAA plan context: whatever the next leap is, it is most likely to come packaged in the form of a CCAA plan, buttressed by the support of creditors voting in favour of that plan.[76]

Footnotes

* Chris Armstrong is a partner at Goodmans LLP in Toronto and has also been an adjunct professor at Western Law where he teaches the Advanced Restructuring and Insolvency Law course. He became an IIC member in 2020. He wishes to thank his colleagues at Goodmans, and in particular Cathy Costa, Ti-Anna Wang, Andrew Patel and Brennan Caldwell for their assistance in connection with this paper. The views and opinions expressed in this article are those of the author for scholarly purposes and do not necessarily reflect the position of Goodmans LLP or any of its lawyers or clients.

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

2 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para. 78 [*Bluberi*].

3 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) at para. 62 [ABCP], ; leave to appeal refused 2008 CarswellOnt 5432, [2008] S.C.C.A. No. 337 (S.C.C.).

4 For some of the rare exceptions, see, for instance, CCAA s. 6(3)-(8).

5 *ABCP*, *supra* note 3 at para. 62.

6 CCAA, ss. 4 and 5.

7 CCAA, s. 6(1).

8 *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182, [1993] O.J. No. 545 (Ont. Gen. Div.) at paras. 36-37.

9 CCAA, s. 6(1)(a).

10 Alfonso Nocilla, "Reorganizations, Sales, and the Changing Face of Restructuring in Canada: Quantitative Outcomes of 2012 and 2013 CCAA Proceedings" (2019) 42 Dal. L.J. 371 at 385 [Nocilla].

11 Janis Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law" in *Annual Review of Insolvency Law 2016* (Toronto: Carswell, 2017).

12 The term "liquidating CCAA" is an imprecise and somewhat derisive term, having been used to describe cases ranging from a full going concern sale of a debtor's entire business that is functionally indistinguishable from a successful stand-alone restructuring except as to corporate form (see, for instance, the recent CCAA proceedings of Cirque du Soleil and Clover Leaf Seafoods), to CCAA proceedings that have been used to implement the full scale wind-down of a debtor's business (see, for instance, Target Canada, Sears Canada and a host of other retail CCAAs), to all manner of cases in between that involve a sale of some portion of the debtor's business.

13 While a CCAA plan is also a potential outcome of a SISP, as discussed previously, recent stats suggest it has become a less popular option.

14 See, for instance, CCAA, ss. 11.3(3)(b) and 36(3)(e).

15 A more expedited timeline can be pursued through a pre-packaged plan process, although in most cases that would limit the scope of the restructuring to financial indebtedness and not other types of liabilities (*e.g.*, trade debt, litigation claims, etc.).

16 Where a pre-filing SISP has been undertaken, this timeline can be even more compressed. For instance, in the recent Clover Leaf Seafoods CCAA proceedings, there was an extensive pre-filing SISP in which the "monitor in waiting" had been involved and confirmed to the court represented an extensive marking of the debtors' business that had led to the proposed stalking-horse transaction. The stalking-horse transaction and related bidding procedures were approved on December 20, 2019, with a bid deadline only a month later — see *Clover Leaf Seafoods*, Order (Bidding Procedures, Stalking Horse Approval and Stay Extension

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dated December 20, 2019 (Court File No CV-19-631523-00CL) (Ont. Sup. Ct. [Commercial List]) [*Clover Leaf Seafoods*]. In some circumstances, it may even be possible to complete a CCAA sale transaction entirely on the strength of a pre-filing SISP, without any post-filing SISP: see *Re Sanjel Corp.*, 2016 ABQB 257 (Alta. Q.B.).

17 11 U.S. Code §1129(b).

18 A stalking-horse agreement is a sale agreement entered into by a debtor, often prior to or at the outset of a restructuring case, pursuant to which it agrees to sell its business to a purchaser subject to higher or better offers being obtained through the SISP. In exchange for setting the floor in the SISP and demonstrating there will be a going concern resolution, the stalking-horse purchaser is typically afforded a break-fee and expense reimbursement, and may also have a role in shaping the terms of the SISP and the overall conduct of the case. See Ashley Taylor and Yannick Katirai, "An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings" (2013) 2 J.I.I.C. 97.

19 See *Grafton-Fraser Inc. v. Cadillac Fairview Corp.*, 2017 ONSC 2496 (Ont. S.C.J. [Commercial List]) at paras. 21-26.

20 R.S.C. 1985, c. B-3, as amended. For recent examples of distribution orders following or in conjunction with the approval of a CCAA sale, see: *Clover Leaf Seafoods*, *supra* note 16, approval and **vesting order** dated January 28, 2020; and *Aralez Pharmaceuticals Inc. et al.*, Order (Re: Distribution Protocol) dated December 17, 2018, (Court File No. CV-18-603054-00CL) (Ont. Sup. Ct. J. [Commercial List]). In the recent CCAA proceedings of *DEL Equipment*, following the sale of the business and residual assets and repayment of the secured creditor in full, the debtor assigned itself into bankruptcy for purposes of administering claims and distributions to its unsecured creditors from its remaining available cash — see: *DEL Equipment Inc.* CCAA Termination Order dated October 29, 2020 (Court File No. CV-19-62955200CL (Ont. S.C.J. [Commercial List]).

21 *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]) [*Nortel*].

22 See Joe Pasquariello and Chris Armstrong, "The Nortel Stalking Horse Sales: Maximizing Value via CCAA Flexibility" (2012) 1 J.I.I.C. 123.

23 *Re Cliffs Over Maple Bay Investments Ltd.*, 2011 BCCA 180 (B.C. C.A.) [*Cliffs Over Maple Bay*] at para. 32.

24 *Nortel*, *supra* note 21 at para. 49.

25 *Ibid.*, at paras. 43-54.

26 CCAA, s. 36. The 2009 CCAA amendments also added s. 11.3 which permits a debtor to seek to have the CCAA court order an assignment of the debtor's agreements to a purchaser, including where a counterparty opposes the assignment. Although prior CCAA case law (see *Re Playdium Entertainment Corp.*, 2001 CarswellOnt 3893, [2001] O.J. No. 4252 (Ont. S.C.J. [Commercial List]); additional reasons 2001 CarswellOnt 4109 (Ont. S.C.J. [Commercial List])) had confirmed a court's authority to order such an assignment under its broad discretionary authority, the introduction of s. 11.3 was another statutory change that facilitated CCAA sales by formally codifying such authority as well as the process to be followed.

