COURT FILE NUMBER	**2401-02680**
COURT	COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
	AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.
DOCUMENT	**SUPPLEMENTAL BRIEF OF LAW AND ARGUMENT OF ARENA INVESTORS LP**

Clerk's Stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors Suite 3400, 350 7 Avenue SW Calgary Alberta T2P 3N9 Attention: Jessica Cameron/Anthony Mersich Phone: (403) 261-9468/(587) 233-4124 Email: jcameron@fasken.com/amersich@fasken.com

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SUPPLEMENTAL BENCH BRIEF OF ARENA INVESTORS LP

APPLICATION TO BE HEARD BY
THE HONOURABLE JUSTICE B.E.C. ROMAINE

November 27, 2024

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I. INTRODUCTION:

1. This supplemental brief of law is submitted by Arena Investors LP ("**Arena**") in its capacity as the senior secured creditor of Razor Energy Corp. ("**Razor**"), Razor Holdings GP Corp. and Blade Energy Services Corp. (collectively the "**Razor Entities**") in respect of their application seeking approval of a transaction (the "**RVO Transaction**"), scheduled for November 27, 2024 (the "**RVO Application**").

2. Arena filed and submitted its first brief in respect of the RVO Application on November 5, 2024 (the "**First Arena Brief**"). Capitalized terms used herein have the same meaning as in the First Arena Brief and the Affidavit of Greg White, sworn November 5, 2024 (the "**White Affidavit**") unless otherwise defined.

3. Since filing the First Arena Brief, additional information regarding the proposed distributions under the RVO Transaction have come to light and additional materials have been filed by other parties in respect of the RVO Application, including:

   (a) The Eighth Report of the Monitor, dated November 6, 2024 (the "**Eighth Report**"); and

   (b) The Affidavit of Ron Laing of Canadian Natural Resources Limited ("**CNRL**"), sworn November 6, 2024 (the "**Laing Affidavit**").

4. Notwithstanding the fact that Arena is the senior secured creditor of Razor, the RVO Transaction contemplates payment of certain unsecured post-filing claims in priority to repayment of the Arena Indebtedness, such post-filing claims include:

   (a) Conifer Energy Inc. ("**Conifer**"): $777,000;

   (b) Canadian Natural Resources Limited ("**CNRL**"): $191,000;

   (c) "Paramount": $163,000, and

   (d) An omnibus category of "Post-Filing Trade Payables" in the amount of $1.328 million,

(collectively, the "**Contested Post-Filing Claims**"). [1]

5. The Transaction also contemplates payment of what the Applicants have termed "Regulatory Payments" to all of the Alberta Energy Regulator, Orphan Well Association, Alberta Petroleum and Marketing Commission, and now we have learned, Indian Oil and Gas Canada ("**IOGC**"). With the exception of the proposed payments to IOGC, these so-called Regulatory Payments were discussed in Arena's First Brief and total $1.693 million.

6. Between the Contested Post-Filing Claims and the "Regulatory Payments", this is $4.152 million, more than half of the secured indebtedness owing to the Arena Lenders, that is proposed to be paid from the Transaction proceeds to unsecured post-filing creditors.

7. Generally, post-filing claims are unsecured claims that rank subordinate to the claims of pre-filing secured creditors, unless the post-filing claim is secured by a court-ordered priority charge.[2] Although it is expected that amounts owing for post-filing goods and services will be paid on an ongoing basis, and will be kept current,[3] post-filing creditors do not enjoy any priority to secured creditors if their claims are not paid when due, unless the court has granted a charge to secure those amounts.[4]

8. No such charges have been granted in these proceedings. Therefore, any payment to post-filing trade creditors ahead of repayment of the Arena Indebtedness in full constitutes a preferential payment and should not be approved as part of the RVO Transaction. Rather, Arena submits that the amounts proposed to be paid as Contested Post-Filing Claims are subject to its security and should be distributed to Arena in partial satisfaction of the Arena Indebtedness.

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[1] Eighth Report of the Monitor, dated November 6, 2024 at para 94 (the "**Eighth Report**"). Arena has also been provided with an updated waterfall analysis from the Applicants, which the Applicants have advised will provided to the Court in advance of the hearing either by themselves, or the Monitor.

[2] See generally, *Smoky River Coal Ltd., Re*, 2000 ABQB 621 [***Smoky River QB***] [**TAB 1**].

[3] *Doman Industries Ltd., Re*, 2004 BCSC 733 at para 29 [**TAB 2**].

[4] See *Smoky River QB* [**TAB 1**].

II. FACTS:

9. Arena holds valid and enforceable security interests securing the Arena Indebtedness,[5] which is secured against all of Razor Energy's and Razor LP's respective petroleum and natural gas interests, one hundred percent (100%) of the limited partnership units in Razor Royalties LP and one hundred percent (100%) of the common shares in Razor Holdings and the gross overriding royalties ("**GORRs**") granted by Razor Energy in favour of Razor Royalties LP. [6]

10. The RVO Transaction contemplates paying the Contested Post-Filing Claims;[7] however, it does not contemplate any repayment to Arena in respect of the Arena Indebtedness.

11. The Contested Post-Filing Claims arise from processing and operating costs incurred in relation to joint venture and joint operating agreements with Razor Energy (the "**Joint Agreements**").[8] The Joint Agreements provide each of Conifer and CNRL with a right of setoff for such costs against Razor Energy's revenue generated under each of those joint agreements; however, each of their respective Contested Post-Filing Claims, as well as the claim from Paramount, relate to additional costs incurred that are in excess of the amounts setoff under the Joint Agreements.[9]

12. At least Conifer and CNRL[10] have each exercised their setoff remedies under their Joint Agreements in order to collect their share of processing and operating costs,[11] despite the stay of proceedings against the Razor Entities and their property and business provided by the Amended and Restated Initial Order. Setoff is a recognized exception to the general scheme of priorities of creditors;[12] however, Conifer and CNRL, and potentially

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[5] Eighth Report at para 34.

[6] First Affidavit of Doug Bailey February 20, 2024 at para 54.

[7] Eighth Report at para 88, 89 & 94.

[8] Eighth Report at para 85(b).

[9] *Ibid.*

[10] As Paramount has not filed any materials yet with respect to this Application, it is unclear to Arena whether Paramount has similarly been exercising set-off rights. To the extent that they have, this argument would apply with equal force to the Paramount claim.

[11] *Ibid.*

[12] Montréal (Ville) c. Restructuration Deloitte Inc., 2021 SCC 53 at para 71 [**TAB 3**].

Paramount[13], seek a further exception to the scheme of priority of distributions, by obtaining payment of their Contested Post-Filing Claims, through the RVO Transaction, and in priority to the Arena Indebtedness, which is secured.

13. Additionally, Conifer sought, and was denied, payment of its Contested Post-Filing Claim as well as a court-ordered priority charge to secure its repayment in an application brought in these proceedings before the Honourable Justice Mah on September 11, 2024 (the "**Conifer Application**").[14]

14. None of CNRL, Paramount, or any other post-filing creditor have sought or otherwise obtained any form of charge to secure their respective amounts owing under the Contested Post-Filing Claims in priority to the Arena Indebtedness or at all.[15]

III. ISSUE:

15. The RVO Application brought by the Razor Entities requires consideration of the following additional issue:

    (a) Do the Contested Post Filing Claims rank in priority to the Arena Indebtedness?

16. Arena respectfully submits that this issue is answered in the negative, and as a result, those amounts should be paid to Arena, rather than the post-filing trade creditors.

IV. LAW & ANALYSIS:

17. The court in a CCAA proceeding is not free to disregard the general scheme of priorities of creditors without good reason.[16] Although the CCAA does not expressly set out a priority distribution scheme, the absence of such a statutory scheme does not entitle unsecured creditors to obtain enhanced priority over secured creditors.[17]

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[13] It is unknown to Arena whether Paramount has been exercising set-off rights against Razor Energy throughout these proceedings.

[14] See *Razor Energy Corp (Re)*, 2024 ABKB 553 at para 1 [***Mah Decision***] [**TAB 4**].

[15] Although CNRL advised this Court if the Conifer Application had succeeded, it, along with other operators, would likely would have sought similar relief: *Mah Decision* at para 8 [**TAB 4**].

[16] *Smoky River QB* at para 34 [**TAB 1**].

[17] *Windsor Machine & Stamping Limited (Re)*, 2009 CarswellOnt 4471 at para 43 [***Windsor Machine***] [**TAB 5**].

18. The Amended and Restated Initial Order granted in these proceedings (which follows the Court's template Order) authorizes and permits, but does not obligate, the Razor Entities to pay post-filing obligations on an ongoing basis. Paragraph 7 of the ARIO provides as follows:

> Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business, in the ordinary course, after this Order, and in carrying out the provisions of this Order…

19. This Court has interpreted the above-noted permissive language in the template Initial Order to neither create a priority charge in favour of a post-filing claimant, nor mandate payment of post-filing obligations.[18]

20. Section 11.4 of the CCAA provides that the court may grant a charge over the debtor's property in favour of a critical supplier in order to secure the payment of the post-filing goods or services provided by that supplier; however, in the absence of such a charge, an unpaid supplier of post-filing goods and services has the status of an unsecured creditor.[19]

21. The rationale underpinning the restriction on the court's broad authority under the CCAA was set out in the Court of Appeal's reasons in *Smoky River Coal Ltd., Re*, where the Court of Appeal stated as follows:

> It is particularly important that the terms and scope of any charge created by an order be clearly defined. Creditors need to know from the outset whether or not they are entitled to benefit in any charge or other priority created by the order. Those extending credit, be it trade credit or otherwise, should not be forced to participate in litigation after the CCAA proceeding to discover whether or not they hold some form of security or are entitled to a super-priority. **Similarly, secured creditors of a troubled company need to know from the outset the effect the CCAA process will have on their security. They should not be forced to wait until the end of the proceedings to discover that their security has been whittled away due**

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[18] *Sanjel Corporation (Re)*, 2017 ABQB 69 at paras 21, 22 & 30 [**TAB 6**].

[19] *Windsor Machine* at para 46, where the claims for termination pay and severance pay were in respect of the post-filing period (see para 1 and 5(f)) [**TAB 5**]; *Avison Young Real Estate Alberta Inc. v. Bosa Properties (Eau Claire) Inc*, 2015 ABQB 208 at para 30 [***Eau Claire***] [**TAB 7**].

> **to a broad judicial interpretation of qualification for super-priority status.** A precise CCAA order will ensure commercial practicality by allowing all creditors of the debtor company to properly adjust the terms of their credit.[20] (emphasis added)

22. In addition to being able to seek a court-ordered priority charge, a debtor's trade creditors have additional protections under the CCAA in respect of the provision of post-filing goods and services. Section 11.01 of the CCAA provides that a stay of proceedings does not have the effect of:

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

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

23. As a result CCAA s. 11.01, trade creditors can protect themselves by requiring prepayment for goods and services or imposing cash on delivery terms on a debtor company, amongst other things.

24. In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, the Saskatchewan Court of Appeal provided a summary of a supplier's options when dealing with a company restructuring under the CCAA, and noted as follows:

> When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the CCAA, s. 11.3 [now CCAA, s. 11.01] allows the supplier the right:
>
> (a) to refuse to supply any such goods or services at all;
>
> (b) to supply such goods or services on a "cash on demand" basis only;
>
> (c) to negotiate with the insolvent corporation for the amendment of the CCAA Order to create a post-filing supplier's charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or
>
> (d) to take the risk of supplying goods or services on credit.[21]

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[20] *Smoky River Coal Ltd., Re*, 2001 ABCA 209 at para 17 [**TAB 8**].

[21] 2007 SKCA 72 at para 44 [**TAB 9**].

25. As noted above, at the Conifer Application, Conifer sought to have Razor pay all post-filing amounts owing to it, and further, it sought a charge against Razor's property to secure all such post-filing amounts, with such charge ranking only behind the other court-ordered charges and ahead of Arena's security.[22] Justice Mah considered and denied all the relief sought by Conifer, pursuant to his reasons issued on September 19, 2024 in these proceedings.[23]

26. Conifer, as well as the other post-filing claimants, cannot, through the RVO Transaction, now obtain the substantive benefit of a priority charge that was denied by this Court only two months ago.

27. The Monitor justifies paying the Contested Post-Filing Claims on the basis that Razor represented at the Conifer Application that "…the current structure of the [RVO] transaction contemplates payment of Conifer's post-filing claim, other than the $680,000 deposit".[24] In this regard, Arena is in no different position than the claimants for the Contested Post-Filing Claims, since, at the time of the Conifer Application, Arena had also been advised by Razor that the structure of the RVO Transaction would assume the Arena Indebtedness, and preserve Arena's interests in the GORRs.[25]

28. The Monitor also proposes to deal with all post-filing and secured priority claims in the Summary Claims Process described in the Eighth Report; however, the Monitor proposes to pay all undisputed post-filing claims ahead of the pre-filing secured claims, which would include the Arena Indebtedness.[26] The Monitor's rationale for this approach is that the CCAA proceedings would not have advanced to this point, if vendors did not provide services in respect of which they relied on representations from the Applicants that they would be paid.[27]

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[22] *Mah Decision* at para 5 [**TAB 4**].
[23] *Mah Decision* at para 24 [**TAB 4**].
[24] Eighth Report at para 86.
[25] White Affidavit at paras 36-51.
[26] Eighth Report at para 88.
[27] Eighth Report at para 89.

29. Again, Arena is in no different position than the other post-filing creditors, as Arena supported the Razor Entities throughout these CCAA Proceedings by, among other things, supporting the Razor Entities at multiple contested applications,[28] and by foregoing the receipt of any sale proceeds in respect of two asset sales that were approved by this Court pursuant to approval and vesting orders granted on July 17, 2024, so that the CCAA Proceedings could continue.[29] All of these steps taken by Arena were done on the basis of the representations made to it by the Razor Entities that the Arena Indebtedness and attendant security would be assumed as part of the RVO Transaction. As the party with the perfected security interests, Arena should not be the one to bear the entire brunt of these representations proving untrue.

30. Post-filing claimants do not enjoy priority of repayment over secured creditors unless those claimants have been granted a priority charge by the court. This is true irrespective of whether the services provided by the post-filing claimant added value to the restructuring proceedings.[30]

31. In *Eau Claire*, the sales agent sought payment for its sales commission for the sale of a real estate property that was subject to a court-supervised restructuring proceeding. The Court had granted an administrative charge to secure the fees of the receiver and its legal counsel; however, the sales agent's commission was never brought under the umbrella of the court-ordered administration charge.[31]

32. The Court agreed that the sales agent's efforts had contributed to the sale of the property, which was for the benefit of all creditors.[32] However, the court also held that the sales agent failed to protect its own financial position, in particular, by failing to obtain a charge on

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[28] White Affidavit at para 52

[29] White Affidavit at para 34.

[30] *Eau Claire* at para 30 [**TAB 7**]; *Sanjel Corporation, Re*, 2017 ABQB 69 at para 41 [**TAB 6**].

[31] *Eau Claire* at para 10 [**TAB 7**].

[32] *Eau Claire* at para 30 [**TAB 7**].

the property to secure repayment of its commissions,[33] and accordingly, it's claim ranked as an unsecured claim, behind the claims of all secured creditors.[34]

33. This Court has previously denied requests for payment by post filing creditors in other matters, such as the restructuring proceedings of *Allarco Entertainment 2008 Inc*.[35] ("***Allarco***"). Specifically, in *Allarco*, the post-filing claimant had provided services to the debtor company in the thirty day period following the debtor having disclaimed the agreement. The court held that the claimant may have a claim against Allarco, but there was nothing in the CCAA that required Allarco to make immediate payment.[36]

34. In *Ascent Industries Corp. (Re)*, the Court approved of the payment of a post-filing sales commission that was not secured by a priority charge; however, this payment was only approved because all secured creditors and other post-filing creditors had been repaid in full.[37] This case is clearly distinguishable from the matter at hand, where Arena, the debtors' first ranking secured creditor, is proposed to receive absolutely no distribution from the RVO Transaction.

