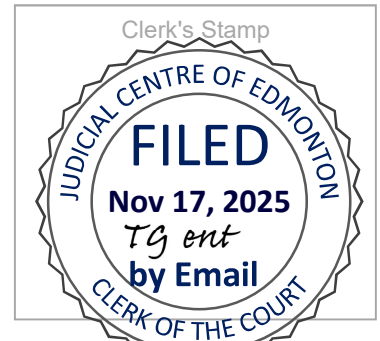


COURT FILE NO. 2503 00016

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 EXTENSION OF STAY OF PROCEEDINGS**

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I. INTRODUCTION and SUMMARY OF CCAA PROCEEDINGS

1. In this Application, KMC Mining Corporation (“**KMC**” or the “**Applicant**”) seeks an Order:
 - a) extending the stay of proceedings (“**Stay Period**”) as against KMC to and including January 31, 2026 (or such further date as the Monitor may recommend), in respect of all proceedings, rights and remedies against KMC including its respective businesses and property, or the Monitor;
 - b) declaring that the Stay Period applies to, and prohibits any steps being taken in, Court File No. 2103 02652 (*Wade Wilson v KMC Mining Corporation*) (the “**Wilson Action**”); and
 - c) extending the term of two Sealing Orders previously granted in these proceedings, with respect to two affidavits (or portions thereof) from December 31, 2025 until June 30, 2026.
2. On December 5, 2024, KMC filed a Notice of Intention to Make a Proposal (“**NOI**”) under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“**BIA**”) in Court File No. (24-3162620) (the “**NOI Proceedings**”).
3. On January 10, 2025, an Initial Order pursuant to section 11 of the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-26, as amended (the “**CCAA**”) was granted by the Honourable Justice M.J. Lema in respect of KMC, which continued the NOI proceedings into these CCAA proceedings, and which included a Stay Period to and including January 20, 2025. FTI Consulting Canada Inc. (“**FTI**”) is the Monitor within the CCAA proceedings (“**Monitor**”).
4. Also on January 10, 2025, the Honourable Justice M.J. Lema also granted an Order approving the sales and investment solicitation process (“**SISP**”) (with the Order approving the SISP being the “**Order – Approve SISP**”) over substantially all of KMC’s assets (“**Property**”). Ernst & Young Orenda Corporate Finance Inc. (the “**Sales Agent**”) administered the SISP as Sales Agent, with oversight from the Monitor.
5. On January 20, 2025, the Honourable Justice J.T. Nielson granted, *inter alia*, an amended and restated initial order (“**ARIO**”) which, *inter alia*, extended the Stay Period to June 16, 2025.
6. Concurrent with the granting of the ARIO, the Court granted an Order establishing a process for the sale or return of KMC’s leased equipment (the “**Lease Equipment Return Process Order**”).
7. On April 17, 2025, the Honourable Justice D.A. Mah granted, *inter alia*, a Sale Approval and Vesting Order (“**SAVO**”) approving a transaction arising from the SISP whereby substantially all of KMC’s Property was sold to a third-party purchaser (the “**Transaction**”) for proceeds in excess of \$100 million. The Transaction closed on May 2, 2025.

8. Concurrent with the granting of the SAVO, the Court granted an Order authorizing and directing the Monitor to make interim distributions of up to 66 2/3% of the net sale proceeds from the Transaction to those secured creditors whose collateral was sold as part of the Transaction.
9. On May 23, 2025, the Honourable Justice L.K. Harris granted KMC's application which extended the Stay Period to and including July 31, 2025 (the "**First Extension Order**") as well as certain other relief including approving a cost allocation and further distribution.
10. On July 30, 2025, the Honourable Justice D.R. Mah granted KMC's application which extended the Stay Period to and including November 30, 2025 (the "**Second Extension Order**") as well as certain other relief related to return of a landlord security deposit, assignment of certain insurance claims to secured creditors and settling certain grievance claims of Local Union No. 955 members.