27 See *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) and CCAA, s. 36(3)(a)-(c).

28 Nocilla, *supra* note 10 at 377.

29 CCAA, s. 36(3)(d) and (e).

30 The lack of disputes around whether a SISP is an appropriate restructuring strategy should not, of course, be confused with a lack of disputes regarding the design or conduct of a SISP, or the preferred transaction arising from a SISP.

31 See the discussion in *Re Danier Leather Inc.*, 2016 ONSC 1044 (Ont. S.C.J.) at paras. 14-40.

32 One novel tactic to incentivize junior creditors to support a plan was deployed by the debtors in the 2010 joint CCAA and Chapter 11 proceedings of Smurfit-Stone. In that case, the debtors proposed a joint plan of reorganization and arrangement for the various U.S. and Canadian debtor entities that would see the reorganized company ("Newco") acquire the Canadian business in exchange for the repayment of the Canadian secured debt and certain priority claims, the assumption of certain employee and pension obligations and the establishment of cash pools for Canadian unsecured creditors (excluding unsecured intercompany claims) totaling $39 million, resulting in an approximately 29% recovery. The plan also featured a convenience class option whereby Canadian unsecured creditors could elect to receive a $5,000 payment in lieu of their *pro rata* share of the cash pools. No

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marketing process had been conducted for the Canadian assets, raising the question of whether the proposed plan and transaction represented the best alternative for Canadian creditors. To address this, the debtors presented Canadian unsecured creditors with a choice: if the plan was approved by them, they would participate *pro rata* in the cash pools or receive their convenience claim payment; if the plan was rejected by them, the U.S. portion of the plan would still proceed, and the Canadian assets would be subject to a marketing and auction process to determine their fair market value. Newco would be entitled to participate in such process, except that it had no obligation to fund the cash pools and unsecured intercompany claims would be entitled to participate in whatever recovery, if any, was generated for Canadian unsecured creditors through the auction process, which would have resulted in a significant dilution of the Canadian creditor pool. Faced with the option of a sum certain recovery under the proposed plan versus "rolling the dice" in an auction process, Canadian unsecured creditors voted overwhelmingly to approve the plan.

33 It appears that nine RVTs were approved in CCAA cases from late 2019 through 2020: see the review of cases in *Re Quest University Canada*, 2020 BCSC 1883 (B.C. S.C.) at paras. 132-149, ; leave to appeal refused 2020 CarswellBC 3252 (B.C. C.A.) [*Quest*], along with *Arrangement relatif à Cirque du Soleil Canada inc.*, 2020 CarswellQue 15373 (Que. Bktcy.) [*Cirque*]. While it is difficult to assess the statistical trend for 2020 CCAA filings given the ongoing status of many of those cases, it stands to reason that the significant increase in RVTs in 2020 will result in a decline in the relative number of CCAA plans for cases filed in that period.

34 In circumstances where there are multiple debtors that are part of a corporate group, it is possible to employ a RVT to **reverse vest** most, if not all, entities in the group. Moreover a "hybrid" structure can also be utilized that incorporates both an RVT and a traditional CCAA asset sale — see *Cirque*, *ibid.*

35 For an excellent review of RVTs and the issues that arise in those transactions as well as the jurisdiction of a CCAA court to authorize a RVT, see Bradley Wiffen, "**Reverse Vesting** Transactions: An Innovative Approach to Restructuring", 2020 CanLIIDocs 3600, 18th Annual Review of Insolvency Law Conference (Toronto: Canadian Association of Insolvency and Restructuring Professionals, February 26, 2021).

36 *Quest*, *supra* note 33, ; leave to appeal denied by *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364 (B.C. C.A.) and *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218 (Que. Bktcy.); leave to appeal refused 2020 QCCA 1488 (C.A. Que.); leave to appeal refused 2021 CarswellQue 4589 (S.C.C.); leave to appeal refused 2021 CarswellQue 5301 (S.C.C.) ["*Nemaska*"]. In *Quest*, the objecting creditors appeared to hold a veto with respect to any plan, and the debtor and purchaser had amended the transaction structure from a plan to a RVT at the last moment to prevent the creditors from blocking a plan.

37 *Quest*, *ibid.*, at paras. 158-159, 163-170 and 178; *Nemaska*, *ibid.*, at paras. 16-17 and 38-39.

38 *Quest*, *ibid.*, at para. 171; *Nemaska*, *ibid.*, at paras. 33 and 36.

39 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended. For ease of reference, these types of plans will be referred to herein generically as "CBCA plans" even though they may also be pursued under relevant provincial corporate legislation.

40 Although on its face subsection 192(3) of the CBCA appears to preclude an arrangement in respect of an insolvent corporation, case law has confirmed that the solvency requirement is met so long as (a) at least one of the applicant companies is solvent or (b) where the applicant will be solvent after the arrangement is implemented. See *Re Concordia*, 2017 ONSC 6357 (Ont. S.C.J.) at paras. 33-35; and *Re Stelco Inc.*, 2006 CarswellOnt 863, [2006] O.J. No. 593 (Ont. S.C.J. [Commercial List]) at para. 4 (SCJ [Commercial List]).

41 In addition to the practical business and public relations benefits of a company avoiding the "bankruptcy" moniker, pursuing a debt restructuring under the CBCA rather than the CCAA may result in the company's directors and officers not being obligated to disclose that they were the director or officer of a company that "was subject to or instituted any proceedings, arrangement or compromise with creditors" under applicable securities law. See Form 51-102F2 Annual Information Form authorized pursuant to National Instrument 51-102.

42 Although section 192 of the CBCA does not require security holder approval as a pre-condition to a court approving an arrangement, the CBCA director is " . . . of the view that, as a minimum, all security holders whose legal rights are affected by a proposed arrangement are entitled to vote on the arrangement . . . ", although the type and levels of approval which a court will require remain a matter of judicial discretion — see Industry Canada Policy Statement Concerning Arrangements Under Section 192 of the CBCA dated January 4, 2010 at sections 3.09 and 3.10 ("*CBCA Policy Statement*").