35. No charge was granted in these CCAA Proceedings to secure any of the Contested Post-Filing Claims. Rather, such a charge was sought and denied, and the Arena Indebtedness remains unpaid and outstanding.[38] Accordingly, none of the post-filing claims, including the Contested Post-Filing Claims and those that the Monitor seeks to reimburse from the funds to be transferred to ResidualCo, may be paid until the Arena Indebtedness is repaid in full.

V. CONCLUSION:

36. As the senior secured creditor, Arena has priority over unsecured post-filing trade creditors. As such, any payment of the Contested Post-Filing Claims ahead of repayment of the Arena

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[33] *Eau Claire* at para 33 [**TAB 7**].
[34] *Eau Claire* at para 30 [**TAB 7**].
[35] Alberta Court of Queen's Bench Action No. 1603-09338.
[36] See *Sanjel* at para 30 referring to *Allarco* [**TAB 6**].
[37] 2019 BCSC 1880 at para 57 [**TAB 10**].
[38] *Mah Decision* at para 24 [**TAB 4**].

Indebtedness would constitute an improper preference, and this Court cannot sanction the RVO Transaction with those payments included. Rather, if this Court is satisfied that the RVO Transaction may otherwise be approved, it should be subject to a declaration that Arena is entitled to receipt of the amounts proposed to be distributed as Contested Post-Filing Claims, which amounts total $2.721 million. For clarity, this is in addition to the Regulatory payments in the amount of $1.693 million, of which Arena maintains also constitute preferential payments under the RVO Transaction and should also be distributed to Arena pursuant to the arguments submitted in Arena's First Brief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21ST DAY OF NOVEMBER, 2024.

FASKEN MARTINEAU DUMOULIN LLP

Per: _____

Jessica L. Cameron/Anthony Mersich
Solicitor for the Applicants

TABLE OF AUTHORITIES

TAB 1

Most Negative Treatment: Reversed in part
Most Recent Reversed in part: Smoky River Coal Ltd., Re | 2001 ABCA 209, 2001 CarswellAlta 1035, 95 Alta. L.R. (3d) 1, [2001] A.J. No. 1006, 299 A.R. 125, 266 W.A.C. 125, 28 C.B.R. (4th) 127, [2001] 10 W.W.R. 204, 107 A.C.W.S. (3d) 724, 205 D.L.R. (4th) 94 | (Alta. C.A., Aug 2, 2001)

2000 ABQB 621
Alberta Court of Queen's Bench

Smoky River Coal Ltd., Re

2000 CarswellAlta 830, 2000 ABQB 621, [2000] 10 W.W.R. 147, [2000] A.W.L.D. 621, [2000] A.J. No. 925, 19 C.B.R. (4th) 281, 297 A.R. 1, 83 Alta. L.R. (3d) 127, 99 A.C.W.S. (3d) 13

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

In the Matter of Smoky River Coal Limited

Allstate Insurance Company, Allstate Life Insurance Company, Security Life of Denver Insurance Company, Indiana Insurance Company, Peerless Insurance Company, Pacific Life Insurance Company, AH (Michigan) Life Insurance Company, Northern Life Insurance Company, Reliastar Life Insurance Company, Modern Woodmen of America, Phoenix Home Life Mutual Insurance Company, American International Life Assurance Company of New York, and Phoenix American Life Insurance Company, Petitioners

Montreal Trust Company of Canada Ltd., Plaintiff and Smoky River Coal Limited, Copton Excol Ltd. and 378419 Alberta Ltd., Defendants

LoVecchio J.

Heard: July 4-5, 2000
Judgment: July 31, 2000 *
Docket: Calgary 9801-10214, 0001-05474

Counsel: *B.A.R. Smith, Q.C.*, *D.W. Mann* and *D. LeGeyt*, for Petitioners.
J. Ircandia and *P. McCarthy, Q.C.*, for Receiver.
R.T.G. Reeson, Q.C., for Finning (Canada).
G. Di Pinto, for Coneco Equipment Inc.
D. Williams, for United Steelworkers of America, Local 7621.
B. Clapp, for Non-Union Employees.
D. Ast, for William H. Mercer Limited, Administrator of S.R.C.L. Retirement Plan.
K.M. Horner and *Mr. Simard*, for ATCO Electric Ltd.
S. McDonough, for Alberta Department of Resource Development.
Mr. Peskett, for Municipal District of Greenview.
Mr. Petrick, for Neptune Bulk Terminals.
T. Warner, for CN.
H. Arnesen, for Ro-Dar Contracting Ltd.
B. Beller, for BCL Consulting Group.
Mr. Glenn, for Icon Office Solutions.

Subject: Corporate and Commercial; Insolvency

2000 ABQB 621, 2000 CarswellAlta 830, [2000] 10 W.W.R. 147, [2000] A.W.L.D. 621...

Headnote

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

Company obtained CCAA protection pursuant to court order — Court order provided that "post-petition trade creditors" who provided essential goods and services during reorganization would benefit from charge securing company's indebtedness in respect of same — Interim receiver was appointed under Bankruptcy and Insolvency Act and CCAA proceedings were stayed, but obligations established throughout proceedings were preserved — Creditors brought applications for recognition as post-petition trade creditors — Applications granted in part — Only creditors who supplied goods and services essential to day-to-day operations during reorganization period qualified as post-petition trade creditors — Body which provided company's coal leases qualified in respect of royalties for coal extended during reorganization — Electricity supplier did not qualify in respect of exit obligations triggered by decline in electrical consumption, as they were not costs associated with regular day-to-day operations — Equipment lessee did not qualify in respect of cost of equipment repairs, as claim really represented attempt to recover for breach of contract — Second equipment lessee did not qualify in respect of claims for legal fees, transportation and payments for unexpired term of lease, as these were costs associated with cessation of lease — Municipality did not qualify in respect of property taxes due, since services would have been provided in any event — Employees who continued to work during reorganization were entitled to payment of statutory severance — Union dues deducted but not remitted during reorganization period did not qualify under charge — Creditor who claimed in respect of future liabilities was not protected under charge — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

APPLICATIONS by creditors for recognition as post-petition trade creditors.

***LoVecchio J.*:**

Introduction

1 This decision relates to the applications of several creditors of Smoky River Coal Limited for recognition as a 'post-petition trade creditor'. The creditors are seeking such recognition in order to participate in a Charge established for the benefit of the PPTC's by the Order of Prowse, J. dated August 19, 1998 under the *Companies' Creditors Arrangement Act* [1] .

Background

2 Smoky, until very recently, operated a coal mine located in Grande Cache, Alberta. Smoky has been experiencing financial difficulties since 1998.

3 As of July 31, 1998, Smoky obtained the protection of the CCAA pursuant to an Order of Cairns, J. dated August 10, 1998. This Order stayed all proceedings against Smoky and provided for the creation of certain charges.

4 As stated, the Charge was established by Prowse, J. by an Order dated August 19, 1998. The Charge was established to encourage the regular trade creditors of Smoky to continue to provide essential goods and services to Smoky during its reorganization period. The relevant sections of the Order are as follows:

> 2.(d) Post-Petition Trade Creditors shall be entitled to the benefit of and are hereby granted a charge ("Post-Petition Trade Creditors' Charge") against, and security interest in, the Property, as security for indebtedness incurred to them from the issuance of the Petition up to the date of the Special Hearing referred to in paragraph 5 below, and the Post-Petition Trade Creditors' Charge shall rank in priority to the Petitioners and any encumbrance, security or security interest of the Petitioners in respect of the property and shall rank subsequent to the CCAA Lender's Charge, the Monitor's Charge, the balances owing to CIBC on its bridge financing with Smoky River Coal and the Directors' Charge.
>
> 5. This Court directs that a hearing ("Special Hearing") be scheduled as soon as counsel can secure a special chamber date, for determination of whether or not and what terms, including priority, if any, Post-Petition Trade Creditors shall be entitled to the benefit of and granted a charge against, and security interest in, the Property, as security for indebtedness incurred to them from and after the date of the Special Hearing.

The term Post-Petition Trade Creditor was not defined in the Order and no 'Special Hearing' to determine entitlement was ever scheduled prior to the applications made in these proceedings.

5 KPMG was originally appointed as Monitor of Smoky. By an Order dated October 14, 1998, PricewaterhouseCoopers Inc. was appointed Monitor, replacing KPMG.

6 Pursuant to an Order that I granted, dated June 16, 1999, the Charge was limited to the sum of $ 7,000,000.00.

7 In the fall of 1999, an offer was made by SRCL Acquisition Inc. and Westshore Terminals Ltd. to purchase the assets of Smoky, as a going concern, and Smoky filed a plan of arrangement in accordance with the CCAA in order to seek the creditors' approval of the sale. The contemplated transaction was never voted on and eventually failed.

8 On March 17, 2000 the stay of proceedings was lifted allowing the Petitioners to accelerate their claims, make a demand for payment, and deliver to Smoky a notice pursuant to Section 244 of the *Bankruptcy and Insolvency Act* [2] . The Order further stipulated that Smoky should only operate and make expenditures as required in the ordinary course of business, or to preserve the status quo.

9 On March 22, 2000 a Notice of Motion was filed seeking to further lift the stay of proceedings to enable the Petitioners to issue a Statement of Claim, and appoint a Receiver/Manager over the undertaking, property and assets of Smoky and its subsidiary corporations. The Notice of Motion also proposed a 'wind-down' of the mining operations given the large number of employees involved. The Motion was adjourned until March 29, 2000, and then again to March 31, 2000. However, a plan for the 'ramping down' of activities was to be formulated to ensure a smooth transition into receivership and, as will be noted below, this was done.

10 In connection with the proposed plan for the 'winding-down' of Smoky's operations, Barry Davies, former President, Chief Executive Officer and Director of Smoky intended to commence termination of both union and non-union employees on the afternoon of March 24, 2000. At this time, Davies wrote to PricewaterhouseCoopers regarding Smoky's intention to pay severance to the employees upon their termination. Specifically, Davies sought PWC's position on payment to the unionized employees of accrued wages, vacation pay and the severance amounts as provided under the collective agreement. In addition, Davies indicated that the company intended to pay the statutory severance amounts, as provided by the *Employment Standards Code* [3] of Alberta, to the non-union employees.

11 Counsel for PricewaterhouseCoopers responded to Davies' letter the same day and reiterated that the receivership had not officially commenced and therefore the company was still governed by the Orders granted in the CCAA Proceedings. Counsel for PWC made specific reference to the March 17, 2000 Order and indicated that commencing the 'wind-down' plan may run contrary to the direction to maintain the "status quo". Smoky was also advised that it may be more prudent to seek both the Court's as well as the Noteholders' approval of the wind-down plan before taking the contemplated actions.

12 On March 25, 2000 Smoky submitted an 'Orderly Shutdown Plan' to PWC. Smoky further indicated that the company intended to establish a trust fund for the payment of vacation pay and severance to the remaining employees.

13 Upon a joint application by PWC and the Petitioners, an Order was granted on March 29, 2000. The Order directed that until March 31, 2000 (when the receivership application was to be considered) or further Order, Smoky's payments to any employee were to be restricted to outstanding wage claims. This Order specifically provides that it was not in any way to be determinative of the legal entitlement of the employees to vacation pay or severance.

14 By Order granted March 31, 2000 in the CCAA Proceedings, the Petitioners were granted leave to commence Proceedings under the BIA and the CCAA Proceedings were stayed. By a second Order granted March 31, 2000 under the BIA, PricewaterhouseCoopers was appointed as the Interim Receiver of Smoky. The obligations established throughout the CCAA Proceedings were preserved by the following provisions of the Order:

7. The Receiver may without further order of the Court and on notice to The Noteholders make payments:

(a) to employees of Smoky River Coal Limited up to the extent of their statutory priority;...

(e) to creditors entitled to the benefit of the CCAA post-petition trade creditors' charge;

provided that the priority of such payments is in accordance with the priorities set out in previous orders of the Court relating to the CCAA Proceedings of the Defendant Smoky River Coal Limited, and shall make no other distribution to the Plaintiff of other creditors of any class without first having obtained the leave of this Court.

19. The Receiver shall be bound by all the charges, priorities and obligations created or approved by this Court in the CCAA Proceedings, and the Receiver is directed to:

(a) determine which creditors are entitled to the benefit of the postpetition trade creditors' charge; and

(b) determine what other charges, priorities and obligations need to be maintained;

and if necessary seek this direction of this Court within 45 days hereof.

15 As Interim Receiver, PWC sought to maximize recoveries to the estate. After exhausting efforts to again conclude a going concern sale, the Interim Receiver conducted a solicitation and sales program of the individual assets of Smoky with the approval of this Court. The total amount, which it is anticipated will be realized from the sale program, is approximately $11,679,313 and the total expected recoveries from the liquidation (with the exclusion of Smoky's interest in the Neptune Terminals) ranges between $12.9 million and $16 million. After the appropriate disbursements are made, it is clear that there will be little or no funds available to the Noteholders who are secured creditors.

16 In light of this bleak recovery, many creditors are seeking the protection of the Charge in order to elevate their claim to a super-priority status.

17 On May 9, 2000, the Interim Receiver sought direction from this Court in an attempt to deal with the various claims made. By Order dated May 9, 2000, the Receiver was authorized to send out notices to all creditors who were claiming refuge under the Charge. The notice would inform the creditor of whether or not the claim had been accepted. Any creditors whose claim had been rejected were provided with a mechanism for the resolution of any disputes.

18 On May 25, 2000, the May 9 Order was amended to extend certain deadlines for the filing of materials associated with the resolution of any disputes, and a hearing was scheduled to commence on July 4, 2000.

19 During the week of June 7, 2000, the Interim Receiver paid out a total of $1,103,868.31 for vacation pay to the union and non-union employees who were terminated between March 29 and March 31 by either Smoky or the Interim Receiver. The amount paid represents the statutory maximum priority of $7,500.00 per employee that is provided under Section 109(3) of the *Employment Standards Code*.

20 As of the date of this hearing, the Interim Receiver has accepted claims under the Charge totalling $5,369,287.11, not including the approximately $1.1 million paid out for vacation pay. The following parties made submissions disputing the Interim Receiver's decision to disallow their claims under the Charge:

Alberta Department of Resource Development	$126,117.81
ATCO Electric	$975,240.00
Coneco Equipment Inc.	$284,773.00
Finning Ltd.	$4,136,675.51
Municipal District of Greenview	$571,978.41
Non-union Employees	$646,527.60
Unionized Employees	$1,593,427.54

Union Dues	$24,802.69
Neptune Bulk Terminals Ltd.	0.00

21 The following parties had their submissions adjourned *sine die*:

Icon Office Solutions

BCL Consulting Group

22 Ro-Dar Contracting Ltd. is subject to a separate Order dated July 14, 2000.

Parameters of the Issue

23 In order to determine whether or not a creditor should participate in the Charge, two issues must be resolved. The first matter for clarification is the appropriate time period to be designated as the CCAA period. The second matter requires the establishment of the determinative factors which will define whether or not a creditor may participate in the benefit of the Charge. These factors must then be applied to each creditor involved in this dispute. The final question to be addressed is whether a creditor should be entitled to the benefit of an alternative charge if the claim is disallowed under the Charge.

Decision

24 The CCAA period commenced on July 31, 1998 pursuant to the Order dated August 10, 1998. The Order dated March 31, 2000 stayed the CCAA Proceedings and an Interim Receiver was put in place under the BIA. Thus, the relevant period to be applied to the Charge is July 31, 1998 through March 31, 2000. In order to be considered for participation under the Charge, the debt in question must have been incurred by Smoky within this time frame.

25 The critical factor to consider when determining who is entitled to participate in the Charge is whether the obligation was incurred in connection with the daily operating activities of Smoky as opposed to those that may arise from the cessation or termination of services. This factor must be considered within the context of the CCAA, which is a statute providing temporary protection while a company seeks to reorganize its affairs so as to avoid liquidation. The existence of security is not in and of itself determinative of whether a creditor's claim should be given super-priority under the Charge.