II. FACTS¹

11. The detailed facts are set out in the Affidavit of Bryn Jones ("**Jones Affidavit #1**") sworn December 31, 2024, Affidavit of Bryn Jones sworn January 14, 2025 ("**Jones Affidavit #2**"), Affidavit of Bryn Jones sworn April 7, 2025 ("**Jones Affidavit #3**"), Affidavit of Daniel Klemke sworn May 9, 2025 ("**Klemke Affidavit**"), Affidavit of Daniel Klemke sworn July 21, 2025 ("**Klemke Affidavit #2**") and the Affidavit of Daniel Klemke sworn November 16, 2025 ("**Klemke Affidavit #3**").
12. The salient facts will generally be referred to directly in argument as outlined below. Specific additional facts which are germane to the background of this matter, and updates on the activity of KMC since the last Court appearance on July 30, 2025 follow on a summary basis.
13. As mentioned, on April 17, 2025, the Court granted the SAVO, which approved the Transaction. No party opposed the Transaction. The Transaction had the support of KMC's primary secured creditor (the Syndicate), various equipment lessors whose equipment was included in the Transaction and the Monitor.
14. The Transaction closed on May 2, 2025 and generated sale proceeds in excess of \$100 Million.
15. As of April 4, 2025, KMC employed 92 full-time employees or subcontractors, of which 14 were located at its head office in Edmonton, Alberta, 40 on a labour supply project in British Columbia, and 38 field employees working in Fort McMurray or a field office location maintained there.

¹ Affidavit of Daniel Klemke sworn November 16 ("**Klemke Affidavit #3**") at paras 13, 16, 21-25.

16. With the Transaction closed, and most of KMC's current operations having been wound down, KMC took steps to reduce its workforce.
17. At present time KMC has 5 employees full and part-time in Edmonton and 2 on labour and supply contracts in Alberta with the purchaser in the Transaction.
18. With respect to one labour and supply contract, as mentioned in my prior Affidavit, KMC had in place a purchase order with Hudbay Minerals ("**Hubday**") at its copper mountain mine in British Columbia to supply equipment operators to the site. That purchase order commenced at or around the date of the Initial Order and concluded in September 2025, with the final invoice paid to KMC in November 2025.
19. As more specifically described within the argument below, chief among the factors necessitating these CCAA proceedings was the sudden and unexpected cancellation of substantial scopes of work under contracts between KMC and its main client, Suncor Energy Inc. ("**Suncor**"). A thorough analysis as to potential claims KMC may have due to those cancellations has commenced and been ongoing.

III. ISSUES

20. The issues to consider in this Application before the Court are:
 - a) whether the Stay Period ought to be extended to January 31, 2026. In that regard, the test for making that determination is:
 - i) whether circumstances exist that make the Order appropriate; and
 - ii) whether KMC has acted, and is acting, in good faith and with due diligence; and
 - b) with respect to the extension of certain Sealing Orders, whether the importance of protecting sensitive business information for a further period of time outweigh the deleterious effects of restricting the accessibility of Court proceedings.

IV. ARGUMENT

A. Extension of the Stay Period

21. It is respectfully submitted that the extension of the stay of proceedings should be granted as the extension of the Stay Period is appropriate and KMC has acted in good faith and with due diligence.
22. Section 11.02(2) of the CCAA provides the jurisdiction for the Court to extend the Stay Period following an Initial Order:

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.²

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

The court shall not make the order unless:

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.³

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

25. The Applicant always has the onus.

Appropriate Circumstance

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

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

² CCAA at section 11.02(2) [TAB 1]

³ CCAA at section 11.02(3) [TAB 1]

⁴ *Re Canada North Group Inc.*, 2017 ABQB 508 at para 33 [TAB 2]

⁵ *Re Canada North Group Inc.*, 2017 ABQB 508 at para 34 [TAB 2]