43 Shareholders may also have a more prevalent role in a CBCA restructuring than they typically would in CCAA restructuring as there is no express subordination of equity claims as under CCAA s. 6(8). While shareholder approval of a CBCA debt

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restructuring plan is not expressly required, the CBCA Policy Statement provides that it may " . . . be appropriate in cases where a proposed arrangement fundamentally alters the security holder's investment, whether economically or otherwise, that the right to vote on the arrangement should be provided to these security holders." See *ibid.*, at section 3.09. As a CBCA debt restructuring typically entails a significant dilution of existing shareholders, it is common place for a CBCA plan to be voted on by shareholders. To incentivize shareholders to approve a CBCA plan and the resulting dilution of their investment, it is typically presented by the company as a superior alternative to a CCAA filing that would likely see their investment fully extinguished.

44 CBCA, s. 192(f).

45 CBCA, s. 2.

46 Of course, the possibility of a CCAA filing as an alternative to a CBCA plan may be a useful means of extracting concessions from other stakeholders that expands the practical utility of a CBCA plan.

47 2020 ONSC 5822 (Ont. S.C.J. [Commercial List]) at paras. 20-29.

48 See, for instance, CBCA, s. 192(4) and *Business Corporations Act* (Ontario), s. 182(5).

49 See, for instance, *Re 45133541 Canada inc.*, 2009 QCCS 6444 (C.S. Que.) at paras. 92-123.

50 See, for instance, *Re Essar Steel Canada Inc.*, 2014 ONSC 4285 (Ont. S.C.J.) at paras. 46-49.

51 Reasons for Judgment (October 30, 2020), Nixon J. in *12178711 Canada Inc*, E-File No: CVQ20CALFRAC at 30:13-32:2; affirmed by *12178711 Canada Inc. v. Wilks Brothers, LLC*, 2020 ABCA 430 (Alta. C.A.) at paras. 37-47 (Calfrac Alta. C.A.), ; leave to appeal refused 2021 CarswellAlta 1285 (S.C.C.).

52 *Calfrac*, *ibid.*, at 31:37-31:40 and *Calfrac* Alta. C.A., *ibid.*, at paras. 42-44.

53 *Calfrac* Alta. CA, *ibid.*, at paras. 43-44.

54 CCAA, s. 5.1(1).

55 *ABCP*, *supra* note 3 at para. 71, ; leave to appeal refused 2008 CarswellOnt 5432, [2008] S.C.C.A. No. 337 (S.C.C.).

56 *Ibid.*, at paras. 43 and 58-68.

57 For a typical example, see *Re Golf Town Canada Holdings Inc.* (March 29, 2019), Doc. CV-16-11527-00CL (Ont. S.C.J.).

58 *Re Green Relief Inc.*, 2020 ONSC 6837 (Ont. S.C.J. [Commercial List]) at para. 59.

59 *Ibid.*, at paras. 10-12.

60 *Ibid.*, at paras. 23 and 25 and *ABCP*, *supra* note 3, at paras. 97-100. See also *Re Nelson Education Ltd.*, 2015 ONSC 5557 (Ont. S.C.J. [Commercial List]) at paras. 48-49 where the court concluded that the principles enunciated in ABCP were also applicable in a non-plan context, although declined to grant the proposed releases on the facts. The court in *Green Relief* did reject the debtor's attempt to position the third-party release as a condition precedent to the RVT, indicating that is was prepared to "call the directors' bluff" and approve the transaction without the release — see *Green Relief* at paras. 13-15 and 52. Indeed, it is difficult to envision a scenario where a director or other debtor fiduciary could insist on securing a personal release as a condition precedent to proceeding with a transaction that in any event represented the best (and perhaps only) transaction available to the debtor.

61 *Ibid.*, at para. 30.

62 *Ibid*., at paras. 48-60.

63 *Nemaska* Que. C.A., *supra* note 36 at para. 43.

64 *Re 12463873 Canada Inc.*, Reasons for decision on application for leave to appeal released March 16, 2021, Court File No M52019 at paras. 11-13.

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[65] 2018 ONSC 4165 (Ont. S.C.J.).

[66] *Ibid.*, at paras. 37-52.

[67] *Re iAnthus Capital Holdings, Inc.*, 2020 BCSC 1442 (B.C. S.C.) at paras. 80-81.

[68] *Ibid.*, at paras. 73-74 and 82-85.

[69] *Re iAnthus Capital Holdings, Inc.*, 2020 BCSC 1484 (B.C. S.C.) at paras. 1-9 [*iAnthus 2*], ; affirmed 2021 BCCA 48 (B.C. C.A.).

[70] *iAnthus 2*, *ibid.*, at para. 19-33.

[71] *Bluberi*, *supra* note 2, at paras. 12-15. The senior creditor's plan failed to achieve the requisite majority vote, leading to approval of interim litigation financing proposed by the debtor and resulting appellate consideration.

[72] See *Re Nortel Networks Corp.*, 2017 ONSC 700 (Ont. S.C.J. [Commercial List]) at paras. 2-9; and *Sears Canada Inc. et al* (Plan Sanction Order dated (November 23, 2020)), Court File No. CV-17-11846-00CL (Ont. S.C.J. [Commercial List]).

[73] *Quest*, *supra* note 33 at paras. 158-173.

[74] *Ibid.*, at para. 171.

[75] *Green Relief*, *supra* note 58 at para. 60; and *iAnthus*, *supra* note 67 at paras. 73-74 and 82-85.

[76] A good recent example of this is *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 (C.A. Que.), where the Québec Court of Appeal dismissed certain third-party retailers' appeals of a sanction order in respect of a CCAA plan that permitted the Monitor to assert claims of the debtor's creditors against the retailers to recover damages relating to the sale of faulty faucets as a means of maximizing the value of the debtor's assets available for distribution. In upholding the CCAA supervising judge and finding that the relief was an appropriate exercise of the broad discretion granted to a CCAA court, the court noted that creditors had voted unanimously to approve the plan and that, "The Monitor is putting into effect the collective will of the creditors expressed through their unanimous vote approving the Plan of Arrangement. Giving effect to creditor democracy reflected in the CCAA is a sound basis for a court to approve the Plan." See *Aquadis*, at paras. 80-82.

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Target Canada Co. (Re), [2015] O.J. No. 247

Ontario Judgments

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

Heard: January 15, 2015.