26 Based on these parameters, the creditors who are entitled to participate in the Charge are as follows: the Alberta Department of Resource Development and the employees (both Union and non-union) to the extent of their claims for statutory severance. The remaining parties do not fit within the parameters of the Charge and are not entitled to payment from this fund.

27 As the $7,000,000.00 limit imposed on the Charge by the June 16, 1999 Order will be exceeded, all participants entitled to its protection will have to share in its benefit *pari passu*.

Discussion

The Scope and Purpose of the CCAA

28 The CCAA is a statute that provides protection for companies who are experiencing financial difficulties, enabling them to reorganize their affairs in the hopes of continuing on in business. A broad and liberal interpretation of the Act has been adopted by the Courts in order to achieve the intended mandate. In *Re Lehndorff General Partner Ltd.* [4] the Court stated:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the Court. In the interim, a judge has great discretion under the CCAA to make orders so as to effectively maintain the status quo

> in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

See also *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* [5], and *Citibank Canada v. Chase Manhattan Bank of Canada* [6].

29 It is within this context that the Charge was established. Clearly, ordinary creditors needed some assurance of payment for goods and services so that they would continue to deal with Smoky and to permit Smoky to continue the operation of the mine while Smoky reorganized its affairs.

The Relevant Time Frame for Participation in the Charge

30 The relief provided under the CCAA is temporary. A company may continue to operate under this umbrella as long as there is an opportunity for successful reorganization. Once it becomes apparent that a reorganization cannot be achieved, the protective umbrella should be collapsed. The British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [7] stated:

> When a company has recourse to the CCAA, the Court is called on to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical.

31 The legal basis for the Charge is the discretionary authority of the Court granted under the CCAA. There is no issue with respect to the date that this protection commenced. It was July 31, 1998. In addition, the August 19, 1998 Order establishing the Charge made it clear that the trade creditors of Smoky were only protected for claims arising after the initial CCAA Order.

32 Counsel for some of the Claimants have made the argument that as no 'special hearing' (as contemplated by the August 19, 1998 Order) has been held to determine participation in the Charge (prior to these proceedings) their protection should continue to accrue up to the date of these proceedings.

33 The CCAA Proceedings were stayed on March 31, 2000 when the Interim Receiver was appointed under the BIA. This was done as it became clear that Smoky did not have any realistic hope of reorganization. In my view, this Order ended the CCAA Proceedings. It follows that the protection of the Charge must also end as the statutory basis for the exercise of discretion is gone. Thus, only actual debts incurred to trade creditors between July 31, 1998 and March 31, 2000 are eligible for consideration.

Characterization of a Post-Petition Trade Creditor

34 While the CCAA requires a large and liberal interpretation in order to be effective, the need for caution arises when the Court exercises its inherent jurisdiction under this statute. Although the CCAA serves a vital and important role in a reorganization, the general statutory scheme of priorities of creditors must not be overlooked. As the Court is altering this scheme, the exercise of the power of the Court to create classes of creditors with a super-priority status should not be taken lightly. Especially in light of the fact that this action could prejudice the recovery of creditors who would, but for the Order, enjoy a priority if a receivership or bankruptcy ultimately ensues. In *Re United Used Auto & Truck Parts Ltd.* [8], the British Columbia Supreme Court made the following comment:

> While I agree with Macdonald, J. that there are considerations in a CCAA situation which do not exist in relation to a receivership, it is my view that the inherent jurisdiction of the Court to subordinate existing security should only be exercised in extraordinary circumstances.

35 The term Post-Petition Trade Creditor is not defined in any case law or in the CCAA itself and it was not defined in the August 19, 1998 Order of Prowse, J. The term must glean its meaning from the context in which it was used and in light of the purpose it was intended to serve.

36 Counsel for the Noteholders drew an analogy between a DIP financing (a technique frequently utilized in CCAA proceedings) and the Charge established in the case at hand. This analogy is based on the premise that both instruments create a super-priority for the creditors entitled to its benefit, and effectively subordinates existing secured creditors. This analogy is appropriate to consider as there is no authority outlining the legal definition of a Post-Petition Trade Creditor within the CCAA context, therefore the authorities on DIP financing will be helpful in establishing the basic guidelines to be followed.

37 In *Re Royal Oak Mines Inc.* [9], the Court considered the scope that should be afforded to the use of extraordinary relief such as DIP financing in the CCAA context:

> It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, *to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period*. Such measures involve what may be a significant re-ordering of priorities form those in place before the application is made, not in the sense of altering existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence
>
> (emphasis added)

38 In this case, Smoky is seriously indebted to the Noteholders and they are expected to recover very little from their security at the conclusion of the receivership. While this fact does not directly impact the determination of who is a 'post-petition trade creditor', the fact that any entitlement to the Charge will diminish the recovery of secured creditors, who would enjoy a statutory priority over unsecured creditors, also warrants a restrictive approach.

39 Counsel for some of the Claimants argued for an application of the ordinary meaning of the words 'trade creditor'. While this definition may be helpful in establishing a loose framework, it is too broad to apply directly to these circumstances.

40 The main purpose of the Charge was to encourage the creditors who supply Smoky with goods and services to continue to deal with Smoky during the reorganization period. The critical characteristic of the service provided by the creditors must have been that it was essential to keeping 'the lights of the company on'. Thus, the costs or expenses incurred must be essential to the continued day to day operations of the mine. Penalties or obligations associated with a breach are not expenses associated with continued operations.

41 Counsel for the Noteholders argued that vulnerability should also be a determinative factor for entitlement to the Charge. This argument suggests that if a creditor is secured by other means, be it statutory or otherwise, their claim should automatically be disqualified from consideration. The availability of other security may be a consideration, but to me cannot alone be determinative. The fact that a trade creditor may have an existing security interest in the assets of Smoky should not in and of itself detract from the fact that they have continued to provide essential goods and services to Smoky during a precarious time, enabling it to keep the lights on.

Application to the Individual Claimants

Alberta Department of Resource Development

42 The Alberta Department of Resource Development is making a claim for unpaid coal royalties in the amount of $ 126,117.81 for the months of February and March 2000. The ADRD provided Smoky with the most basic element required to keep Smoky in business: its coal leases. Under the leases, the right to mine and market coal in return for the payment of royalties on a monthly basis was granted. Although the ADRD could have realized on its security by cancelling Smoky's coal leases, this action would have put Smoky out of business and effectively defeated any attempt by Smoky to continue its operations. The ADRD is only seeking royalties on the coal which has already been extracted by Smoky. Payments of the monthly royalties is necessary to keep the leases in good standing and this permits day to day operations of the mine to continue. As a result, the ADRD should be entitled to recover under the PPTC Charge.

ATCO Electric Ltd.

43 ATCO is seeking recovery of $950,000.00 for Exit Obligations triggered by the decline in electricity consumed by Smoky. These charges represent an obligation imposed on ATCO as a distributer of electricity by the Transmission Administrator under the *Electric Utilities Act* [10] . This Exit Obligation which is imposed on the distributers may, if approved by the Board, be passed on by ATCO to its customers. The Board approved ATCO's application for such action effective April 1, 2000.

44 While the Court is sympathetic to ATCO's claim as its obligation arose from a statutory imposition, the Exit Obligation is a liability that is triggered only upon the cessation of operations. It is not a cost associated with the regular day to day operations. Thus, it does not fit within the parameters established for the Charge.

45 It must also be noted that Smoky was placed under receivership as of March 31, 2000. ATCO did not have the requisite approval of the Alberta Energy and Utilities Board to pass the Exit Obligation on to its customers until April 1, 2000, so Smoky was not legally bound by the Exit Obligation during the CCAA period. Counsel for ATCO argued that the Exit Obligation was incurred during the CCAA period because it was "determined with certainty" that Smoky would become legally subject to the obligation. The authority for this proposition was *Smith (Committee of) v. Wawanesa Mutual Insurance Co.* [11] Given that I have determined that the expense is not associated with daily operations, it is unnecessary for me to decide this point.

Coneco Equipment Inc.

46 Coneco had leased several pieces of equipment to Smoky for use in association with its mining operations. Coneco is seeking recovery of $284,773.00 in addition to the $49,886.92 that the Interim Receiver has already approved for payment under the Charge. The basis for this claim was not clearly itemized in the Claimant's submission, but the oral arguments made by Counsel alluded primarily to the cost of repairs to the equipment.

47 The Claimant is arguing that the cost of repairs to the equipment in question are a requirement or obligation of Smoky as a term of the lease agreement between Coneco and Smoky. The Claimant is further arguing that if trade creditors are not fully compensated according to the terms or conditions of their agreements, they will cease to provide assistance to companies such as Smoky during CCAA reorganization periods.

48 The policy argument raised by Counsel is valid, but it does not change the parameters imposed on entitlement to the Charge. Coneco is really trying to recover damages for breach of contract. Smoky promised to keep the equipment in good repair, but did not. This is a risk that Coneco faces when leasing its equipment to any customer, whether they are currently under the protection of the CCAA or not. Coneco was paid the monthly lease rate throughout the entire CCAA period, which is the only portion of the lease payment that relates to use of the equipment for daily operations. As a result, Coneco's claim for additional recovery under the Charge must fail.

Finning International Inc.

49 Finning also leased various pieces of equipment to Smoky for use in its mining operations. It is not disputed that the equipment supplied by Finning was essential to Smoky's surface operations. Finning is claiming that an additional $4,136,675.51 should be allowed under the PPTC Charge above the $82,729.70 that the Interim Receiver has already agreed to recognize. The claim is broken into four categories: (a) $1,475,526.63 for the cost of repairs that will be effected on the equipment in accordance with the lease agreement, (b) $29,035.78 for legal fees and disbursements incurred by Finning in association with Smoky's default under the leases, (c) the sum of $380,000.00 for the cost of dismantling and transporting the equipment from the mine site and (d) $2,252,113.10 for the unexpired portion of the lease agreement.

50 The claims for legal fees, transportation and payments for the unexpired term of the lease under (b), (c) and (d) above are costs clearly associated with the cessation of the lease, not daily operations. Unliquidated damages are not to be afforded super-priority under the Charge.

51 The lease agreement between Finning and Smoky sets out a maintenance schedule giving rise to repair obligations throughout the term of the lease. Counsel for Finning focussed on the fact that repairs were an incremental obligation, just as the monthly cost of the equipment rental. Counsel relied on the case of *Kirklinton v. Wood* [12] to advance the argument that "where a Lease contains a covenant to execute specific repairs in a particular time period, the obligation to repair attaches as soon as the time period begins, and the fact that the lease is terminated before the expiration of the time period does not relieve the lessee of its obligations to repair."

52 The problem with the above argument is that Smoky may have been obligated to make repairs, but there were no repairs made during the CCAA period and no expenses have been incurred by Finning for repairs not made by Smoky. The claim is simply one for unliquidated damages for breach of this obligation and it too must fail.

Municipal District of Greenview

53 The MD of Greenview is seeking $571,978.41 for 1999 property taxes. Counsel advanced the argument that the MD should be recognized as a Post-Petition Trade Creditor on the basis that the MD provides essential services to Smoky River in exchange for the payment of property taxes. The essential services referred to were the local infrastructure, garbage and waste disposal services, RCMP and police services and other emergency services.

54 The classification of property taxes as a 'traded commodity' is troublesome. Taxes are a means of revenue generation for government. The services provided by the MD would have been provided in any event. The arguments that the MD is proposing are not in line with the restrictive approach that should be taken when awarding super-priority status under the CCAA. The MD will have to rely on their priority charge on the property itself in order to recover the taxes.

The Employees

55 The claims of both the Union and the non-union employees can be considered together. The unionized employees (United Steelworkers of America, Local 7621) are seeking severance in the amount of $1,593,427.54. The claim of the non-union employees is two fold. First, they are seeking severance in the amount of $580,615.25, which represents the statutory minimum entitlement under the *Employment Standards Code*. Second, they are claiming an additional $65,912.35 in vacation pay as eight employees did not receive the full amount of vacation pay owing to them as a result of the $7,500 cap imposed by the Receiver when making the June payment.

56 The primary argument made by both parties was that the Interim Receiver holds the above amounts in trust, either express or constructive, for the employees. The position that the funds are held in trust is untenable. The Order of this Court on the 29 th of March, 2000 prohibited Smoky from establishing such a trust. Counsel for the Noteholders accurately pointed out that the applicants cannot try and accomplish indirectly what they were prohibited from doing directly.

57 The alternative argument raised by the employees is that they should be entitled to participate in the Charge as Post-Petition Trade Creditors. Counsel for all parties conceeded that an employee is a Post-Petition Trade Creditor with respect to the entitlement to wages and vacation pay accrued during the CCAA period. The claim for severance is somewhat different. Severance represents a payment in lieu of working notice. If notice or payment in lieu is not given, then the employee is entitled to damages. See David Harris, Wrongful Dismissal [13] . Counsel for the Union and non-union employees argued that statutory minimum entitlements are not unliquidated damages as the entitlements are clearly established by the *Employment Standards Code*, and these amounts are not impacted by a duty to mitigate.

58 Counsel for the non-union employees also raised the inequitable treatment between the employees terminated prior to March 29 (who were given full severance), and those terminated afterwards (who have not received any severance). It must be noted that all employees were terminated during the CCAA period. Counsel urged that the March 29, 2000 Order was not meant to prejudice any employees with respect to their legal entitlements, and argued that to treat the employees terminated

after this Order differently than those terminated prior would be inequitable. Counsel also noted that but for the March 29th Order, the employees would have been paid severance.

59 The Orders made throughout the CCAA period sought to protect the employees. The Order dated March 17, 2000 permitted Smoky to continue in the ordinary course of business, and preserve the status quo. The fact of the matter is that Smoky had been paying severance to the employees in the ordinary course of business. It is arguable that the status quo is that all employees are entitled to the same treatment, whether terminated at the beginning of the reorganization period or at the end.

60 The Notice of Motion brought before this Court on March 22, 2000 proposed that a 'ramping down' of Smoky's operations would be prudent. The plan submitted by Smoky to PWC and the Noteholders contemplated the termination of the remaining employees and identified the amounts owed in severance and vacation pay to each employee. The subsequent Order of March 29, 2000 was not to be used as a basis to argue that the employees were not entitled to severance or vacation pay; it temporarily suspended the determination of entitlement and prevented the establishment of a trust fund for this purpose.

61 The Order dated March 31, 2000 specifically contemplates the statutory entitlements of the employees, and directs that the Interim Receiver is free to pay these amounts without further Order of this Court. The statutory priority referred to in clause 7 a) of that Order in no way referrs to the BIA and its related priority scheme. Rather, the entire clause is seeking to preserve the obligations established during the CCAA period. Thus, payment of vacation pay and the statutory entitlements to severance will not contravene any of the prior Orders and will have the effect of preserving the status quo established as to how employees were treated throughout the CCAA period.

62 The case *Re Westar Mining Ltd.* [14] was raised by Counsel for the Noteholders as a basis for denying payment to the employees. In *Westar*, there was a series of applications regarding the creation of funds or trusts for the payment of vacation pay and severance to employees. After making reference to the $4 million trust that had already been established, the Court concluded that to make an additional provision for vacation pay would be to "change the status quo to a degree which is unacceptable". It was argued that any additional payment to the employees would have the effect of treating them better than other unsecured creditors.

63 While there are many similarities between the circumstances in *Westar* and the case at hand, there is a critical distinguishing factor. In *Westar* there was a trust established which was to be shared equally by all of the employees, and only the application for an additional allocation to this trust was denied. The employees of Smoky did not have the benefit of a fixed trust amount, and are only seeking to be treated equitably throughout the CCAA period. Thus, all of the employees in *Westar* were in the same boat. For the employees of Smoky, some were given a spot on the life raft, while others were expected to go down with the sinking ship.

64 All employees gave their services to Smoky during a precarious time and deserve to be treated equally. As a result, both the Union and non-union employees should be entitled to the payment of statutory severance under the Charge.