28. The circumstances necessitating these CCAA proceedings arose due to several factors, though chief among those factors being the sudden and unexpected cancellation of substantial scopes of work under contracts between KMC and Suncor or affiliates.⁶
29. Prior to these CCAA proceedings, Suncor was KMC's most significant, if not only, customer. KMC had been providing contracting mining services to Suncor for several decades.⁷
30. Suncor's contracting practice generally, and with KMC specifically, utilizes a master Multiple Use Agreement ("**MUA**") which sets out general terms and conditions, and allows for the entering of multiple sub-agreements, contracts or purchase orders under the umbrella of the MUA for any number of different projects or scopes of work.⁸
31. KMC believes it has substantial claims against Suncor which can be broadly characterized as follows:
- a) a claim for the impacts of adverse site conditions and extended hauling distances on the 2024 Fort Hills Overburden scope of work (the "**Condition Impact Claim**");
 - b) a claim for demobilization costs as permitted under the MUA and applicable purchase order for the 2024 Fort Hills Overburden scope of work (the "**Demobilization Claim**");
 - c) a claim for damages arising from the cancellation of the 2024 Fort Hills Overburden scope of work for convenience (the "**Overburden Cancellation Claim**");
 - d) a claim for damages arising from the cancellation of the waste stream and rejects scope of work (the "**Rejects Cancellation Claim**"); and
 - e) a claim for damages for the breach of the Settlement and Release Agreement arising from the cancellation of the 2019 Overburden Removal Contract (the "**Breach of Settlement Claim**").⁹
32. KMC's legal counsel conducted a high-level overview of the potential claims against Suncor for, *inter alia*, the circumstances described above. That evaluation has concluded and has been reviewed. The combined damage estimate at this time is in the tens of millions of dollars, with further evaluation ongoing that could materially increase said estimate.¹⁰
33. KMC has been engaged with litigation funders in assessing its options for pursuit of the claims against Suncor. As part of that process, KMC has engaged separate legal counsel to provide a second opinion on the potential claims against Suncor. That evaluation is ongoing, with the second opinion scheduled to be

⁶ Klemke Affidavit #3 at para 25.

⁷ Klemke Affidavit #3 at para 26.

⁸ Klemke Affidavit #3 at para 27.

⁹ Klemke Affidavit #3 at para 28.

¹⁰ Klemke Affidavit #3 at para 29.

delivered by the end of November. If successful, even in part, the claims against Suncor, and recovery therefrom, would have a material, positive outcome for KMC's stakeholders.¹¹

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

- a) working to wind-up its non-union staff's pension plan with Canada Life/London Life, which is now complete subject to the pension regulator in Alberta confirming the pension termination is approved (with pension members thereafter being free to move their pension assets or maintain individual accounts with Canada Life);
- b) working with the Workers' Compensation Board ("**WCB**") to reconcile 2024 accounts based on a reduced actual payroll than was originally forecasted, reconciliation of premiums paid and credits owed, and to finalize rebates from WCB. KMC has received a credit refund from WCB for 2024 and as KMC has certain mechanics still working, a 2025 WCB account reconciliation will be necessary to finalize any additional refunds;
- c) KMC is working with its heavy equipment insurer with respect to refunds from certain insurance policies previously held by KMC. The latest update is that approximately \$500,000 is expected to be refunded to KMC by end of November 2025; and
- d) KMC is both a Plaintiff and Defendant in actions related to a new Komatsu 830E that KMC rented from SMS Equipment ("**SMS**"), which was destroyed by fire within 10 hours of commencing work. KMC suffered a loss of approximately \$600,000 related to loss of KMC property (tires) as well as cost of removing burned materials from the site where the fire occurred. KMC has taken steps to preserve their rights to this potential claim (by both commencing litigation to preserve limitation periods, and entering into standstill agreements with its insurer with respect to any insurance claim).¹²

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

Good Faith

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

¹¹ Klemke Affidavit #3 at paras 30-32.

¹² Klemke Affidavit #3 at para 33.

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

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

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

"Good faith" is defined as "honesty of intention" in the Concise Oxford Dictionary. Regardless of which definition is used, honesty is at the core...¹³

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

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

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

San Francisco has met the prerequisites that it has acted and is acting with due diligence and in good faith in working towards presenting a plan of arrangement to its creditors. Appreciating that the CCAA is to be given a broad and liberal interpretation to give effect to its remedial purpose, I am satisfied that, in the circumstances, extending the stay of proceedings is appropriate.¹⁴

¹³ *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 at paras 14-16 [TAB 3]

¹⁴ *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 at paras 30-32 [TAB 3]