Judgment: January 16, 2015.

Court File No.: CV-15-10832-00CL

[2015] O.J. No. 247 | 2015 ONSC 303 | 2015 CarswellOnt 620 | 248 A.C.W.S. (3d) 753 | 22 C.B.R. (6th) 323

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as Amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

(85 paras.)

Counsel

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

Jay Swartz, for the Target Corporation.

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

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

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

ENDORSEMENT

G.B. MORAWETZ R.S.J.

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or

finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

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

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

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

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

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

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

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

  a) Should the stay be extended to the Partnerships?

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

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

  d) Should the Court approve protections for employees?

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

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

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

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

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

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

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

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

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

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

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

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

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

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

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

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

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

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property

LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp*., 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

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

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

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend

that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

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

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

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

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

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

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

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

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

a) Logistics and supply chain providers;

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

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

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

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

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

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

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

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

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

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

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

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

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

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

c. Whether there is an unwarranted duplication of roles;

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

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

f. The position of the Monitor.

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

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

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

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

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

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

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

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

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

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

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

G.B. MORAWETZ R.S.J.

End of Document

Lemare Holdings Ltd. (Re), [2012] B.C.J. No. 2218

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.C. Grauer J.

Heard: October 16, 18 and 19, 2012.

Judgment: October 26, 2012.

Docket: S124409

Registry: Vancouver

[2012] B.C.J. No. 2218 | 2012 BCSC 1591 | 96 C.B.R. (5th) 35 | 223 A.C.W.S. (3d) 307 | 2012 CarswellBC 3294

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended AND IN THE MATTER OF the Business Corporations Act, S.B.C. 2002, c. 57, As Amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Lemare Holdings Ltd., Lemare Lake Logging Ltd., Lone Tree Logging Ltd., C.&E. Roadbuilders Ltd., Coast Dryland Services Ltd., Dominion Log Sort Ltd., and Central Coast Industries Ltd., Petitioners

(94 paras.)

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Application of Act — Debtor company — Compromises and arrangements — Claims — Where Crown affected — Application by Province to set aside Initial Order dismissed; application by petitioners for order excluding evidence tendered by Province in its application and for further stay and claims process order allowed in part — Court rejected Province's assertion petitioners were not insolvent when Initial Order granted — Amount of assessed stumpage and penalties claimed by Province against petitioners constituted a contingent claim — Reasonably foreseeable expectation of looming liquidity crisis existed at time of Initial Order — Provision made in claims process order to facilitate Province's claim in manner that preserved its ability to take advantage of Forest Act provisions.

Bankruptcy and insolvency law — Proceedings — Practice and procedure — Courts — Jurisdiction — CCAA matters — Evidence — Affidavits — Stays — Application by Province to set aside Initial Order dismissed; application by petitioners for order excluding evidence tendered by Province in its application and for further stay and claims process order allowed in part — Court rejected Province's assertion petitioners were not insolvent when Initial Order granted — Reasonably foreseeable expectation of a looming liquidity crisis existed at time of Initial Order — Excerpts of Province's affidavit that referred to information unlawfully seized from petitioners redacted — Petitioners' stay extended and claims process order accepted with minor modifications.

Application by the Province to set aside an Initial Order that had been granted pursuant to the Companies' Creditors Arrangement Act ("CCAA"); application by the petitioners for an order excluding certain evidence tendered by the Province in its application, for a further stay and for a claims process order ("CPO"). The petitioners were a group of companies that constituted an integrated forestry business. For a considerable time, the petitioners had been at loggerheads with the Province over stumpage that the Province claimed the petitioners owed. In May and June 2012, the petitioners received letters from the Province, supported by extensive documentation, which proposed to

56 Although courts have generally had regard to the BIA definition of "insolvent person" when dealing with insolvency under the CCAA, the modern trend is to take into account the different objectives of the CCAA. These address the interests of a broader group of stakeholders, and include a more comprehensive process to preserve the debtor company as a going concern.

57 Thus in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at para. 21, the Supreme Court of Canada described the CCAA regime as a flexible, judicially supervised reorganization process that allows for creative and effective decisions. It noted that with reorganizations becoming increasingly complex:

> [61] *... CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA.*
>
> ...
>
> [70] ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company.

58 In *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J.); leave to appeal refused: [2004] O.J. No. 1903, 2004 CarswellOnt 2936 (C.A.), the Court dealt with a submission, like the Province's here, that the Initial Order should be reversed on the ground that Stelco was not a "debtor company" because it was not "insolvent" as defined by the BIA.

59 Mr. Justice Farley, whose views in this area do not bind me but are entitled to the highest respect, made the following observations, which I have taken the liberty of paraphrasing:

- *On timing*: the usual problem is leaving the application for an Initial Order too late. CCAA should be implemented at a stage prior to the company's death spiral. Thus objections in the reported cases have been based not on an absence of insolvency, but on the proposed plan being doomed to failure as coming too late. [Paras. 13-15]
- *On stakeholders*: these include not only the company and its creditors, but also its employees and their interest in a viable enterprise. Thus there is an emphasis on operational restructuring so that the emerging company will have the benefit of a long-term viable fix, to the advantage of all stakeholders. [Paras. 17-20]
- *On the test for insolvency*: given the time and steps involved in a reorganization, the condition of insolvency perforce requires an expanded meaning under the CCAA. What the debtor must do is meet the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in the context and within the purpose of that legislation. The BIA definition of insolvent person is acceptable with the caveat that under the first branch (unable to meet obligations as they generally become due), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. Considering the notion of 'insolvent' contextually and purposively, the question is whether, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by Court authorization pursuant to a CCAA order. [Paras. 26 and 40]

60 There is, of course, no precise and invariable formula. This is not a "cookie cutter" exercise. As Farley J. pointed out, the matter must be decided on the basis of credible evidence and common sense, employing a principled, purposive and contextual approach.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11

Canada Statutes

R.S.C. 1985, c. C-36, s. 11 | L.R.C. 1985, ch. C-36, art. 11

Notice

Current Version: Effective 18-09-2009

SECTION 11.