65 All employees terminated after March 28, 2000 have received vacation pay to a maximum of $7,500. The non-union employees should not be entitled to recover vacation pay in excess of the amount provided by the statutory cap. Imposing the statutory limit as referred to in the March 31, 2000 Order will prevent additional disturbance to the priorities that will govern under the BIA and will also lead to a more consistent treatment as between these employees.

66 The Interim Receiver's payment of vacation pay in June of 2000 should also be accounted for under the Charge as these are amounts that had accrued to the employees during the CCAA period.

Union Dues

67 An application was made on behalf of the Union for recovery of $24,802.69 in union dues. The dues had been deducted from the employees' earnings by Smoky, but not remitted to the Union. Counsel is seeking a declaration that the amounts are held in trust for the Union, or in the alternative that the union dues should be paid under the Charge.

68 On a strict interpretation, the union dues could not qualify for payment under the Charge as the dues do not represent a good or service extended to Smoky in order for the mine to continue with day to day operations.

69 However, it is clear that the Union has been deprived of funds to which it was entitled. Smoky has been enriched as the funds in question were deducted from the employees' wages for the purpose of remitting them to the Union. Smoky only played an intermediary role as it would with any source deductions made by an employer. The deductions were made with the employees' approval for the Union's benefit so the argument that the union dues are held in trust for the Union warrants consideration. The money that should have been remitted to the Union is not Smoky's, although the funds were not segregated or kept in a separate account. An express trust was not established in this case, nor was there a statutory trust applicable to these remittances. The question remaining is whether a constructive trust should be imposed in a bankruptcy or receivership context.

70 In *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)* [15], the Ontario Court of Appeal affirmed that a constructive trust can be used as a remedy in bankruptcy situations when strict requirements are met, although they denied the remedy in that case. At trial, the learned judge based this conclusion upon the Supreme Court of Canada decision in *International Corona Resources Ltd. v. Lac Minerals Ltd.* [16]. Under the proviso that a restitutionary claim must be established, the Court stated:

> ...a constructive trust should only be awarded if there is a reason to grant to the plaintiff additional rights that flow from the recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. [17]

71 Thus, a constructive trust could be applicable in a bankruptcy context if the party claiming the relief can show a proprietary interest in the property and prove the elements required to establish a constructive trust.

72 The Supreme Court of Canada outlined the test for a constructive trust in *Soulos v. Korkontzilas* [18]. The trust can arise to remedy unjust enrichment or profit from wrongdoing. The critical elements are as follows: (a) the defendant has been enriched, (b) the plaintiff has been deprived, (c) there must be a substantial connection or proprietary interest in the property in question, (d) the defendant has no juristic reason to retain the property or no defence, and (e) the constructive trust is a just remedy to both sides.

73 In this case, the elements outlined in (a), (b) and (d) above are satisfied. It is not clear that the Union has a proprietary interest in the disputed property. The property is money that is no longer held by Smoky. The funds were not segregated and held in a separate account. The payment of the union dues would effectively allow the Union to recover damages for breach of contract, as Smoky has breached its agreement to remit the funds. Given the circumstances, that may be an unjust result.

Neptune Bulk Terminals Ltd.

74 Counsel for Neptune appeared for the purpose of trying to have Neptune recognized as a Post-Petition Trade Creditor in the event that some future liabilities may arise. Neptune has been paid every monthly installment owed by Smoky during the CCAA period. In order for Neptune to have a claim under the Charge, they would have to show some liability incurred by Smoky during the CCAA period which was related to the day to day operations of the business. Neptune has no such claim as all installments required to be made have been made in accordance with their contractual requirements. The fact that the CCAA period is finite, and the Charge is applicable only to this period makes it impossible for any potential contingent future liabilities to be considered in this context.

Other Charges

75 There is no basis on which any of the claims should be considered as part of the other charges established under the CCAA Proceedings for the protection of the Directors or for the use of the Monitor.

Petition for Receiving Order

76 The application for a Receiving Order made by the Noteholders in April of 2000 was adjourned until the date of these proceedings. The application is granted effective 12:01 a.m., April 1, 2000.

Conclusion

77 The applications made by the Alberta Department of Resource Development, the Union (with respect to the unionized employees) and the non-union employees with respect to their claims for statutory severance pay, are granted. All other applications for participation in the Charge are denied. By my calculations this brings the total amount approved to over the $7,000,000 limit. As a result, the participants accepted under the Charge will have to share on a *pari passu* basis with any creditors who are already approved, but have not yet been paid.

Costs

78 Counsel may speak to me concerning costs in the next 30 days if they wish.

Order accordingly.

Footnotes

* Changes in a corrigendum issued August 9, 2000 have been incorporated herein.

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

2 R.S.C. 1985, c. B-3.

3 S.A. 1996, c. E-10.3, as amended.

4 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at 31

5 (1988), 63 Alta. L.R. (2d) 361 (Alta. Q.B.)

6 (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.)

7 (1990), 4 C.B.R. (3d) 307 (B.C. S.C.) at 315

8 (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at 152

9 (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at 321

10 S.A. 1995, c. E-5.5

11 (1996), 38 C.C.L.I. (2d) 223 (Ont. Gen. Div.)

12 (1916), [1917] 1 K.B. 332 (Eng. K.B.)

13 looseleaf (Toronto: Carswell, 1984)

14 (1992), 14 C.B.R. (3d) 88 (B.C. S.C.)

15 (1997), 50 C.B.R. (3d) 79 (Ont. C.A.)

16 [1989] 2 S.C.R. 574 (S.C.C.)

17 ibid, at 51.

18 (1997), 146 D.L.R. (4th) 214 (S.C.C.)

End of Document

TAB 2

2004 BCSC 733
British Columbia Supreme Court

Doman Industries Ltd., Re

2004 CarswellBC 1262, 2004 BCSC 733, [2004] B.C.W.L.D. 870, [2004] B.C.J. No. 1149, 131 A.C.W.S. (3d) 859, 1 C.B.R. (5th) 7, 29 B.C.L.R. (4th) 178, 45 B.L.R. (3d) 78

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

IN THE MATTER OF THE COMPANY ACT R.S.B.C. 1996, c. 62

IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT R.S.C. 1985, c. C-44

IN THE MATTER OF THE PARTNERSHIP ACT R.S.B.C. 1996, c. 348

IN THE MATTER OF DOMAN INDUSTRIES LIMITED, ALPINE PROJECTS LIMITED, DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED, DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED, DOMAN INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD., DOMAN-WESTERN LUMBER LTD., EACOM TIMBER SALES LTD., WESTERN FOREST PRODUCTS LIMITED, WESTERN PULP INC., WESTERN PULP LIMITED PARTNERSHIP, and QUATSINO NAVIGATION COMPANY LIMITED (PETITIONERS)

Tysoe J.

Heard: May 25, 2004
Judgment: May 25, 2004 *
Docket: Vancouver L023489

Counsel: E.J. Harris, Q.C., P.D. McLean for Petitioner, Western Forest Products Ltd.
I.G. Nathanson, Q.C., S.R. Schachter, Q.C. for Hayes Forest Services Ltd.
M.I. Buttery for Tricap Restructuring Fund
S.R. Ross for Strathcona Contracting Ltd.
K. Zych for Committee of Unsecured Noteholders
C.E. Hirst for Petro-Canada Inc.

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Insolvent company was in process of attempting restructuring under Companies' Creditors Arrangement Act — Insolvent company brought application for approval of termination of contracts it had with H Ltd. and S Ltd. — Application dismissed — Insufficient evidence existed to support conclusion that proposed contract terminations were fair and reasonable in all circumstances — Available evidence simply supported conclusion that insolvent company would have opportunity of being more profitable if contracts were terminated — It was not demonstrated that loss of this opportunity to be more profitable would outweigh prejudice that would be suffered by H Ltd. and S Ltd. if contracts were terminated — Termination of contracts as condition precedent of restructuring plan was not contained in initial draft of plan and there was no evidence as to why it was inserted later — It could not be said that condition precedent was result of adversarial negotiation and that restructuring was unlikely to proceed if it was not satisfied — It is not necessary for insolvent company to demonstrate that termination of contract is essential to making of viable plan or arrangement.

Table of Authorities

Cases considered by *Tysoe J.*:

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Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — followed
Repap British Columbia Inc., Re (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.) — considered
Skeena Cellulose Inc., Re (2002), 43 C.B.R. (4th) 178, 2002 BCSC 1280, 2002 CarswellBC 2032, 5 B.C.L.R. (4th) 193 (B.C. S.C.) — considered
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T. Eaton Co., Re (1999), 1999 CarswellOnt 3542, 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
Forest Act, R.S.B.C. 1996, c. 157
Generally — referred to
Forestry Revitalization Act, S.B.C. 2003, c. 17
Generally — referred to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157
Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally

APPLICATION by insolvent company for approval of termination of contracts.

***Tysoe J.* (orally):**

1 One of the Petitioners, Western Forest Products Ltd., ("Western") applies, in these proceedings under the *Companies Creditors Arrangement Act* (the "*CCAA*") involving the Doman group of companies, for authorization or approval of the termination of contracts it has with Hayes Forest Services Ltd. ("Hayes") and Strathcona Contracting Ltd. ("Strathcona").

2 The Doman group of companies ("Doman") carry on business in the B.C. forestry industry. Doman encountered financial difficulties and has been in the process of attempting to restructure under the *CCAA* for approximately one and a half years. The liabilities of *Doman* consist of secured term debt in the principal amount of U.S. $160 million, unsecured term notes in the principal amount of U.S. $513 million, unsecured trade debt in excess of $20 million, a secured operating line of credit and other miscellaneous obligations.

3 The restructuring process is nearing completion. A plan of compromise and arrangement (the "Restructuring Plan") has been filed and the meeting of creditors to consider it has been scheduled to be held in approximately two weeks. The deadline for creditors to file proofs of claim is today.

4 In very simple terms, the Restructuring Plan contemplates that the lumber and pulp assets of Doman will be transferred into new corporations and that the unsecured noteholders, trade creditors and other unsecured creditors will have their debt converted into shares in one of the new corporations, which will own the lumber assets and the shares of the other corporation holding the pulp assets. The secured term debt is to be refinanced and the secured operating line of credit will be unaffected. The existing shareholders of Doman are to receive warrants entitling them to purchase a limited number of shares in the new parent corporation.

5 The implementation of the Restructuring Plan is subject to the fulfilment of numerous conditions precedent. One of the conditions is the termination of the contracts with Hayes and Strathcona which are the subject matter of this application.

26 Although the Court of Appeal's decision in *Skeena Cellulose Inc.* settles that the court has the necessary jurisdiction to deal with the termination of contracts, none of the above decisions includes any detailed discussion with respect to the basis upon which the court becomes involved in decisions to terminate contracts. Newbury J.A. discussed the jurisdiction in terms of the court approving a plan of arrangement which involves the termination of contracts, but the court will often authorize the termination of contracts prior to the formulation of a plan of arrangement.

27 If a debtor company repudiated a contract prior to commencing *CCAA* proceedings, the court would not have any direct involvement in the termination of the contract unless, possibly, the other party to the contract sought specific performance of the contract (which, as Brenner C.J.S.C. pointed out in *Skeena Cellulose Inc.*, is particularly inappropriate in an insolvency). The other party to the contract would have a claim for damages in respect of the repudiation and would be treated like any other unsecured creditor for the purposes of the plan of arrangement.

28 Once an insolvent company seeks the assistance of the court by commencing *CCAA* proceedings, the company comes under the supervision of the court. The supervision also involves a consideration of the interests of the broad constituency served by the *CCAA* mentioned in *Skeena Cellulose Inc.* by Newbury J.A. These interests, when coupled with the exercise by the court of its equitable jurisdiction, bring into play the requirements for fairness and reasonableness in weighing the interests of affected parties.

29 Generally speaking, the indebtedness compromised in *CCAA* proceedings is the debt which is in existence at the time of the *CCAA* filing, and the debtor company is expected to honour all of its obligations which become owing after the *CCAA* filing. It is common for the initial stay order or the come-back order to provide that the debtor company is to continue carrying on its business and to honour its ongoing obligations unless the court authorizes exceptions.

30 In many reorganizations under the *CCAA*, it is necessary for the insolvent company to restructure its business affairs as well as its financial affairs. Even if the financial affairs are restructured, the company may not be able to survive because portions of the business will continue to incur ongoing losses. In such cases, it is appropriate for the court to authorize the company to restructure its business operations, either during the currency of the *CCAA* proceedings or as part of a plan of arrangement. The process is commonly referred to as a downsizing if it involves certain aspects of the business coming to an end. The liabilities which are incurred as a result of the restructuring of the business operations, for such things as termination of leases and other contracts, are included in the obligations compromised by the plan of arrangement even though the debtor company will have been honouring its ongoing commitments under the leases and other contracts after the commencement of the *CCAA* proceedings. The inclusion of these liabilities in the plan of arrangement is an exception to the general practice of debtor companies paying the full extent of post-filing liabilities and compromising only the pre-filing liabilities.

31 It is within this context that the court is called upon to authorize the termination of contracts which the debtor company could have repudiated without any authorization prior to the commencement of *CCAA* proceedings. The liabilities to be compromised have, in general terms, been crystallized by the filing of the *CCAA* petition, and the affairs of the debtor company are under the supervision of the court, which is required to exercise its equitable jurisdiction fairly and reasonably.

32 I do not approach the matter in the same fashion as Lo Vecchio J. did in *Blue Range Resource Corp.* I do not see the resistance of a party to the termination of a contract with the debtor company to be an attempt to elevate their claim for damages above the claims of all the other unsecured creditors. Apart from any monies which may have been outstanding under the contract at the time of the *CCAA* filing, the party to the contract was not an unsecured creditor who was going to be subjected to a compromise under a plan of arrangement. The party only becomes a creditor in respect of its damage claim if the contract is terminated. Although Lo Vecchio J. could be interpreted as suggesting in the quoted paragraphs 36 to 38 that a debtor company may terminate contractual relations as long as the resulting damage claim is included in its plan of arrangement, I do note that he subsequently commented that the termination of the contracts in that case was necessary to the company's survival program.

33 I prefer the approach of Farley J. in *Dylex Ltd.*, which involves the court weighing the competing interests and prejudices in deciding what is fair and reasonable. I would anticipate that in the majority of cases a debtor company will be able to persuade

TAB 3

2021 SCC 53, 2021 CSC 53
Supreme Court of Canada

Montréal (Ville) c. Restructuration Deloitte Inc.

2021 CarswellQue 18529, 2021 CarswellQue 18528, 2021 SCC 53, 2021 CSC 53, [2021] 3 S.C.R. 736, [2021] 3 R.C.S. 736, 340 A.C.W.S. (3d) 7, 463 D.L.R. (4th) 657, 94 C.B.R. (6th) 1

Ville de Montréal (Appellant) and Deloitte Restructuring Inc. (Respondent) and Alaris Royalty Corp., Integrated Private Debt Fund V LP, Thornhill Investments Inc., Ville de Laval and Union des municipalités du Québec (Interveners)

Wagner C.J.C., Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin JJ.

Heard: May 20, 2021
Judgment: December 10, 2021
Docket: 39186

Proceedings: affirming *Arrangement relatif à Consultants SM inc.* (2020), EYB 2020-349836, 2020 QCCA 438, 2020 CarswellQue 1987, Healy J.C.A., Rochette J.C.A., Ruel J.C.A. (C.A. Que.); varying *Arrangement relatif à Consultants SM inc., Re* (2019), 2019 CarswellQue 5032, 2019 QCCS 2316, EYB 2019-312681, Corriveau J.C.S. (C.S. Que.)