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

- a) KMC took steps to return certain assets which were secured to various lessors, pursuant to the Lease Equipment Return Order granted January 20, 2025;¹⁵
- b) KMC has reduced the number of employees it employs, as necessitated by current downsized operations;¹⁶
- c) KMC paid in full the interim lending facility under these CCAA proceedings;¹⁷
- d) the SISP was implemented, with the Property marketed on a worldwide basis by the Sales Agent, and with due diligence undertaken by parties as far away as Australia;¹⁸
- e) pursuant to the SISP, one party made an *en bloc* offer for substantially all the assets of KMC (the Transaction), including the assignment of certain contracts to which KMC was a party;¹⁹
- f) no party opposed the Transaction, and KMC's main secured lender (the Syndicate), the Monitor and lessors whose assets were to be included in the Transaction supported the same;²⁰
- g) the Transaction closed, generating sale proceeds of over \$100 million;²¹
- h) KMC maintained, until September 2025, a purchase order with Hudbay at its copper mountain mine in British Columbia to supply equipment operators to the site;²²
- i) KMC, through counsel, undertook a review and analysis of potential claims against Suncor which would, if successful even in part, have a material positive impact on stakeholders. KMC has engaged with litigation funders, and has engaged separate legal counsel to provide a second opinion on the potential claim;²³ and
- j) KMC has continued to act on various matters as part of its wind down process, including winding down its non-union pension, reconciling amounts paid to WCB, reconciling refunds under its heavy equipment insurance policies, and evaluation of other potential claims which may have monetary benefit to KMC.²⁴

¹⁵ Jones Affidavit #3 at paras 17-21.

¹⁶ Klemke Affidavit #3 at paras 23-24.

¹⁷ Jones Affidavit #3 at para 16.

¹⁸ Jones Affidavit #3 at para 43.

¹⁹ Klemke Affidavit #3 at para 11.

²⁰ Klemke Affidavit #3 at para 15.

²¹ Klemke Affidavit #3 at para 16.

²² Klemke Affidavit #3 at para 24.

²³ Klemke Affidavit #3 at paras 29-30.

²⁴ Klemke Affidavit #3 at para 33.

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

Due Diligence

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

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

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

B. Stay of Proceedings – Wilson Action

44. KMC is a Defendant in the Wilson Action, which is a claim that seeks to certify a class action claim related to alleged underpayment of severance and pension plan payments to certain KMC former employees.

45. While KMC wholly disputes the claim, the claim is stayed by virtue of the ARIO granted January 20, 2025 in these proceedings, and the subsequent Stay Period extensions. With respect to the Plaintiff in the Wilson Action, there appears to be some confusion that the Stay Period applies to their action.

46. Presently, the Plaintiff in the Wilson Action has an Application scheduled for November 20, 2025 to, among other things, seek summary judgment and to certify the action as a class action.

47. To avoid any lack of clarity on the matter and to avoid the need for KMC to be expending resources responding to a claim that is clearly stayed, KMC seeks a declaration from the Court that the Wilson Action is stayed.

²⁵ *Cantrail Coach Lines Ltd., Re*, 2005 BCSC 351 at para 22 [TAB 4].

C. Extension of Sealing Orders

48. 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*.²⁶
49. 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.²⁷
50. 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.²⁸
51. The Applicant seeks extension of the Sealing Orders to June 30, 2026 with respect to:
- a) Exhibit “I” of the Confidential Affidavit of Daniel Klemke sworn December 6, 2024 (in the NOI proceedings, Court File No. 24-3162620, which were taken up and continued in these CCAA proceedings by the Initial Order); and
 - b) the Confidential Affidavit of Bryn Jones sworn April 7, 2025.
52. Sealing Orders with respect to the above documents were granted in this Action on January 10, 2025 and April 17, 2025, with the sealing to expire on December 31, 2025. The Applicants seek that be extended to June 30, 2026.

²⁶ *Alberta Rules of Court*, Alta Reg 124-2010, Division 4 of Part 6.

²⁷ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 45 [TAB 5].

²⁸ *Sherman Estate v Donovan*, 2021 SCC 25 at para 38 [TAB 6].

53. The information within the aforementioned materials contains certain commercially sensitive information related to, among other things, KMC's contracts with Suncor, which remains a live issue.²⁹ KMC is unaware of any other party which would be negatively affected by this continued sealing.
54. Sealing is the least restrictive method available to prevent the dissemination of the confidential information. The purpose of the sealing order, being to protect sensitive commercial information, far outweigh the deleterious effects of restricting the accessibility of Court proceedings.
55. The Applicant submits that the Sealing Order is appropriate in the circumstances and ought to be granted.

V. CONCLUSIONS AND RELIEF SOUGHT

56. The extension of the Stay Period to and including January 31, 2026 is just and appropriate, and consistent with the objectives of the CCAA. In all the circumstances this Application ought to be allowed.

DATED this 17th day of November, 2025.

DUNCAN CRAIG LLP

Per:



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

²⁹ Affidavit #3 of Daniel Klemke at para 41.