General power of court

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

End of Document

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.

appropriate; and that the applicant has acted and continues to act in good faith and with due diligence.[112]

The British Columbia Supreme Court has held that the debtor corporation has an obligation to demonstrate measurable and substantive progress towards a plan if an extension is to be granted, and the court will also consider the economic impact on stakeholders and members of the surrounding community.[113] Thus, even where the exercise of authority to extend the stay period is not as constrained by express statutory requirements as it is in the sanctioning of the plan, there is a substantial degree of certainty in the tests applied to applications for an extension. As with the initial stay order, the extension of a stay is only a temporary suspension of creditors' rights.

Generally, the court wants assurance that corporate officers understand the reason for the firm's insolvency, so that they have a realistic sense of whether there is a potentially viable plan that can be devised. On granting an extension, the court will usually order the monitor to report on cash-flow projections on a regular basis to senior creditors and others so that they have timely notice of any further deterioration in the financial position of the debtor corporation.[114]

The courts have held that approval of the creditors is not a prerequisite for extension of a stay; rather, the extension is for the benefit of all the company's stakeholders, not just the creditors.[115] All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders and the public generally.[116] The Ontario Court of Appeal in *Re Stelco Inc.* held that it must be a matter of judgment for the supervising judge to determine whether a proposed plan is doomed to fail, and that where a plan is supported by the other stakeholders and the independent monitor, and is a product of the business judgment of the board, it is open to the supervising judge to conclude that the plan was not doomed to fail and that the process should continue.[117]

On an application for an extension of the stay pursuant to s. 11.02(2) of the *CCAA*, the applicants must establish that they have met the test set out in s. 11.02(3), specifically, whether circumstances exist that make the order appropriate in advancing the policy objectives of the *CCAA*, and whether the applicant has acted, and is acting, in good faith and with due diligence.[118] The *CCAA* debtor

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[112] Section 11.02(3), *CCAA*.

[113] *Re Skeena Cellulose Inc.*, 2001 CarswellBC 2226, 2001 BCSC 1423 (B.C.S.C.).

[114] *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C.S.C. [In Chambers]).

[115] *Taché Construction ltée c. Banque Lloyds du Canada* (1990), 5 C.B.R. (3d) 151 (Que. S.C.).

[116] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.).

[117] *Re Stelco Inc.*, 2005 CarswellOnt 6283 (Ont. C.A.) at para. 24, affirming 2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List]).

[118] *Re Worldspan Marine Inc.*, 2011 BCSC 1758, 2011 CarswellBC 3667 (B.C.S.C.) at para. 12.

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
D.R. Bieganek, Q.C., for Monitor, Ernst &Young LLP
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.

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

I Introduction

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

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

II History

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

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

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

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

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

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

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

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

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

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

• expansion of the Stay to include 1919 is reasonable.

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

V Law

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

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

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

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

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

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

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

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

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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

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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

Juniper Lumber Co., Re (2001), 2001 NBCA 30, 2001 CarswellNB 114 (N.B. C.A.) — referred to

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

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

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

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

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9
Generally — referred to

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

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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.

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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

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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

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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

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U.S. Steel Canada Inc. (Re), [2014] O.J. No. 5547

Ontario Judgments

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: October 8, 2014.

Judgment: October 22, 2014.

Court File No. CV-14-10695-00CL

[2014] O.J. No. 5547 | 2014 ONSC 6145 | 20 C.B.R. (6th) 116 | 247 A.C.W.S. (3d) 266 | 2014 CarswellOnt 16465

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as Amended AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement With Respect to U.S. Steel Canada Inc.

(48 paras.)

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Compromises and arrangements — Claims — Priority — Sanction by court — Motion by applicant, who had been granted protection under Companies' Creditors Arrangement Act, to vary Initial Order allowed — Appropriate to approve debtor-in-possession loan and lender's charge to ensure stable continuing operations — Granting super-priority to Administration and Director's Charges granted in Initial Order was essential to success of any possible restructuring — Proposed key employee retention programme was approved — Currently unrepresented beneficiaries were granted representation — Extension of stay provisions in Initial Order was granted.

Motion by the applicant, who had been granted protection under the Companies' Creditors Arrangement Act, to vary the Initial Order. The applicant sought approval of a debtor-in-possession loan facility between it and a subsidiary of its largest creditor to assist its cash flow. A condition precedent to funding under the loan was an order granting the lender priority over all encumbrances. The loan was supported by the monitor and was not opposed by any of the major stakeholders. The applicant also sought to amend the Initial Order to provide that the Administration and Director's Charges granted ranked ahead of all other Encumbrances except the loan charge. It sought approval of its proposed key employee retention programme. The applicant's secured creditor and the monitor supported the programme. The applicant proposed the appointment of six representatives and representative counsel to represent the interests of beneficiaries who were currently unrepresented. It sought an extension of the stay provisions in the Initial Order.
HELD: Application allowed.

The existence of a financing facility was of critical importance to the applicant to ensure stable continuing operations. The loan would assist and enhance the restructuring process. It was appropriate to approve the loan and the lender's charge. Granting super-priority to the Administration and Director's Charges was essential to the success of any possible restructuring. The continued employment of the employees to whom the retention programme applied was important for the stability of the business. The programme was approved. The representatives were approved as the beneficiaries were an important stakeholder group and deserved meaningful representation. An extension of the stay provisions of the Initial Order was granted to provide stability. The applicant was acting in good faith and with due diligence to facilitate the restructuring process.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.01(2), s. 11.02(3), s. 11.2, s. 11.2(4), s. 11.51, s. 11.52

Ontario Regulation 99/06,

Pension Benefits Act, R.S.O. 1990, c. P.8,

Rules of Civil Procedure, Rule 10.01, Rule 12.07

Counsel

R. Paul Steep, Jamey Gage and Heather Meredith, for the Applicant.

Kevin Zych, for the Monitor.

Michael Barrack, Robert Thornton and Grant Moffat, for United States Steel Corporation and the proposed DIP Lender.

Gale Rubenstein, Robert J. Chadwick and Logan Willis, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario).

Ken Rosenberg and Lily Harmer, for the United Steelworkers International Union and the United Steelworkers Union, Local 8782.

Sharon L.C. White, for the United Steelworkers Union, Local 1005.

Shayne Kukulowicz and *Larry Ellis*, for the City of Hamilton.

Steve Weisz and Arjo Shalviri, for Caterpillar Financial Services Limited.

S. Michael Citak, for various trade creditors.

Kathryn Esaw and Patrick Corney, for the Independent Electricity System Operator.