Counsel: Raphaël Lescop, Eleni Yiannakis, for the appellant
Guy P. Martel, Danny Duy Vu, for the respondent
Alain Tardif, for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP
Luc Béliveau, for the intervener Thornhill Investments Inc.
Elizabeth Ferland, for the intervener Ville de Laval
Marc Duchesne, for the intervener Union des municipalités du Québec

Subject: Corporate and Commercial; Insolvency; Public; Municipal

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Set-off

Consulting engineering firm performed variety of contracts for municipality — Link was later uncovered between firm and parties involved in collusion schemes — Firm sought protection under Companies' Creditors Arrangement Act — Following initial order, firm continued to perform work for municipality — However, municipality refused to pay for that work — Municipality invoked its right to effect compensation between its debt to firm for work done after initial order and two claims against firm that, according to municipality, arose before order and resulted from fraud on firm's part — Monitor brought motion for declaratory judgment stating that compensation could not be effected — Supervising judge granted monitor's motion, holding that pre-post compensation was not possible — Municipality appealed — Majority reached same conclusion as supervising judge that pre-post compensation could not be effected in this case — Municipality appealed to Supreme Court of Canada — Appeal dismissed — Words of stay order were broad enough to prohibit pre-post compensation with respect to both claims — In any event, it would not be appropriate to allow municipality to effect compensation or withhold payments owed to firm — Therefore, supervising judge's decision was confirmed.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Demande initiale — Procédures assujetties à la suspension — Compensation

Firme de génie-conseil a exécuté divers contrats pour une municipalité — On a plus tard découvert l'existence d'un lien entre la firme et des parties ayant participé à des stratagèmes de collusion — Firme s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — À la suite de l'ordonnance initiale, la firme a continué à effectuer des travaux pour la municipalité — Toutefois, la municipalité a refusé de payer ces travaux — Municipalité a invoqué son droit d'opérer compensation entre sa dette envers la firme résultant des travaux effectués postérieurement à l'ordonnance initiale, et deux créances envers la firme qui, soutenait-elle, étaient nées avant l'ordonnance et résulteraient de fraude de cette dernière — Contrôleur a déposé une requête visant à obtenir un jugement déclaratoire portant qu'il n'était pas possible d'opérer compensation — Juge surveillante a accueilli la demande du contrôleur, estimant que la compensation pré-post n'était pas possible — Municipalité a interjeté appel — Juges majoritaires ont conclu, à l'instar de la juge surveillante, que la compensation pré-post ne pouvait s'opérer en l'espèce — Municipalité a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Termes de l'ordonnance initiale étaient suffisamment larges pour interdire la compensation pré-post relativement aux deux créances — En tout cas, il ne serait pas approprié d'autoriser la municipalité à opérer compensation ou à retenir les paiements dus à la firme — Par conséquent, la décision de la juge surveillante a été confirmée.

A consulting engineering firm performed a variety of contracts for a municipality over a period of several years. A link was later uncovered between the firm and parties involved in collusion schemes, and criminal charges were laid. The firm subsequently became insolvent. The firm sought protection under the Companies' Creditors Arrangement Act, and the rights and remedies of its creditors were stayed. Following the initial order, the firm continued to perform work for the municipality. However, the municipality refused to pay for that work. It invoked its right to effect compensation between its debt to the firm for the work done after the initial order and two claims against the firm that, according to the municipality, arose before the order and resulted from fraud on the firm's part. The first claim arose from a settlement agreement entered into by the firm and the Minister of Justice, acting on the municipality's behalf, under the Voluntary Reimbursement Program implemented as a result of an exhaustive inquiry into the existence of schemes involving collusion and corruption in the awarding and management of public contracts ("VRP claim"). The second claim was based on a proceeding brought by the municipality against the firm for allegedly having participated in collusion in relation to a call for tenders for a water meter contract ("water meter contract claim"). The monitor brought a motion for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the municipality to the firm for work performed for the municipality.

The supervising judge granted the monitor's motion, holding that, according to the principles laid down in a recent decision rendered by the Court of Appeal, pre-post compensation was not possible. She also concluded that the water meter contract claim was neither liquid nor exigible, which precluded compensation. The municipality appealed.

The majority at the Court of Appeal reached the same conclusion as the supervising judge that pre-post compensation could not be effected in this case. With regard to the water meter contract claim, the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later, in a proceeding other than that of the restructuring case. The dissenting judge was of the view that the VRP claim had to be presumed to fall within the exception set out in s. 19(2)(d) of the Act and that the decision referred to had to be distinguished on the basis that it had been rendered in a different context. Consequently, he allowed pre-post compensation between the two parties' respective debts. The municipality appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Wagner C.J.C., Côté J. (Moldaver, Karakatsanis, Rowe, Martin JJ. concurring): The VRP claim in this case was not a claim that related to a debt resulting from fraud pursuant to s. 19(2)(d) of the Act. The mere fact that a debtor company participated in the VRP was not sufficient to infer that the company defrauded a public body. First, the content of the VRP agreement itself was a complete bar to the municipality's argument that participation in the program in itself justified a finding that the municipality's claim resulted from the firm's fraudulent activities. Because this confidential agreement entered into by the parties clearly stipulated that the amount fixed in the agreement could in no way be considered to constitute an admission of liability, it could not be presumed that the VRP claim was a claim that fell within s. 19(2)(d) of the Act. Second, the program itself did not create a statutory presumption or a presumption of fact that a debtor made fraudulent representations based solely on the fact that it participated in the VRP. In fact, fraud was characterized in the program as a mere possibility rather than a certainty.

A right to pre-post compensation invoked under the civil law or the common law can be stayed under ss. 11 and 11.02 of the Act. However, a supervising judge has the discretion to authorize pre-post compensation only in exceptional circumstances, given the high disruptive potential of this form of compensation. Here, the words of the initial order were broad enough to prohibit pre-post compensation. What remained to be determined was whether the Superior Court should have exercised its discretion under s. 11 of the Act and allowed such compensation in respect of the VRP claim. In exercising its discretion under the Act, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part. Applied in the present case, these considerations tended to confirm that it would not be appropriate to allow the municipality to effect compensation with respect to the VRP claim.

The words of the stay order made by the Superior Court were broad enough to prohibit pre-post compensation with respect to the water meter contract claim. In any event, it would not be appropriate to authorize the municipality to withhold the payments owed to the firm pending the outcome of the case relating to the water meter contract for the same reasons as those relating to the VRP claim.

Per Brown J. (dissenting): It was agreed with the majority that a supervising judge has a discretion under s. 11 of the Act as to whether to allow a creditor to effect compensation between pre-initial order and post-initial order debts. However, this discretion was not limited solely to the exceptional circumstances the majority described. Following a thorough analysis, it was held that the decision relied on by the supervising judge wrongly stated that pre-post compensation could never be allowed under the Act. Given that the supervising judge in this case did not exercise her discretion, the appeal should be allowed solely for the purpose of remanding the case to the Superior Court so it could decide whether the municipality may effect compensation between the debts incurred by the firm before the initial order and the amounts owed by the municipality to the firm for work performed by the latter after the initial order.

Further, the appeal should be allowed so that it could be determined whether compensation was available in respect of the municipality's water meter claim against the firm, as nothing in s. 21 of the Act prohibited judicial compensation.

Une firme de génie-conseil a exécuté divers contrats pour une municipalité sur une période de plusieurs années. On a plus tard découvert l'existence d'un lien entre la firme et des parties ayant participé à des stratagèmes de collusion, et des accusations criminelles ont été déposées. Par la suite, la firme est devenue insolvable. La firme s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies, et les droits et recours des créanciers ont été suspendus. À la suite de l'ordonnance initiale, la firme a continué à effectuer des travaux pour la municipalité. Toutefois, la municipalité a refusé de payer ces travaux. La municipalité a invoqué son droit d'opérer compensation entre sa dette envers la firme résultant des travaux effectués postérieurement à l'ordonnance initiale, et deux créances envers la firme qui, soutenait-elle, étaient nées avant l'ordonnance et résulteraient de fraude de cette dernière. La première créance découlait d'une entente de règlement intervenue entre la firme et la ministre de la Justice, agissant pour le compte de la municipalité, dans le cadre du Programme de remboursement volontaire mis en place à la suite d'une enquête en profondeur concernant l'existence de stratagèmes de collusion et de corruption dans l'octroi et la gestion de contrats publics (« créance PRV »). La seconde créance était fondée sur un recours intenté par la municipalité contre la firme au motif qu'elle aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau (« créance relative au contrat des compteurs d'eau »). Le contrôleur a déposé une requête visant à obtenir un jugement déclaratoire portant que les sommes dues à la firme par la municipalité pour des travaux exécutés pour son bénéfice ne pouvaient faire l'objet de compensation.

La juge surveillante a accueilli la demande en jugement déclaratoire du contrôleur, estimant qu'en vertu des principes établis dans une récente décision de la Cour d'appel, la compensation pré-post n'était pas possible. Elle a statué, par ailleurs, que la créance relative au contrat des compteurs d'eau n'était ni liquide ni exigible, de sorte que la compensation ne pouvait être opérée. La municipalité a interjeté appel.

Les juges majoritaires de la Cour d'appel ont conclu, à l'instar de la juge surveillante, que la compensation pré-post ne pouvait s'opérer en l'espèce. En ce qui concerne la créance relative au contrat des compteurs d'eau, les conditions de la compensation judiciaire n'étaient pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration. Le juge dissident, quant à lui, était d'avis qu'il fallait présumer que la créance PRV était visée par l'art. 19(2)d) de la Loi et que la décision à laquelle on s'était référé devait être distinguée puisqu'il avait été rendu dans un contexte différent. Ainsi, il a autorisé la compensation pré-post entre les dettes respectives des deux parties. La municipalité a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Wagner, J.C.C., Côté, J. (Moldaver, Karakatsanis, Rowe, Martin, JJ., souscrivant à leur opinion) : La créance PRV visée en l'espèce n'était pas une réclamation se rapportant à une dette qui découlait de fraude aux termes de l'art. 19(2)d) de la Loi. La seule participation au PRV par une société débitrice n'était pas suffisante pour inférer la commission d'une fraude par cette dernière à l'endroit d'un organisme public. En premier lieu, le contenu même de l'entente PRV constituait un obstacle dirimant à la prétention de la municipalité selon laquelle le seul fait de la participation à ce programme suffisait pour conclure que sa créance résulte des activités frauduleuses de la firme. En effet, comme il était clairement stipulé dans cette entente confidentielle intervenue entre les parties que la somme convenue dans celle-ci ne pouvait en aucun cas être assimilée à une admission de responsabilité, on ne saurait présumer que la créance PRV constituait une réclamation visée à l'art. 19(2)d) de la Loi. En deuxième lieu, le programme lui-même ne créait pas une présomption légale ou factuelle de l'existence de représentations frauduleuses de la part d'un débiteur du seul fait de sa participation au PRV. En fait, la fraude était caractérisée dans le programme comme une éventualité, par opposition à quelque chose de certain.
Le droit à la compensation pré-post invoqué en vertu du droit civil ou de la common law peut être suspendu en application des art. 11 et 11.02 de la Loi. Toutefois, le juge surveillant possède le pouvoir discrétionnaire d'autoriser la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. En l'espèce, les termes de l'ordonnance initiale étaient suffisamment larges pour interdire la compensation pré-post. Il restait à déterminer si la Cour supérieure aurait dû exercer son pouvoir discrétionnaire en vertu de l'art. 11 de la Loi et permettre l'application de cette compensation à l'égard de la créance PRV. Dans l'exercice du pouvoir discrétionnaire que lui confère la Loi, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur. Appliquées dans le cas présent, ces considérations tendaient à confirmer qu'il n'était pas approprié de permettre à la municipalité d'opérer compensation relativement à la créance PRV.
Les termes de l'ordonnance initiale rendue par la Cour supérieure étaient suffisamment larges pour interdire la compensation pré-post relativement à la créance relative au contrat des compteurs d'eau. En tout cas, il ne serait pas approprié d'autoriser la municipalité à retenir les paiements dus à la firme jusqu'au dénouement du litige relatif au contrat des compteurs d'eau pour les mêmes motifs que ceux relatifs à la créance PRV.
Brown, J. (dissident) : On était d'accord avec les juges majoritaires pour dire que le juge surveillant possède, en vertu de l'art. 11 de la Loi, le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation entre des dettes pré-ordonnance initiale et post-ordonnance initiale. Toutefois, ce pouvoir n'était pas limité aux seules circonstances exceptionnelles décrites par la majorité. À la suite d'une analyse en profondeur, on a estimé que la décision sur laquelle la juge surveillante s'est fondée affirmait incorrectement que la compensation pré-post ne pourrait jamais être autorisée en vertu de la Loi. Comme la juge surveillante n'a pas exercé son pouvoir discrétionnaire dans la présente affaire, le pourvoi devrait être accueilli à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé si la municipalité peut opérer compensation entre les dettes de la firme antérieures à l'ordonnance initiale et les sommes dues par la municipalité à la firme pour des travaux réalisés par cette dernière après l'ordonnance initiale.
De plus, le pourvoi devrait être accueilli afin qu'il soit décidé si la réclamation de la municipalité à l'encontre de la firme à l'égard des compteurs d'eau donnait ouverture à compensation, puisque rien dans l'art. 21 de la Loi n'interdisait la compensation judiciaire.

APPEAL by municipality from decision reported at *Arrangement relatif à Consultants SM inc.* (2020), 2020 QCCA 438, EYB 2020-349836, 2020 CarswellQue 1987 (C.A. Que.), confirming supervising judge's decision that municipality could not effect compensation or withhold payments owed to engineering firm.

POURVOI formé par une municipalité à l'encontre d'une décision publiée à *Arrangement relatif à Consultants SM inc.* (2020), 2020 QCCA 438, EYB 2020-349836, 2020 CarswellQue 1987 (C.A. Que.), ayant confirmé la décision de la juge surveillante que la municipalité ne pouvait pas opérer compensation ou retenir des montants dus à une firme de génie-conseil.

Wagner C.J.C., Côté J. **(Moldaver, Karakatsanis, Rowe and Martin JJ. concurring):**

I. Introduction

1 This appeal raises an issue relating to compensation, or set-off in a common law setting, between two debts in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The question is whether

— *Collection Droit des affaires — Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at No. 70; see also *Kitco*, at para. 34).

69 With all due respect for our colleague, in light of the context of s. 21, it is evident that this provision is not meant to legitimize pre-post compensation.

70 This contextual interpretation of s. 21, which limits its scope to pre-pre compensation, is also confirmed by the section's purpose. It was added to the *CCAA* to prevent the unfair situation that would result from a creditor being required to pay its debt to the debtor company in full but receiving almost nothing from the debtor in payment of its claim under an arrangement or compromise. The effect of s. 21 is that the creditor receives payment of its claim up to the value of the debt it owes to the debtor (Anderson, Gelbman and Pullen, at p. 27; Boucher, at No. 70; McElcheran, at p. 116).

71 It is true that compensation "creat[es] a type of security interest in the [insolvent company's] estate" because it "[authorizes] the party claiming **set-off** [to] 'reorde[r]' ... his **priority**" by reducing the value of that party's claim (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at paras. 59-60; see *Kitco*, at paras. 63-68). The creditor uses its indebtedness to the debtor as a form of security for its claim, security that is equal in value to its debt to the insolvent company (*Stein v. Blake* (1995), [1996] 1 A.C. 243 (U.K. H.L.), at p. 251). This portion of its claim is therefore sure to be paid in full (*Husky Oil* , at para. 58). The effect of compensation is thus to deviate from the principle of equality among ordinary creditors, a fundamental principle of insolvency law that applies with equal force in proceedings under the *CCAA*, one of the remedial objectives of which is to ensure the fair and equitable treatment of the claims made against a debtor (*Callidus*, at para. 40). The **exception** created by compensation must therefore be interpreted narrowly. As a general rule, "[o]nce a formal insolvency process commences, all unsecured creditor remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share any remaining recoveries in the estate *pro rata* with all other unsecured creditors" (McElcheran, at p. 78).

72 The prejudice suffered by a creditor wishing to effect pre-post compensation does not justify expanding the scope of s. 21. When the debt owed by the creditor arises after a stay order has been made, prejudice is merely illusory. The fact that the creditor contracted obligations toward the debtor company during the stay period does not place it in a worse situation than it would have been in had it contracted with a third party instead. If it had contracted with a third party, it would likewise have had to pay the full price of the goods or services it obtained (*Tungsten* (S.C.), at para. 27). A creditor that contracts with the debtor company during the status quo period knows or ought to know that it will probably receive only pennies on the dollar in payment of its pre-order claim and that payment of its post-order debt will benefit it and the other creditors.