TABLE OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11.02
2. *Re Canada North Group Inc.*, 2017 ABQB 508
3. *San Francisco Gifts Ltd., Re*, 2005 ABQB 91
4. *Cantrail Coach Lines Ltd., Re*, 2005 BCSC 351
5. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
6. *Sherman Estate v Donovan*, 2021 SCC 25

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

Canada Statutes

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

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

Notice



Current Version: Effective 01-11-2019

SECTION 11.02

Stays, etc. - initial application

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

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. - other than initial application

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

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

Restriction

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

End of Document

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

Canada Statutes

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

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

Notice



Current Version: Effective 18-09-2009

SECTION 11.3

Assignment of agreements

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

Exceptions

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

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

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

- (a) under an eligible financial contract;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

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

Copy of order

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

2017 ABQB 508

Alberta Court of Queen's Bench

Re Canada North Group Inc

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

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

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

S.D. Hillier J.

Heard: July 27, 2017

Judgment: August 17, 2017

Docket: Edmonton 1703-12327

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J. Oliver, for Business Development Bank of Canada

T.M. Warner, for ECN Capital Corp.

M.J. McCabe, Q.C., for PricewaterhouseCoopers

R.J. Wasylyshyn, for Weslease Income Growth Fund LP

H.M.B. Ferris, for First Island Financial Services Ltd.

G.F. Body, for Canada Revenue Agency

Subject: Insolvency

Headnote

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

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

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

- the leasing arrangement with Weslease has been extended for use by the Group valued at approximately \$6M and listed as: three Jack+Jill dorms, two power distribution centres and one waste water treatment plant;
- expansion of the Stay to include 1919 is reasonable.

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

V Law

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

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

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

36 Pursuant to s. 11.02(3), the applicant is required to demonstrate that it has acted, and continues to act, in good faith. Honesty is at the core of "good faith": *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.) at para 16, (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:

San Francisco Gifts Ltd., Re, 2005 ABQB 91, 2005 CarswellAlta 174

2005 ABQB 91, 2005 CarswellAlta 174, [2005] A.W.L.D. 1426, [2005] A.J. No. 131...

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 Bridgdear, Howard J. Sniderman for Companies

Michael McCabe, Q.C. for Monitor, Browning Crocker Inc.

Jeremy H. Hockin for Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc.; 20 Vic Management Ltd.; Morguard Investments Ltd.; Morguard Real Estate Investments Trust; Millwoods Town Centre, Edmonton; Park Place, Lethbridge; Metro Town, Burnaby, B.C.; Northgate Mall, Edmonton; Brandon Shopping Mall, MB; Herongate Mall, Ottawa; Westmount Shopping Centre, London; Village Mall, St. John's NFLD; Kingsway Garden Mall; Westbrook Mall; Bonnie Doon Shopping Centre; Red Deer Centre; Marlborough Mall; Circile Park Mall; Kildonan Place Mall; Cambridge Centre; Oshawa Centre; Tecumseh Mall; Downtown Chatham Centre; Simcoe Town Centre; Niagara Square; Halifax Shopping Centre; RioCan Property Services; 1113443 Ontario Inc.; Shoppers World, Brampton, ON; Tillicum Mall, Victoria, BC; Confederation Mall, Saskatoon, SK; Parkland Mall, Yorkton, SK; Cambrian Mall, Sault Ste. Marie, ON; Northumberland Mall, Cobourg, ON; Orangeville Mall, Orangeville, ON; Renfrew Mall, Renfrew, ON; Orillia Square Mall, Orillia, ON; Elgin Mall, St. Thomas, ON; Lawrence Square, North York, ON; Trinity Conception Square, Carbonear, NFLD; Charlottetown Mall, Charlottetown PEI; Timiskaming Square

Kent Rowan for Locher Evers International, Neuvo Rags, Quality Press

Tim Shelley (Agent Employee) for Lauer Transportation Services

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.b Grant of stay](#)

XIX.2.b.vii Extension of order

Headnote

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

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

Table of Authorities

Cases considered by *Topolniski J.*:

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

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

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

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

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

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

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

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

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

San Francisco Gifts Ltd., Re, 2005 ABQB 91, 2005 CarswellAlta 174

2005 ABQB 91, 2005 CarswellAlta 174, [2005] A.W.L.D. 1426, [2005] A.J. No. 131...

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

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

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

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

Background

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

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

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

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

(a) An investigation by the St. John’s, Newfoundland, Fire Marshall, arising from a complaint about a faulty lamp sold by San Francisco, led to the discovery that the lamp bore a counterfeit safety certification label commonly called a “UL” label.³ The R.C.M.P. conducted searches of San Francisco stores across the country, its head office, and a warehouse, which turned up other counterfeit electrical UL labels as well as counterfeit products bearing the symbols of trademark holders of Playboy, Marvel Comics and others.