Andrew Hatnay, for certain retirees and for the proposed representative counsel.

ENDORSEMENT

H.J. WILTON-SIEGEL J.

1 U.S. Steel Canada Inc. (the "Applicant") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, and was granted the requested relief pursuant to an initial order of Morawetz R.S.J. dated September 16, 2014 (the "Initial Order"). The Initial Order contemplated that any interested party, including the Applicant and the Monitor, could apply to this court to vary or amend the Initial Order at a comeback motion scheduled for October 6, 2014 (the "Comeback Motion").

arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

26 The maximum amount payable under the KERP is $2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

27 The Court's jurisdiction to authorize the KERP is found in its general power under s. 11 of the CCAA to make such order as it sees fit in a proceeding under the CCAA. The following factors identified in case law support approval of the KERP in the present circumstances.

28 First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

29 Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

30 Third, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the Applicant's operations, the employees to be covered by the KERP would likely consider other employment options if the KERP were not approved

31 Fourth, the KERP was developed through a consultative process involving the Applicant's management, the Applicant's board of directors, USS, the Monitor and the CRO. The Applicant's board of directors, including the independent directors, supports the KERP. The business judgment of the board of directors is an important consideration in approving a proposed KERP: see *Timminco Ltd. (Re)*, 2012 ONSC 506 at para.73, [2012] O.J. No. 472. In addition, USS, the only secured creditor of the Applicant, supports the KERP.

32 Fifth, both the Monitor and the CRO support the KERP. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor has advised in its First Report that it is satisfied that each of the employees covered by the KERP is critical to the Applicant's strategic direction and day-to-day operations and management. It has also advised that the amount and terms of the proposed KERP are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings.

33 Sixth, the terms of the KERP, as described above, are effectively payable upon completion of the restructuring process.

Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries

34 The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "Non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

35 The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to make such an order under

Walter Energy Canada Holdings Inc. (Re), [2016] B.C.J. No. 122

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: January 5, 2016.

Judgment: January 5, 2016.

Released: January 26, 2016.

Docket: S1510120

Registry: Vancouver

[2016] B.C.J. No. 122 | 2016 BCSC 107 | 23 C.C.P.B. (2d) 201 | 2016 CarswellBC 158 | 33 C.B.R. (6th) 60

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as Amended AND IN THE MATTER OF the Business Corporations Act, S.B.C. 2002, c. 57, as Amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

(77 paras.)

Case Summary

Bankruptcy and insolvency law — Proceedings — Practice and procedure — Effect on other proceedings — Stays — Of concurrent proceedings — Petition by Walter Canada Group for relief respecting potential restructuring allowed — Petitioners, who comprised part of Canadian arm of coal exporter, obtained initial order that included stay of union's claims against partnership that operated one of Canadian mines — Union wanted stay to be lifted — Proceeding with union's claims would detract managerial and legal focus from primary task of implementing sale and solicitation process and thus potentially interfere with restructuring efforts.

Petition by the Walter Canada Group for relief with respect to a potential restructuring. The petitioners comprised part of the Canadian arm of a major coal exporter with mines in three countries. The Canadian mines were placed in care and maintenance. The American companies, which had historically supported the Canadian operations with funding and management services, filed a bankruptcy proceeding. The only remaining director of the petitioners was based in the United States and expected to resign when a sale of the American assets completed. The petitioners obtained an initial order that included a stay of the claims of a union that represented employees at one of the Canadian mines against the partnership that operated it. The petitioners now sought the approval of a sale and solicitation process, the appointment of professionals to manage it, a key employee retention and an extension of the stay. The stakeholders were largely supportive of the relief sought, but the union opposed certain aspects as to who should be appointed to conduct the sale process and wanted the stay to be lifted so that the claims against the partnership could continue.
HELD: Petition allowed.

Professional advisors were necessary in order to have a chance for a successful restructuring. There was a legitimate risk that the petitioners' ship could become rudderless in the midst of the proceedings. The risk was exacerbated by the fact that the management support traditionally provided by the American entities would not be provided after the American assets were sold. The petitioner's assets and operations were significantly complex so

as to justify the appointments. Proceeding with the union's claims would detract managerial and legal focus from the primary task of implementing the sale and solicitation process and thus potentially interfere with the restructuring efforts. It was not imperative to determine the union's claims now.

Statutes, Regulations and Rules Cited:

Bankruptcy Code (US), Chapter 11

Business Corporations Act, S.B.C. 2002, c. 57, as Amended,

Companies Creditors' Arrangement Act, R.S.C. 1985, c. C-36 as Amended, s. 11, s. 11.02(2), s. 11.02(3), s. 11.52

Employee Retirement Income Security Act of 1974, 29 USC s. 101, as amended,

Labour Relations Code, R.S.B.C. 1996, c. 224, s. 54

Counsel

Counsel for the Petitioners: Marc Wasserman, Mary I.A. Buttery, Tijana Gavric, Joshua Hurwitz.

Counsel for United Mine Workers of America 1974 Pension Plan and Trust: John Sandrelli, Tevia Jeffries.

Counsel for Steering Committee of First Lien Creditors of Walter Energy, Inc.: Matthew Nied.

Counsel for Her Majesty the Queen in Right of the Province of British Columbia: Aaron Welch.

Counsel for Morgan Stanley Senior Funding, Inc.: Kathryn Esaw.

Counsel for KPMG Inc., Monitor: Peter Reardon, Wael Rostom, Caitlin Fell.

Counsel for Canada Revenue Agency: Neva Beckie.

Counsel for the United States Steel Workers, Local 1-424: Stephanie Drake.

Reasons for Judgment

S.C. FITZPATRICK J.

Introduction and Background

1 On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

2 The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

3 The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay

numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

58 Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

59 I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

60 In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISP.

61 What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

Cash Collateralization / Intercompany Charge

Aralez Pharmaceuticals Inc. (Re), [2018] O.J. No. 6145

Ontario Judgments

Ontario Superior Court of Justice

Commercial List - Toronto, Ontario

S.F. Dunphy J.

Heard: November 16, 2018.

Judgment: November 21, 2018.