73 Because there is really prejudice only in the case of pre-pre compensation, this exception to the principle of equality should apply to only one of the debtor's assets on the date of commencement of insolvency proceedings, that is, the debt owed to it by the creditor (*Kitco*, at para. 68; *Husky Oil* , at para. 59). Otherwise, giving the green light to pre-post compensation would amount to granting certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings (for example, amounts received as interim financing). Professor Wood aptly describes the injustice that would thus befall the other ordinary creditors whose rights and remedies have been stayed:

> The ability to exercise a right of set-off in restructuring proceedings can operate to improve greatly the position of one creditor at the expense of the other creditors. This is illustrated in the following example. Suppose that the debtor company owes $1,000 to a creditor. The debtor company then initiates restructuring proceedings. While the proceedings are under way, the debtor company sells and delivers goods to the creditor for $1,000. By exercising its right of set-off, the creditor obtains full recovery of its claim at the expense of the other unsecured creditors whose claims will be compromised or otherwise affected by the plan. [p. 400]

74 Yet the very purpose of the stay period is to ensure that no creditor gains an advantage over the others while the restructuring of the debtor company is under way (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (B.C. S.C.) , at para. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at para. 6); *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11 (B.C. S.C. [In Chambers]), at para. 17). Pre-post compensation should not allow a creditor to do indirectly what it cannot do directly. Parliament could not have intended to create such an

TAB 4

2024 ABKB 553
Alberta Court of King's Bench

Razor Energy Corp (Re)

2024 CarswellAlta 2385, 2024 ABKB 553

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

And In the Matter of the Plan of Compromise or Arrangement of Razor Energy Corp, Razor Holdings GP Corp, and Blade Energy Services Corp

Douglas R. Mah J.

Heard: September 11, 2024
Judgment: September 19, 2024
Docket: Calgary 2401-02680

Counsel: Keely Cameron, Sarah Aaron, for Applicant, Conifer Energy
Sean Collins, for Razor Energy Corp, Razor Royalties Limited Partnership, Razor Holdings GP Corp., and Blade Energy Services Corp.
Kelly J. Bourassa, for Monitor, FTI Consulting Canada Inc.
Jessica Cameron, for 405 Dolomite ULC, as agent to certain lenders (Arena Investors LP)
Randal Van de Mosselaer, for Canadian Natural Resources Limited
Corey Luda, for Vulcan County
Michael Swanberg, for Big Lakes County and Municipal District of Greenvew
Stacey McPeak, for Alberta Petroleum Marketing Commission
Philip LaFair, for Sabre Energy Ltd.
Daniel Segal — Justice Canada
Marianne Panenka, for Indian Oil and Gas Canada
Kristopher Lensink — Government of Alberta, Alberta Energy and Mineral Energy Legal Team

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Creditor and debtor co-owned gas plant along with other parties — Debtor defaulted in its obligations to pay its share of plant's operating costs — Creditor partially locked debtor out of plant and they could not agree on terms by which debtor could return — Debtor declared bankruptcy and was granted stay under s. 11.02 of Companies' Creditors Arrangement Act — Debtor continued to owe creditor and debt was escalating monthly — Debtor advised court that corporate transaction was underway with third-party purchaser which would result in creditor being paid post-filing arrears in full — Creditor brought application for payment of post-filing obligations and priming charge to secure payment — Application dismissed — Allowing creditor's application would cause corporate transaction to collapse — Granting application would not have provided conditions under which debtor could execute corporate transaction but rather would hasten its bankruptcy or receivership — Creditor would be given unfair advantage by authorizing preferential payment and/or artificially elevating its priority position — Granting application would not provide constructive solution to any stakeholders other than creditor — If granted, creditor's application would permit interests of single post-filing creditor to determine fate of entire proceedings under Act to detriment of remaining stakeholders.

Table of Authorities

Cases considered by *Douglas R. Mah J.*:

Agro Pacific Industries Ltd., Re (2000), 2000 BCSC 879, 2000 CarswellBC 1180, 76 B.C.L.R. (3d) 376, 5 B.L.R. (3d) 176, 18 C.B.R. (4th) 1, [2000] B.C.T.C. 332 (B.C. S.C.) — referred to

Reasons for Decision

A. Background

1 Within the ambit of ***CCAA*** [1] proceedings, a creditor (Conifer Energy Inc) of the debtor corporation (Razor Energy Corp) seeks an Order under s 11 for payment of post-filing obligations and a priming charge to secure that payment.

2 Here is a brief factual synopsis:

• Razor and Conifer are oil and gas producers. Conifer operates the Judy Creek Gas Conservation Plant where Conifer, under an ownership and operating agreement (OOA) with Razor, received and processed a major portion of Razor's gas production.

• Razor and Conifer, along with others, are owners of the gas plant. The OOA requires Razor to pay its share of the plant's operating costs and to pay for ongoing processing services in respect of its gas processed there. There are 8 other owners who have ownership interests in the functional units comprising the facility.

• In December 2023, after Razor defaulted in its obligations under the OOA, Conifer physically locked Razor out of the gathering system at 16 separate points within the South Swan Hills Gas Gathering System, thus preventing processing of about two-thirds of Razor's gas.

• Conifer was unable to completely lock out Razor because the configuration of the infrastructure did not allow Conifer to do so without adversely affecting third-party interests. Conifer set-off and continues to set-off the revenue from the one-third of Razor's gas that continues to be processed against Razor's obligations.

• Razor filed a Notice of Intention to Make a Proposal (NOI) under the ***BIA*** [2] in January 2024, thus invoking the statutory stay provided in s 69(1)(a) of the ***BIA***.

• Justice Lema in a February 21, 2024 decision reported as ***Blade Energy Services Corp (Re)*, 2024 ABKB 100** determined that Conifer's lockout action was contrary to the statutory stay so far as any pre-NOI amounts were concerned, but not any post-NOI amount owing. He determined that Conifer continues to enjoy any contractual remedies it may have with regard to unpaid post-NOI obligations.

• Following Justice Lema's decision, Conifer and Razor were unable to reach terms by which Razor could revert to full access to the plant. Razor had determined that it could continue to carry on business even without access to the Judy Creek plant. Thus, the lockout of the two-thirds of Razor's output continues and the set-off by Conifer of the revenue from the remaining one-third also continues.

• On February 28, 2024 Razor converted its NOI proceedings into a ***CCAA*** proceeding, engaging a new stay under s 11.02. There have been extensions applied for and granted. The current stay period expires on October 13, 2024. The amounts sought to be paid (or secured) relate to the period on and after February 28, 2024 or the "post-filing" period.

• Razor advises that its plan in the ***CCAA*** proceedings takes the form of a pending "Corporate Transaction" with a third-party purchaser which, according to Razor's affiant (Mr. Bailey, affidavit of September 6, 2024 at para 6), will come together on or about September 20, 2024 and will result in Conifer being paid the post-filing arrears in full. For reasons of commercial confidentiality, the details of the Corporate Transaction have not been disclosed.

• It is Conifer's surmise (affidavit of Ms. Wilkins affirmed September 3, 2024 at para 16) that Razor's interest in the Judy Creek gas plant and South Swan Hills Unit form part of the assets under sale in the Corporate Transaction.

• Razor continues to not pay Conifer under the OOA. Razor says it is insolvent and unable to do so. Conifer says that Razor is getting a "free ride" with respect to the one-third of gas output that continues to be processed at the Judy Creek plant and

with regard to its ownership obligations. Furthermore, Conifer advises that Razor's obligations to another owner, CNRL, are now being allocated by CNRL to Conifer, thus jeopardizing Conifer's financial status.

• The amount owed to Conifer by Razor for the post-filing period as of September 2, 2024 for services is $1.89 million, including Razor's share of the plant's operating costs. The debt is escalating at a rate of $250,000 per month after set-off. The amount reallocated by CNRL to Conifer in respect of Razor is more than $4.15 million which includes approximately $360,000 for post-filing amounts charged by CNRL.

B. Principles underlying the CCAA

3 The Supreme Court of Canada in ***Century Services Inc v Canada (Attorney General),* 2010 SCC 60**, by its majority at paras 57-60, set out the foundational precepts of decision-making under the ***CCAA***:

• The ***CCAA*** is "skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred." Thus, ***CCAA*** decisions are often based on discretionary grants of jurisdiction. Judicial discretion in this regard must be exercised in furtherance of the ***CCAA***'s purposes.

• The purpose of the ***CCAA*** is remedial "in the purest sense" in providing a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a Court-supervised attempt to reorganize the financial affairs of the debtor company is undertaken.

• The Court engaged in judicial decision-making under the ***CCAA*** must "first of all provide the conditions under which the debtor can attempt to reorganize." This can be achieved by staying enforcement action to allow the debtor's business to continue, preserving the *status quo* while the debtor readies itself to present the restructuring or reorganization plan to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed.

• The Court must be cognizant of and weigh all stakeholder interests and the public interest that may come into play in any decision of whether to allow a particular action.

4 I consider this application against the backdrop of the above principles.

C. Conifer's Position

5 Conifer seeks this Order from the Court:

• requiring Razor to pay Conifer all amounts owing under the OOA for the post-filing period;

• requiring Razor to pay Conifer all post-filing amounts owed by Razor to CNRL that CNRL intends to seek from Conifer;

• that such payments be made in priority to any other creditors of Razor and be paid by September 20, 2024 (coinciding with the date that the Corporate Transaction is supposed to be signed); and

• that Conifer be granted a charge against Razor's property to secure the post-filing amounts, ranking only behind the administration charge and directors' charge, or a declaration of constructive trust against Razor's property, for the post-filing amounts. (This appears to be alternative relief to a Court Order for an immediate in-full cash payment.)

6 As justification for the relief sought, Conifer says:

• The amounts are owed by Razor to Conifer under the OOA.

• Both s 11.01 of the ***CCAA***, as an exception to the stay provision, and para 19 of the Amended and Restated Initial Order (ARIO) permit Conifer to require immediate payment from Razor for post-filing amounts.

• Conifer notes that Razor is paying certain partners and service providers their post-filing invoices but not Conifer, resulting in Conifer facing risk while those other creditors receive ongoing payment, contrary to the spirit of insolvency legislation as expressed in ***Québec Inc v Callidus Capital Corp*, 2020 SCC 10** at para 75.

• The Court has broad jurisdiction under section 11 of the ***CCAA*** to make the Order sought. When assessed against the policy objectives of the ***CCAA***, Conifer notes the purpose of the ***CCAA*** is not to disadvantage creditors but rather to provide a constructive solution for all stakeholders and where all stakeholders are treated as advantageously and fairly as circumstances permit: ***Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6** at para 205.

• Under its inherent powers, the Court can create a security interest for creditors who supply goods and services to the debtor after the filing of a ***CCAA*** petition and can provide for the priority and ranking of such a security interest with respect to other security holders: ***Arrangement relatif à Gestion Éric Savard inc***, 2019 QCCA 1434 at paras. 17-24; Houlden, Morawetz and Sarra, ***The 2024 Annotated Bankruptcy and Insolvency Act***, Toronto: Thomson Carswell, 2024, pp. 1464-1465, commenting on ***Re Smoky River Coal Ltd*, 2000 ABQB 621**, aff'd in 2001 ABCA 209.

• Further, or in the alternative, the Court may declare a constructive trust in respect of the supplier's entitlement to be paid for post-filing goods and services provided under an executory contract: ***General Motors Corporation v Peco, Inc.,*** 2006 CanLII 4758 at paras. 17-31.

7 In its brief at paragraph 41, Conifer invoked s 11.4 the ***CCCA***, which provides the Court the ability to declare a charge in favor of a "critical supplier" but did not press that position during the hearing. The evidence before me was that Razor was carrying on business without support from Conifer and Conifer was not cutting off services completely only because of the configuration of the infrastructure and its obligations to other parties. In this sense, Conifer was not a critical supplier of Razor.

8 CNRL appeared by counsel at the hearing. No argument was made on its behalf regarding whether the Orders sought should be granted or not. Counsel confined his remarks to saying that if the Court was inclined to grant the Orders in favour of Conifer, then payment of the amounts earmarked for reallocated obligations by CNRL should be paid directly to CNRL. Counsel for CNRL also suggested that if Conifer was successful, then one might expect CNRL and other operators involved with Razor to make the same application.

D. Razor's position

9 In response, Razor submits the following:

• The OOA between Conifer and Razor provides the remedies for breach and non-payment. The Court should not be rewriting the OOA by giving Conifer new remedies and rights, nor does the ***CCAA*** **confer jurisdiction on the Court to do so:*Allarco Entertainment Inc, Re,*** 2009 ABQB 503 at paras 52-54. (As noted, Conifer is presently exercising the existing right of set-off.)

• Enforcement of the post-filing amounts remain stayed. No application has been made to lift the stay. The remedy inherent in s 11.01 is not an Order for payment but rather stoppage of supply.

• The Court should remain alive to the principle that the *status quo* should be maintained until a conclusion is reached under the ***CCAA***. Accordingly, there is no basis for Conifer to obtain the Court's assistance to either improve its position by enhancing priority or effect collection of amounts owing: ***Agro Pacific Industries Ltd, Re*, 2000 BCSC 879** at para 17.

• Case law establishes that s 11.01 must be construed narrowly. In order for a creditor to fit within the exception to the stay of proceedings found in s 11.01, the creditor must be compelled by ***CCAA*** Order to continue supply of services during the post-filing period. The *quid pro quo* for this compulsion is the statutory obligation for the debtor to continue paying on a current basis during the post-filing period: ***Smith Brothers Contracting Ltd (Re) (Trustee of)***, 1998 CanLII 3844 (BCSC) at para 14; ***Royal Bank v Cow Harbour Construction Ltd*, 2012 ABQB 59**.

• The Corporate Transaction contemplates full payment of post-filing arrears to both Conifer and CNRL (less only the deposit for future services which would not be required).

• The documentation for the Corporate Transaction is scheduled to be completed and signed as of September 20, 2024, which is a scant day away. Mr. Bailey (Razor's CEO) expresses optimism that the Corporate Transaction will actually come to pass. There is no contrary information before me.

• Conifer is not left dangling indefinitely. There are milestone dates looming: September 20, 2024 for the signing of the Corporate Transaction and October 13, 2024 for the expiry of the current stay.

22 Based on the evidence before me, I conclude as follows:

• Allowing Conifer's application (and the other similar applications that would inevitably follow) will likely have the effect of causing the Corporate Transaction to collapse.

• In the words of ***Century Services***, granting the Order sought would not "provide the conditions" under which Razor can execute on the Corporate Transaction but rather would hasten its bankruptcy or receivership.

• Granting the Order sought would give Conifer an unfair advantage now and in any subsequent bankruptcy or receivership by authorizing a preferential payment and/or artificially elevating its priority position. It would not provide a constructive solution to all stakeholders, only Conifer.

• Granting the Order would in effect permit the interests of a single post-filing creditor to determine the fate of the entire ***CCAA*** proceeding to the detriment of remaining stakeholders.

23 In exercising my discretion under the ***CCAA***, I remain cognizant of the remedial purpose of the ***CCAA*** and the requirement to consider broad stakeholder interests. I appreciate the Corporate Transaction, if signed, is still subject to Court approval but, on the basis of the evidence before me, it does represent the best and fairest outcome for all stakeholders.

24 In the result, I find that Conifer's post-filing claim does not fall within the narrow exception created by s 11.01. Whether it does or not, I would still exercise my discretion against granting the Order for the reasons given above. In consequence, I dismiss Conifer's application.

25 If the parties/counsel so wish, they may address costs with me within 30 days of the date of this decision by submitting a written submission not longer than two single-spaced pages, excluding exhibits and authorities, and including a draft Bill of costs.

Application dismissed.

Footnotes

1 ***Companies' Creditors Arrangement Act***, RSC, 1985, c C-36 as am.