(b) Counterfeit UL labels were found in the offices of Slawsky and San Francisco’s Head of Sales. There was also a fax from “a Chinese location” found in Slawsky’s office that threatened that a report to Canadian authorities about the counterfeit safety labels would be made if payment was not forthcoming.

(c) [Copyright Act](#) charges against Slawsky were withdrawn when San Francisco entered a plea of guilty to the charges;

(d) The sentencing judge accepted counsels’ joint submission that a \$150,000.00 fine would be appropriate. In passing sentence, he condemned the company’s conduct, particularly as it related to the counterfeit labels, expressing grave concern for the safety of unknowing consumers.⁴

(e) San Francisco was co-operative during the R.C.M.P. investigation and the Crown’s prosecution of the case.

(f) San Francisco had been convicted of similar offences in 1998.

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

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

Analysis

Fundamentals

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

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

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

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

Meaning of "Good Faith"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

on appeal²⁹ on the basis that there was nothing in the plans that sanctioned wrongful acts or omissions. The Court of Appeal remitted the matter back for reconsideration on the merits, stating that while the discretion to be exercised must relate to the merits or propriety of the plans, the court could consider whether approving the plans would sanction possible wrongdoing or otherwise hinder later litigation.

Supervising Court's Role

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

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

Conclusions

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

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

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

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

Application granted.

Schedule Time Frames

1. February 14, 2005 Date Monitor posts Notice to Creditors on website
2. February 14, 2005 Date Monitor publishes the advertisement for one day in Globe & Mail or National Post
3. April 1, 2005 Date for receipt of claims from creditors

2005 BCSC 351

British Columbia Supreme Court

Cantrail Coach Lines Ltd., Re

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

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

Master Groves

Heard: March 1, 2005

Judgment: March 1, 2005

Docket: Vancouver B050363

Counsel: H. Ferris for Petitioner

R. Finlay for Creditor (Volvo)

Subject: Insolvency

Headnote

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

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

APPLICATION for extension of time for filing bankruptcy proposal.

Master Groves:

- 1 This is my decision on the matter of the proposal of Cantrail Coach Lines Ltd. who I will refer to as Cantrail.
- 2 Cantrail applies to the Court pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act* for extension of time for filing a proposal.
- 3 VFS Canada Inc., who I will refer to as Volvo, a secured creditor of Cantrail, opposes the application and cross-applies for a termination of the proposal period and for an order to substitute the current trustee for a trustee of their choosing, though the substance of the substitution of the trustee application was not argued before me.
- 4 The facts are that Cantrail is a tour bus operation, a family-owned business, operating in the Lower Mainland of British Columbia, on Vancouver Island and into Washington State. They are a company of some 25 years standing. They have 26 employees and they have 22 buses in their operations and two headquarters, one in Delta, British Columbia and one in Port Alberni.
- 5 Over one half of their buses, 13 in total, are secured by the secured creditor Volvo. Cantrail appears to have been facing some financial difficulties recently which a number of companies in the travel industry are facing. It is certainly true in this part of the world that there has been a general decline in the travel industry related to what are now historical factors such as

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

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

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

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

The insolvent person may, before the expiration of a 30-day period mentioned in subsection (8), apply to the Court for an extension of that period and the Court may grant such extensions not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiration of the 30-day period mentioned in subsection (8), if satisfied on each application that:

- (a) the insolvent person has acted and is acting in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

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

The Court may, on application by a creditor, declare terminated before it actually expires the 30-day period mentioned subsection (8) or any extension thereof granted under subsection (9) if the Court is satisfied that:

- (a) the insolvent person has not acted or is not acting in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiry of the period in question,
- (c) the insolvent person will not likely be able to make a proposal before the expiry of the period in question that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application granted.

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 Welfare)*, [2000] 3 F.C. 360, aff'd (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

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 — 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 <TREATMENT/> 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