Court File No.: CV-18-603054-00CL

[2018] O.J. No. 6145 | 2018 ONSC 6980 | 299 A.C.W.S. (3d) 462 | 65 C.B.R. (6th) 149 | 2018 CarswellOnt 19784

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c.c-36, as Amended RE: IN THE MATTER OF a Plan of Compromise or Arrangement of Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc., Applicants

(58 paras.)

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Compromises and arrangements — Sanction by court — Costs of administration — International insolvencies — Motion for approval of Key Employee Incentive Plans allowed — Debtor company operated in integrated manner and U.S. bankruptcy proceedings were also underway and both proceedings targeted managed liquidation — KEIP involved nine senior management employees who would be incented to achieve highest cash flow and sale proceeds — There was substantial evidence process was negotiated at arm's length with objective oversight and secured creditor had no objection — Program not overbroad and employees had been working in good faith with expectation debtor would seek court approval — Incentives were approximately 50 per cent of employees' compensation, which was reasonable.

Motion by the debtor for the approval of Key Employee Incentive Plans. At the conclusion of the hearing, the court approved Key Employee Retention Plans. These were Companies' Creditor Arrangement Act proceedings and a number of affiliated entities had sought Chapter 11 relief in the United States. The secured creditor possessed security on substantially all assets on both sides of the. The cases were targeting managed litigation and a stalking-horse agreement was underway. The secured creditor had significant interest in the KERP and KEIP as funds diverted to the programs would come from its pocket, and any improvements would benefit it. One of the stalking horse bids involved the sale of assets, resulting in unsecured creditors being given effective priority over the secured creditor, which increased the weight of its interest. The KERP involved only three employees, who reported extensively to the monitor and the plan was not opposed by any stakeholders and involved a bonus of 25-50 per cent of the employees' salaries, for a total of $256,710. The KEIP affected nine senior management employees, none of whom would have ongoing roles once the bankruptcy process was completed. KEIP was to incent these employees to assist in achieving the highest possible cash flow during the process and the highest possible sale proceeds. The total payouts could rise to $4,058,360, but that was compared to stalking horse bids with a $240 million floor price. The costs would be shared by the Canadian and U.S. estates and the boards of affected entities approved the plans. The Official Committee of the Unsecured Creditors in the U.S. proceeding objected on the basis the program bonuses were too high and too easily earned.
HELD: Motion allowed.

There was substantial evidence that the process of negotiating and designing both programs benefitted from

significant arm's length and objective oversight. The process leading to both programs began prior to the insolvency filings and the monitor was consulted extensively and recommended the programs. The secured creditor had no objection to the programs and its judgment and judgement of the boards of directors involved was entitled to weight. The design of the programs demonstrated the appropriate regard for the criterion of necessity and were not overbroad. While 81.25 per cent of incentives appeared to be all but assured to the employees in KEIP, these employees had been working hard with the expectation the employer would seek approval of KEIP later. This good faith and constructive behaviour should not be discouraged. The targets were realistic and appropriate when set. When the historical compensation of the KEIP employees was taken into account, the incentive was close to 50 per cent of total compensation, which was reasonable.

Statutes, Regulations and Rules Cited:

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

U.S. Bankruptcy Code,

Counsel

Maria Konyukhova and Kathryn Esaw for Applicants.

Jeffrey Levine, for the Official Committee of Unsecured Creditors.

David Bish, for Richter Advisory Group, Monitor.

Danish Afroz, for Deerfield Management Company, L.P.

REASONS FOR DECISION

S.F. DUNPHY J.

1 This case raises for determination the always-troubling question of Key Employee Retention Plans (or "KERPs") and Key Employee Incentive Plans (or "KEIPs"). At the conclusion of the hearing. I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

2 For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

3 The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies' Creditors Arrangement Act*, R.S.C. 1990, c. C.-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the same corporate group sought relief pursuant to Chapter 11 of the United States Bankruptcy Code on the same day. The Chapter 11 case is being managed by Justice Glenn in the United States Bankruptcy Court for the Southern District of New York. Both courts have adopted a cross-border protocol.

4 As their names suggest, the Aralez group of companies are in the pharmaceutical industry. The debtor companies have operated in an integrated manner and have 41 employees at the Canadian entities and 23 in the Chapter 11 entities.

5 In addition to being operationally integrated, Aralez has an integrated capital structure as well. The secured credit

circumstances to determine whether the process has provided a reasonable means for *objective* business judgment to be brought to bear and whether the end result is objectively reasonable.

28 Perfect objectivity, like the Holy Grail, is unattainable. However, where business judgment is applied in a process that has taken appropriate account of as many of the opposing interests as can reasonably be brought into the equation, the result will adhere most closely to that unattainable ideal.

29 My review of the limited case law on the subject of KERP (or KEIP) approvals suggests that there are no hard and fast rules that can be applied in undertaking this task. However the principles to be applied do emerge. Morawetz J. suggested a number of considerations in *Cinram International Inc. (Re),* 2012 ONSC 3767 (CanLII), relying on the earlier decision of Newbould J. in *Grant Forest Products Inc. (Re)*, 2009 CanLII 42046 (ON SC)[1]. I reproduce here the synthesis of Morawetz J. (*Cinram*, para. 91):

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

d. the employees' history with and knowledge of the debtor;

e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

30 I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:

(a) Arm's length safeguards: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process -- from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.

(b) Necessity: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while

employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.

(c) Reasonableness of Design: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

(a) Arm's length safeguards

31 In my view, there is substantial evidence that the process of negotiating and designing both programs has benefitted from significant arm's length and objective oversight in the negotiation, design and implementation phases of these two programs.

32 The process leading to both programs began prior to the insolvency filings on August 10, 2018. Aralez had engaged A&M as its financial advisor for the restructuring process and asked A&M to help formulate both the key employee incentive and retention programs. A&M worked on program design in consultation with the debtor's legal counsel and with input from the compensation committee of the Aralez Pharmaceuticals Inc. Board of Directors, none of whom are beneficiaries of either program.

33 The Monitor has been consulted extensively. The Monitor has inquired into the design and objects of the proposed plans and has verified the levels of the proposed incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

34 The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

35 Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

36 The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

37 In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

38 The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

39 Any analysis of whether a program is over-broad must take into account the nature of the business. In some

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Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

2001: November 6 / 2002: April 26.

File No.: 28020.