2 ***Bankruptcy and Insolvency Act***, RSC 1985, c B-3 as am.

TAB 5

2009 CarswellOnt 4471
Ontario Superior Court of Justice [Commercial List]

Windsor Machine & Stamping Ltd., Re

2009 CarswellOnt 4471, [2009] O.J. No. 3195, 179 A.C.W.S. (3d) 611, 55 C.B.R. (5th) 241

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WINDSOR MACHINE & STAMPING LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD., 442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD., TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE MANUFACTURING INC. AND 383301 ONTARIO LIMITED (Applicants)

Morawetz J.

Heard: March 6, 10, 2009
Judgment: July 27, 2009
Docket: CV-08-7672-00CL

Counsel: Andrew Hatnay, Andrea McKinnon for United Auto Workers Local 251
Daniel Dowdall, Jane Dietrich for Bank of Montreal
Joseph Marin for Applicants
Tony Reyes for Monitor, RSM Richter Inc.
Raong Phalavong for Saginaw Pattern

Subject: Insolvency; Employment; Public

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Termination and severance pay — Union represented employees at P Ltd. and T Ltd. — Applicants, including T Ltd. and P Ltd., were granted protection under Companies' Creditors Arrangement Act ("CCAA") — Operations at T Ltd. and P Ltd. were subsequently shut down — Employees did not receive termination or severance pay — Union brought motion for order requiring applicants to pay termination and severance pay due and owing to employees of T Ltd. and P Ltd. under Employment Standards Act ("ESA") — Motion was opposed by bank and applicants — Motion dismissed — Conclusions from recent Superior Court case on same issue were adopted — Priority of secured creditors must be recognised — There was no basis for argument that absence of statutory distribution scheme entitled unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations — It was essential in court supervised process to give due consideration to priority rights of secured creditors — Fact that applicants had cash did not justify alteration of legal priorities — Legal priority position was that claims for termination and severance pay were unsecured claims which ranked pari passu with other unsecured creditors and subordinate to interests of secured creditors — Applicants did not use CCAA to avoid termination and severance pay obligations under ESA — Claims for termination and severance pay were unsecured claims and enforcement proceedings were stayed, save for any incremental amount of termination or severance pay attributable to time after applicants went into CCAA protection.

Labour and employment law --- Employment standards legislation — Termination of employment — Exemptions to entitlement to statutory termination or severance pay — Miscellaneous

CCAA proceedings — Union represented employees at P Ltd. and T Ltd. — Applicants, including T Ltd. and P Ltd., were granted protection under Companies' Creditors Arrangement Act ("CCAA") — Operations at T Ltd. and P Ltd. were

subsequently shut down — Employees did not receive termination or severance pay — Union brought motion for order requiring applicants to pay termination and severance pay due and owing to employees of T Ltd. and P Ltd. under Employment Standards Act ("ESA") — Motion was opposed by bank and applicants — Motion dismissed — Conclusions from recent Superior Court case on same issue were adopted — Priority of secured creditors must be recognised — There was no basis for argument that absence of statutory distribution scheme entitled unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations — It was essential in court supervised process to give due consideration to priority rights of secured creditors — Fact that applicants had cash did not justify alteration of legal priorities — Legal priority position was that claims for termination and severance pay were unsecured claims which ranked pari passu with other unsecured creditors and subordinate to interests of secured creditors — Applicants did not use CCAA to avoid termination and severance pay obligations under ESA — Claims for termination and severance pay were unsecured claims and enforcement proceedings were stayed, save for any incremental amount of termination or severance pay attributable to time after applicants went into CCAA protection.

Table of Authorities

Cases considered by *Morawetz J.*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 3583, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List]) — followed

West Bay SonShip Yachts Ltd., Re (2009), 49 C.B.R. (5th) 159, 71 C.C.E.L. (3d) 45, *(*sub nom. *West Bay SonShip Yachts Ltd. v. Esau)* 446 W.A.C. 203, *(*sub nom. *West Bay SonShip Yachts Ltd. v. Esau)* 265 B.C.A.C. 203, 306 D.L.R. (4th) 294, 89 B.C.L.R. (4th) 82, [2009] 4 W.W.R. 415, 2009 BCCA 31, 2009 CarswellBC 139 (B.C. C.A.) — distinguished

1231640 Ontario Inc., Re (2007), 37 C.B.R. (5th) 185, 2007 ONCA 810, 2007 CarswellOnt 7595, 289 D.L.R. (4th) 684, 13 P.P.S.A.C. (3d) 57 (Ont. C.A.) — distinguished

Statutes considered:

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

Generally — referred to

s. 47 — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

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

Generally — referred to

s. 11 — referred to

s. 11(4) — referred to

s. 11.3 [en. 1997, c. 12, s. 124] — referred to

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

s. 5 — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

s. 20(1)(b) — referred to

MOTION by union for order requiring applicants to pay termination and severance pay to employees as result of terminations that occurred subsequent to filing of proceedings under *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

Introduction

1 International Union, United Automobile Aerospace & Agricultural Implement Workers of America ("United Auto Workers, Local 251" or the "Union") bring this motion for an order requiring the Applicants to pay termination and severance pay that is due and owing to the unionized employees of Tilbury Assembly Ltd. ("Tilbury") and Pellus Manufacturing Limited ("Pellus") under the *Employment Standards Act*, 2000 ("ESA") as result of terminations that occurred subsequent to the filing of proceedings by the Applicants under the *Companies' Creditors Arrangement Act* ("CCAA").

2 The motion was opposed by Bank of Montreal (the "Bank"), the secured creditor of the Applicants and by the Applicants.

3 The amount owing to the Tilbury employees for termination pay is approximately $23,000 and the amount owing for severance pay is approximately $216,000. These amounts are not in dispute.

4 The amount claimed to be owing to the Pellus employees (assuming that the employees were terminated on February 20, 2009) is approximately $132,000 and the amount claimed to be owing for severance pay as of that date is approximately $326,000. This amount is disputed by Pellus.

5 The Union submits that the Applicants should be required to pay the termination pay and severance pay owing to the Tilbury and Pellus employees for the following reasons:

> (a) The ESA sets out a comprehensive code that requires an employer who terminates an employee to give the employee prior notice of termination, or if such notice is not given, pay in lieu of notice (commonly referred to as "termination pay"). The ESA also requires that an additional amount (referred to as "severance pay") be paid to certain long service employees if criteria in the ESA are met.
>
> (b) The Amended and Restated Initial CCAA Order and the consent orders issued by this Court dated October 29, 2008, do not authorize the company to avoid paying termination pay and severance pay. The October 29, 2008 consent orders state that "the *Employment Standards Act, 2000* continues to apply".
>
> (c) Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.
>
> (d) The Supreme Court of Canada has held that federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights, as long as the doctrine of paramountcy is not triggered. In the absence of paramountcy, a provincial law such as the ESA continues to apply in insolvency proceedings.
>
> (e) For the Tilbury and Pellus employees who continued to work for the Company after it went into CCAA protection and who were subsequently terminated, the payment of termination pay and severance pay is an ordinary course payment by the Company. It is to be paid the same way wages, benefits and other aspects of employee compensation are paid.
>
> (f) The payment of termination pay and severance pay in a CCAA proceeding is not a re-ordering of priorities among creditors nor is it giving a higher rank to unsecured employee creditors. Termination pay and severance pay that arises on the termination of employees post-CCAA filing is not pre-filing debt. It is an ordinary course payment.
>
> (g) The payment of termination pay and severance pay in the case at bar is within the reasonable expectations of the parties because:
>
> > (i) Company management represented to the Union employees from the outset of the CCAA proceedings that it would continue to pay all contractual amounts due to employees who worked during the CCAA proceedings, which would include amounts for termination pay and severance pay; and
> >
> > (ii) The Company, the Bank and the Monitor consented to the terms of court orders that expressly state that the "*Employment Standards Act 2000* continues to apply".

dismissal. This type of claim is distinct from a claim for severance pay or termination pay under employment standards legislation, as noted by Levine J.A. at paragraph [14].

(ii) Tilbury Union Employees and Pellus Union Employees did provide services after the date of the CCAA application. Any incremental increase in termination pay and severance pay attributable to the period of time after the Applicants went into CCAA protection may justify treatment as a post-filing claim.

39 This motion raises an interesting question. Should the Applicants be faulted for commencing proceedings under the CCAA, even though it turns out that no plan can be proposed which provides value to the unsecured creditors. In this case, the alternative to filing under the CCAA would have been to continue with the NOI under the BIA. In light of the acknowledgment that no CCAA plan can be presented which would be of benefit for the unsecured creditors, it follows that no viable proposal could have been made under the BIA. The failure to file a proposal under the BIA would have resulted in a bankruptcy and likely a receivership. In a receivership/bankruptcy, the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees would rank as unsecured claims and subordinate to the secured creditors.

40 In turn, this raises a further question. Should the priority status of the Tilbury Union Employees and Pellus Union Employees be different in the context of CCAA proceedings as opposed to a receivership or bankruptcy.

41 In this case, the Monitor reports that certain secured creditors will suffer a loss. Any amount paid in respect of termination and severance pay claims would be as a result of a direct deduction from recoveries for the secured creditors. In my view, the effect of granting the requested relief would be to accord the termination and severance pay claims special status over the claims of other unsecured creditors of the Applicants and would also result in the payment of such claims in priority to the claims of the Applicants' secured creditors.

42 In addition to my conclusions as set out in *Nortel*, I have not been persuaded that the requested relief can be justified in this case on the following grounds.

43 First, the priority of secured creditors must, in my view, be recognized. Counsel to the Union made the submission that the Applicants and the Bank are advancing a priority argument that may be relevant in a bankruptcy or receivership proceeding but not in a CCAA proceeding, as there is no priority distribution scheme in the CCAA. In my view this submission is misguided. Although there is no specific priority distribution scheme in the CCAA, that does not mean that priority issues should not be considered. An initial order under the CCAA usually results in a stay of proceedings as against secured creditors as well as unsecured creditors. The stay prevents secured creditors from taking enforcement proceedings which would confirm their priority position. The inability of a secured creditor to take such enforcement proceedings should not result in an enhanced position for unsecured creditors. There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the *status quo* during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors. In this case, the secured creditors have priority over the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees.

44 Second, counsel to the Union also submits that based on the rationale in the decision of the Court of Appeal in *1231640 Ontario Inc., Re* (2007), 37 C.B.R. (5th) 185 (Ont. C.A.), priority rules do not crystallize in a CCAA proceeding. I do not accept this argument. *State Group* addressed a priority issue as between competing PPSA secured creditors in the context of a interim receivership under s. 47 of the BIA. The issue in *State Group* was whether a s. 47 BIA receiver was a person who represents creditors of the debtor under s. 20(1)(b) of the PPSA. The Court of Appeal held that an interim receiver was not such a person. The issue in *State Group* governs the relationship as between competing interests under the PPSA. In my view, it does not stand

for the proposition that the priority position of a secured creditor vis-à-vis unsecured creditors should not be recognized in the context of a CCAA proceeding.

45 Third, the Union put forth submissions to the effect that, in this particular situation, the amount of termination pay and severance pay is relatively low and the Applicants have the cash to pay the amounts owing and, further, that such payments would not jeopardize the Proposed Sale.

46 In my view, the fact that the Applicants may have available cash does not mean that the Applicants can use the cash as they see fit. The asset is to be used in accordance with credit agreements and court authorized purposes, including those set out in the Amended and Restated Initial Order. I am in agreement with these submissions of counsel to the Applicants as set out at [15]. This Order placed restrictions on the use of cash, which restrictions are consistent with legal priorities. In my view, the fact that the Applicants have cash does not justify an alteration of legal priorities. The legal priority position is that the claims for termination pay and severance pay are unsecured claims which rank pari passu with other unsecured creditors and subordinate to the interests of the secured creditors. (See also Indalex Limited CV-09-8122-00CL - July 24, 2009 on this point.)

47 I acknowledge that the situation facing the employees is unfortunate and that in Nortel, a hardship exception was made. However, this exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the former employees. Such is not the case in this matter.

48 Counsel to the Union also submitted that paragraph 11(d) of the Amended and Restated Initial Order only allows the company to terminate employees on terms agreed to by the employees or "to deal with the consequences thereof in the plan". Counsel to the Union submits that there is no agreement in this case and there is no plan and consequently paragraph 11(d) does not authorize the company not to pay termination pay and severance pay.

49 In my view, the Applicants provide a complete response to this argument in their submission summarized at [15] which I accept and at paragraph 32 of their factum by noting that the Applicants could have proposed a Plan that would not have seen value paid to the unsecured creditors and that could have effected the Proposed Sale through a Plan, and to require that the Applicants propose a Plan in order to effect the sale would be an overly technical requirement inconsistent with the CCAA's remedial objective. I also accept these submissions. In my view, this is not a case where the Applicants have used the CCAA to avoid termination and severance pay obligations under the ESA. The fact that these claims will not be paid is a result of legal priorities as opposed to any specific action of the Applicants.

50 I also note the CCAA proceedings are ongoing and the Applicants have brought forth a motion to propose a plan directed only at the secured creditors, but such a plan has been accepted in other cases. (See *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), aff'd (2002), 34 C.B.R. (4th) 157 (Ont. C.A.)) This motion has yet to be heard.

Disposition

51 In the result, I have not been persuaded that the facts of this case are such that would justify an outcome different from that of *Nortel*. The claims for termination pay and severance pay are unsecured claims and enforcement proceedings are stayed, save and except for any incremental amount of termination pay and severance pay attributable to the period of time after the Applicants went into CCAA protection.

52 Counsel to the Bank also raised the issue that Tilbury and Pellus do not have the funds to pay the termination and severance claims as all cash is held by WMSL. Counsel to the Bank submits that if an order were to be made that WMSL were required to pay or to loan money to Tilbury or Pellus so that they could then pay the termination and severance pay claims, such would be equivalent to a common employer finding without a proper trial of such issue. I accept this position and to the extent that I have erred in my conclusions and this issue becomes relevant, it would be necessary, in my view, to have a hearing to determine whether WMSL, Tilbury and Pellus are a common employer. This possibility is recognized at paragraph 38 of the Reply Factum served by counsel to the Union.

53 For the foregoing reasons, subject to the caveat in [51], the motion is dismissed.

TAB 6

2017 ABQB 69
Alberta Court of Queen's Bench

Sanjel Corporation, Re

2017 CarswellAlta 925, 2017 ABQB 69, [2017] A.W.L.D. 2289, 280 A.C.W.S. (3d) 18, 48 C.B.R. (6th) 328

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

And in the matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

B.E. Romaine J.

Judgment: January 31, 2017
Docket: Calgary 1601-03143

Proceedings: leave to appeal refused *Wells Fargo Securities Canada Ltd. v. Sanjel Corp.* (2017), 2017 CarswellAlta 648, 2017 ABCA 120, Marina Paperny J.A. (Alta. C.A.)