[2002] 2 S.C.R. 522 | [2002] 2 R.C.S. 522 | [2002] S.C.J. No. 42 | [2002] A.C.S. no 42 | 2002 SCC 41

Atomic Energy of Canada Limited, appellant; v. Sierra Club of Canada, respondent, and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, respondents.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (92 paras.)

Case Summary

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance [page523] by the government triggered s. 5(1)(b) of the Canadian Environmental Assessment Act ("CEAA"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, inter alia, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in

accordance with Charter principles because a confidentiality order will have a negative effect on the s. 2(b) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[page524]

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the CEAA, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a Charter right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies [page525] both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an

action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Mentuck, [2001] 3 S.C.R. 442, 2001 SCC 76; M. (A.) v. Ryan, [1997] 1 S.C.R. 157; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; R. v. Keegstra, [1990] 3 S.C.R. 697; referred to: AB Hassle v. Canada (Minister of National Health and [page526] Welfare), [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; Ethyl Canada Inc. v. Canada (Attorney General) (1998), 17 C.P.C. (4th) 278; R. v. Oakes, [1986] 1 S.C.R. 103; R. v. O.N.E., [2001] 3 S.C.R. 478, 2001 SCC 77; F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35; Eli Lilly and Co. v. Novopharm Ltd. (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b). Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(b), 8, 54, 54(2)(b). Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.
J. Brett Ledger and Peter Chapin, for the appellant. Timothy J. Howard and Franklin S. Gertler, for the respondent Sierra Club of Canada. Graham Garton, Q.C., and J. Sanderson Graham, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

IACOBUCCI J.

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important [page527] issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and accordingly would allow the appeal.

II. Facts

operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the Charter. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while Dagenais dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the [page540] accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both Dagenais and New Brunswick was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the Charter than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the Charter and the Oakes test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in Dagenais, but broadened the Dagenais test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to [page541] allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve Charter rights, and that the ability to invoke the Charter is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflec[t] the substance of the Oakes test", we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the Dagenais framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 Mentuck is illustrative of the flexibility of the Dagenais approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with Charter principles, in my view, the Dagenais model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in Dagenais, New Brunswick and Mentuck, granting the confidentiality order will have a negative effect on the Charter right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with Charter

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Sherman Estate v. Donovan, [2021] S.C.J. No. 25

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and M.J. Moldaver, A. Karakatsanis, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.

Heard: October 6, 2020;

Judgment: June 11, 2021.

File No.: 38695.

[2021] S.C.J. No. 25 | [2021] A.C.S. no 25 | 2021 SCC 25 | 2021 CSC 25 | [2021] 2 S.C.R. 75 | 458 D.L.R. (4th) 361 | 66 C.P.C. (8th) 1 | 67 E.T.R. (4th) 163 | 72 C.R. (7th) 223 | 2021 CarswellOnt 8339 | 490 C.R.R. (2d) 237 | EYB 2021-391973 | 331 A.C.W.S. (3d) 489 | 2021EXP-1617

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate, Appellants; v. Kevin Donovan and Toronto Star Newspapers Ltd., Respondents, and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee, Interveners

(108 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Civil litigation — Civil evidence — Documentary evidence — Publication bans and confidentiality orders — Sealed evidence — Appeal by estate trustees from Ontario Court of Appeal decision that lifted sealing orders dismissed û-Application judge had granted sealing orders over probate files of prominent couple whose death had generated intense public interest — Privacy could be important public interest under test for discretionary limits on court openness where it could be shown protection of human dignity was at serious risk — Estate trustees had failed to establish serious risk to important public interest that overcame strong presumption of court openness — Information contained in probate files did not reveal anything particularly private or highly sensitive and did not strike at core identity of affected individuals — Record did not disclose serious risk of physical harm to affected individuals.

Wills, estates and trusts law — Proceedings — Practice and procedure — Application judge had granted sealing orders over probate files of prominent couple whose death had generated intense public interest — Privacy could be important public interest under test for discretionary limits on court openness where it could be shown protection of human dignity was at serious risk — Estate trustees had failed to establish serious risk to important public interest that overcame strong presumption of court openness —

Information contained in probate files did not reveal anything particularly private or highly sensitive and did not strike at core identity of affected individuals — Record did not disclose serious risk of physical harm to affected individuals.

Appeal by the estate trustees from a decision of the Ontario Court of Appeal that lifted sealing orders granted by the application judge. The unexplained deaths of a prominent couple in their home generated intense public interest. The estate trustees obtained sealing orders of the probate files. The orders were challenged by a journalist. The application judge sealed the probate files, finding the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal lifted the sealing orders on the basis that the privacy interest advanced lacked a public interest quality and there was no evidence of a real risk to anyone's physical safety.
HELD: Appeal dismissed.

Privacy could be an important public interest under the test for discretionary limits on court openness where it could be shown that the protection of human dignity was at serious risk. It had to be demonstrated that the information was sufficiently sensitive such that it could be said to strike at the biographical core of the individual and that there was a serious risk that without an exceptional order, the affected individual would suffer an affront to their dignity. The estate trustees had failed to establish a serious risk to the important public interest in privacy, predicated on dignity, that overcame the strong presumption of openness. The information contained in the probate files did not reveal anything particularly private or highly sensitive and did not strike at the core identity of the affected individuals. Merely associating the affected individuals with the couple's unexplained deaths was not sufficient to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The record did not show a serious risk of physical harm to any affected individuals. Any inference of a serious risk of physical harm was speculative.

Statutes, Regulations and Rules Cited:

Bill C-11, An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts, 2nd Sess., 43rd Parl., 2020

Canadian Charter of Rights and Freedoms, 1982, s. 2(b), s. 8

Charter of Human Rights and Freedoms, CQLR, c. C-12, s. 5

Civil Code of Quebec <TREATMTENT/> Article 35 R Article 41 R

Code of Civil Procedure, CQLR, c. C-25.01, Article 12

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Privacy Act, R.S.C. 1985, c. P-21

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Courts -- Open court principle -- Sealing orders -- Discretionary limits on court openness -- Important public interest -- Privacy -- Dignity -- Physical safety -- Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files -- Whether privacy and physical safety

They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Limited*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception

to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss -- resulting in inconvenience, even in upset or embarrassment -- is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar -- higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness -- for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order -- properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption -- albeit one that is rebuttable -- in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and