Counsel: Lisa Hiebert, Jessica L. Cameron, for Monitor
Brett Harrison, Adam Maerov, for Wells Fargo Securities Canada Ltd.
Kelly J. Bourassa, Chris Nyberg, for Lending Syndicate
Walker Macleod, for Liberty Oilfield Services Holdings, LLC
Robin Schwill, for Ascribe Capital

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous Declaration as to priority — Debtor engaged financial advisor (advisor) to sell two of its operations and granted charge of US $5 million on debtor's property to secure obligations under engagement letter (letter) — Judge approved letter in Companies' Creditors Arrangement Act (CCAA) proceeding but dismissed advisor's application for payment of entire engagement fee of US$2.5 million in priority to other creditors on basis that charge only secured US$500,000 — Application judge dismissed advisor's application for leave to appeal as without merit, finding that judge's interpretation that clause in initial order did not constitute direction to pay, nor priority for that portion of financial advisors' fee that was not secured by charge, was only one available having regard to terms of initial order and purpose for which orders were granted — Sale of assets generated insufficient proceeds to pay entirety of indebtedness to secured creditor — Advisor brought application for declaration that transaction fee should be paid to it in priority to claim of secured creditor — Application dismissed — Order approving letter, in context of remainder of order and circumstances that gave rise to it, did not constitute direction requiring debtor to pay advisor success fee in priority to claims of secured creditor — Advisors' charge did not secure full amount of fees payable under letter — Clear and unambiguous language was required to create priority for certain creditors — Court approved, retroactively, debtor entering into letter and granting of charges — Although order authorized and directs debtor to continue to engage advisors and comply with obligations to them under agreements, it did not create priority for fees unprotected by charge but only gave priority to portion of fees set out in agreements — Court in CCAA proceeding was not free to disregard general statutory scheme of priorities of creditors — Decision involving receivership following CCAA proceedings wherein legal accounts of former directors were ordered paid on ongoing basis was distinguishable — Here, nothing was paid to advisor and there was no specific provision compelling payment — Charge operate as cap on amounts given priority — Advisor's contention that this was not priority issue was disingenuous.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Afton Food Group Ltd., Re (2006), 2006 CarswellOnt 3002, 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) — distinguished

Smoky River Coal Ltd., Re (2000), 2000 CarswellAlta 830, [2000] 10 W.W.R. 147, 83 Alta. L.R. (3d) 127, 19 C.B.R. (4th) 281, 2000 ABQB 621, 297 A.R. 1 (Alta. Q.B.) — referred to

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, [2001] 10 W.W.R. 204, 205 D.L.R. (4th) 94, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — referred to

Winalta Inc., Re (2011), 2011 ABQB 399, 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157, 521 A.R. 1 (Alta. Q.B.) — referred to

Statutes considered:

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

Generally — referred to

s. 6 — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

APPLICATION by financial advisor for declaration that charge had priority over that of secured creditor.

***B.E. Romaine J.*:**

1 In this *Companies' Creditors Arrangement Act* proceeding, Wells Fargo Securities Canada Ltd seeks a declaration that an engagement letter entered into with Sanjel Corp is enforceable, and that the transaction fee set out in the letter should be paid by Sanjel in priority to the claim of the secured creditor.

2 Wells Fargo relies on paragraph 6 of the initial CCAA order granted on April 4, 2016.

3 The relevant parts of that paragraph are as follows:

> . . . the engagement letter entered into between Wells Fargo Securities Canada, Ltd. ("Wells Fargo Securities") and Sanjel Corp. dated September 22, 2015 (collectively, ... hereinafter referred to as the "Financial Advisors") (the "Financial Advisors' Engagement Letters") ... are hereby approved and Sanjel Corp is authorized and directed to continue the engagement of the Financial Advisors as Assistants thereunder and to comply with all of its obligations thereunder. The Financial Advisors are hereby granted a single charge in the maximum aggregate amount of ... US $500,000 (for the benefit of Wells Fargo Securities) (collectively, the "Financial Advisors' Charge") on the Property to secure all obligations under the Financial Advisors Engagement Letters. The Financial Advisors' Charge shall have the priority set out in paragraphs 48 and 50 hereof.
>
> (emphasis added)

4 The Financial Advisors' Charge did not secure the full amount of fees payable under the engagement letters of any of the Financial Advisors.

5 Nevertheless, Wells Fargo submits that paragraph 6 should be interpreted as a direction to pay the entirety of its transaction fee of $2.5 million in priority to the debt owed to the secured creditor, the Lending Syndicate.

6 Unfortunately, the sale of assets in this CCAA proceeding has generated insufficient proceeds to pay the entirety of the indebtedness to the Lending Syndicate. Sanjel proposed to pay the portion of the transaction fees owed to the Financial Advisors secured by the Financial Advisors' Charge, but treat the balance as unsecured claims, which in the circumstances will receive nothing.

7 The Alberta Court of Appeal has commented that the remedial purpose of the CCAA must be kept at the forefront in interpreting a CCAA order: *Smoky River Coal Ltd., Re*, 2001 ABCA 209 (Alta. C.A.) at para 16. The Court noted at para 17 that:

> It is particularly important that the terms and scope of any charge created by an order be clearly defined. Creditors need to know from the outset whether or not they are entitled to benefit in any charge or other priority created by the order. Those extending credit, be it trade credit or otherwise, should not be forced to participate in litigation after the CCAA proceeding to discover whether or not they hold some form of security or are entitled to a super-priority. Similarly, secured creditors of a troubled company need to know from the outset the effect the CCAA process will have on their security. They should not be forced to wait until the end of the proceedings to discover that their security has been whittled away due to a broad judicial interpretation of qualification for super-priority status. A precise CCAA order will ensure commercial practicality by allowing all creditors of the debtor company to properly adjust the terms of their credit.

8 While the Court was referring to the scope of a charge, it is equally important that any provision in an order that purports to create a priority for a creditor over other creditors be clearly delineated and set out with precision.

9 With this in mind, the context and purpose of the initial order is relevant.

10 In support of Sanjel's application for the initial order, the Monitor prepared a pre-filing report that commented on the financial advisors' charges sought by Sanjel. The Monitor noted that transaction fees for financial advisors totalled $10.4 million, and that the success fee payable to Wells Fargo seemed high based on the nature and extent of work performed.

11 At the hearing of the application, counsel for the Monitor commented that the transaction fees were high, but also noted that the charges were not for the whole amount. Wells Fargo had been engaged to aid in the sale of two Sanjel assets known as Suretech and Terracor, but had been unsuccessful in obtaining any acceptable offers at the time of the initial order. Counsel for the Monitor noted that the Wells Fargo fee was very high on its face, and that "we will no doubt be reporting back to the Court if there is a transaction on [the Suretech/Terracor side] of the business".

12 I noted the following in granting the initial order:

> The applicants seek a Financial Advisors' Charge up to a maximum amount of US $6.1 million in respect of the fees and disbursements of Credit Suisse and PJT Partners, and a charge of U.S. $500,000 in respect of Wells Fargo. I note that undue duplication has been considered, but that the differing experience and mandate of the financial advisors has resulted in the coordination of efforts, rather than a duplication. This will be a large and complex cross-border restructuring and I have been aided in considering the quantum of the charge by the Monitor's analysis of advisor fees from a number of different restructurings.
>
> I note the Monitor's advice that, while the proposed charge is higher than average, based on the synergies provided by the financial advisors, their success in bringing credible purchasers to Sanjel leading to the execution of purchase and sale agreements supported by the syndicate, and the consent of the syndicate to the charge, the agreed upon Financial Advisors' Charge is not unreasonable in the circumstances and I approve it.
>
> (emphasis added)

13 What I was asked to do, and what I did, was to approve, retroactively, Sanjel entering into the engagement letters and to grant the charges granting priority of payment for a portion of the fees payable under the letters.

14 After the initial order was granted, a Wells Fargo representative contacted the Sanjel CRO expressing concern about the size of the Wells Fargo charge. The representative referred to previous conversations with a Sanjel representative. He said that the representative had assured him not to be concerned, that the Monitor had approved the engagement letter and that the fees had been set aside. The Monitor says that it is incorrect that fees had been set aside for the transactions fees, as only funds to cover the charges were set aside.

15 Sanjel's CRO responded to Wells Fargo that "we didn't cut your fees, the banking syndicate only approved the reduced first charge, which we had to fight for even that".

16 Attempts to sell the Suretech and Terracor assets continued after the initial order, but without the involvement of Wells Fargo, although it was offered. Eventually these assets were sold. Wells Fargo submits that the sales arose from work it had performed prior to the initial order.

17 Although paragraph 6 of the order authorizes and directs Sanjel to continue to engage financial advisors and to comply with its obligations to the financial advisors under the agreements, it does not by this language create a priority for the financial advisory fees that are not protected by the Financial Advisor's Charge. As noted in *Smoky River Coal Ltd., Re*, 2000 ABQB 621 (Alta. Q.B.) at para 34, the court in a CCAA proceeding is not free to disregard the general statutory scheme of priorities of creditors without good reason. When it does alter priorities, it should do so in clear language.

18 While Section 11.52 of the CCAA authorizes the court to grant a priority charge where it considers it appropriate, there are factors set out under section 11.52 in considering such a charge, which I considered and referred to at the time of the initial order.

19 Section 6 must be read in its entirety and in the context of the order as a whole: *Winalta Inc., Re*, 2011 ABQB 399 (Alta. Q.B.) at para 96. While the order approves the engagement letters, it only gives a priority charge to a portion of the fees set out in the agreements.

20 As noted by the Monitor, Wells Fargo's position would render the creation of the charges in the latter part of paragraph 6 redundant and ineffective.

21 Other provisions in the initial order support this interpretation. Paragraph 7 provides that Sanjel is "entitled but not required" to pay the "reasonable fees" of Assistants (which include financial advisors) but only those the payment of whose fees are expressly approved by this order.

22 Paragraph 48 lists the charges created by the order, with specific limits, and makes it clear that it is only the US $500,000 charge that gives priority to the claim of Wells Fargo. Paragraph 6 and paragraph 48 of the order cannot be read together to give effect to Wells Fargo's interpretation of paragraph 6.

23 Wells Fargo makes a number of additional submissions in support of its interpretation.

24 It submits that Sanjel cannot use the CCAA to unilaterally revise or amend contractual terms.

25 The Monitor does not dispute the amount of the Wells Fargo success fee, nor suggest that Wells Fargo is not entitled to it under the terms of the engagement letter. However, in the circumstances, the only way that Wells Fargo can recover more than the US $5,00,000 covered by the Financial Analysts' Charge in its favour is if it can establish a priority to estate funds over that of the Lending Syndicate.

26 Wells Fargo also submits that Sanjel breached the co-operation provision of the engagement letter by entering into direct discussions with potential purchasers without the involvement of Wells Fargo. At best, Wells Fargo may have an unsecured contingent claim for damages if it establishes a breach on this basis. The resulting contingent claim would not be given priority over the Lending Syndicate.

27 Alternatively, Wells Fargo submits that the success fee is a post-filing obligation, and therefore not subject to the stay of proceedings.

28 The engagement letter is clearly a pre-filing obligation, even if the success fee only became payable if and when Suretech and Terracor were sold. Even if Wells Fargo supplied services to Sanjel following the date of the initial order, which appears not to be the case, paragraph 7 of the order entitles, but does not require Sanjel to pay reasonable expense incurred in carrying on business in the ordinary course after the order.

29 Wells Fargo submits that this means that it is the only post-filing creditor not to be paid for its services. Paragraph 7, with its reference to "expenses incurred . . . in carrying on the Business in the ordinary course" is focused on trade creditors that are necessary for the continued day-to-day existence of the debtor's business. Wells Fargo's services were not in the ordinary course of business, even if it had rendered services after the order.

30 At any rate, the paragraph is permissive. In Allarco Entertainment 2008, Inc, ABQB No. 1603-09338, where a licensor sought to recover payment from Allarco of post-filing service charges incurred in the 30-day period subsequent to Allarco having disclaimed those services, the Court held that, despite the licensor having actually supplied services during that time, and while it may have a claim against Allarco, there was nothing in the CCAA that required Allarco to make immediate payment to the licensor of the post-filing services charges.

31 The Monitor points out that Wells Fargo's position would mean that any obligation that crystallized post-filing would have automatic priority over existing security interests. That would be contrary to the Court of Appeal's comments in *Smoky River Coal*, and would render section 11.52 of the CCAA unnecessary and redundant.

32 Wells Fargo characterizes paragraph 6 of the order as a "mandatory injunction." It is not. Such an interpretation cannot prevail given the order as a whole. There was no application for an injunction or direction to pay before the Court at the time of the initial order.

33 In fact, the Monitor expressed concern over the size of the transaction fee. Had I intended to direct Sanjel to pay the fee, I would have had to address the Monitor's comment that the fees appeared too high, and paragraph 6 would not require the charging language.

34 Wells Fargo relies on *Afton Food Group Ltd., Re*, [2006] O.J. No. 1950 (Ont. S.C.J.) for the proposition that a distinction should be drawn between what it characterizes as a "mandatory injunction" and the charge. The facts in *Afton* are distinguishable, and in any event do not aid Wells Fargo.

35 *Afton* involved a receivership that followed CCAA proceedings. The CCAA Justice made a specific order that the legal accounts of former directors be paid on an ongoing basis. That order was continued in the receivership proceedings, and the Receiver was directed to pay the fees and expenses of counsel to the directors in the ordinary course out of cash flow under its control, in the same manner as previously.

36 The CCAA order also included indemnification provisions for the former directors, secured by a third-ranking charge, and this was also continued under the receiver order. One of the issues before the Court was whether or not the $1 million charge on the directors' indemnification provision was being reduced as legal fees were being paid to counsel for the directors.

37 Spies, J. commented that if the directors were compelled to look to the charge for claims asserted against them, including legal fees, then those legal fees would be included in the $1 million charge, and that, on that basis, the legal fees would reduce the amount of security available for the claims: para 52. However, since what had actually happened was that fees were paid as they were invoiced in the ordinary course, there would be no need for the directors to look to the charge, and thus the payment of the fees did not reduce the $1 million amount of the charge: para 54.

38 Spies, J. thus found that "the charge . . . is exclusive of the legal fees and disbursements *paid* by the Applicants to counsel ..." para 59 (emphasis added).

39 It is clear that nothing in this case has been paid to Wells Fargo, nor is there the kind of specific provision obligating payment that existed in the *Afton* orders found in the initial order. The only paragraph that expressly directs payment is paragraph 35, which mandates weekly payment of fees for certain professionals involved in the CCAA proceedings, but not the financial advisors.

40 Wells Fargo also submits that a charge is not a cap on payment. It may or may not be depending on the terms of the relevant order, but it is, and must operate as, a cap on amounts given priority.

41 Finally, Wells Fargo submits that this is not a priority issue, that it is merely seeking to enforce a direction to pay. This is disingenuous, as the only basis on which the order could be interpreted to direct payment of the transaction fee in the circumstances of this CCAA proceeding is if paragraph 6 created a priority for Wells Fargo over the claim of the Lending Syndicate.

Conclusion

42 Paragraph 6 of the initial order, in the context of the remainder of the order and the circumstances that gave rise to it, does not constitute a direction to pay that would require Sanjel to pay Wells Fargo a success fee in priority to the claims of the secured creditor, the Lending Syndicate. The proposition that paragraph 6 creates an direction to pay, either implicit or explicit, is not supported by either the language of the initial order nor the requirement that provisions that create in effect a priority for certain creditors must be supported by clear and unambiguous language.

Application dismissed.

TAB 7

2015 ABQB 208
Alberta Court of Queen's Bench

Avison Young Real Estate Alberta Inc. v. Bosa Properties (Eau Claire) Inc.

2015 CarswellAlta 569, 2015 ABQB 208, [2015] A.W.L.D. 2057, 24 C.B.R. (6th) 143, 252 A.C.W.S. (3d) 397, 611 A.R. 189

In The Matter of the Bankruptcy of 3 Eau Claire Developments Inc.

Avison Young Real Estate Alberta Inc., Applicant and Bosa Properties (Eau Claire) Inc., Respondent

S.J. LoVecchio J.

Heard: February 13, 2015
Judgment: March 30, 2015
Docket: Calgary B101-859192

Counsel: Alexis Teasdale for Applicant, Avison Young Real Estate Alberta Inc.
John Sandrelli for Respondent, Bosa Properties (Eau Claire) Inc.

Subject: Insolvency; Restitution

Headnote

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors

B Inc. and other company ("bankrupt") entered negotiations to form joint venture to develop land — B Inc. advanced funds to bankrupt, secured by mortgage on bankrupt's land, before negotiations collapsed and B Inc. withdrew from project — Bankrupt signed listing agreement appointing A Inc. as bankrupt's real estate agent and setting out commission — B Inc. sought to enforce its security — Bankrupt filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act — Receiver was appointed — Bankrupt was assigned into bankruptcy — Receiver was appointed trustee — When land was sold, secured claims exceeded proceeds of sale — A Inc. applied to recover commission in priority to other claims, alleging receiver approved payment of reduced commission to A Inc. — Application dismissed — A Inc. had valid agreement with bankrupt, but receiver was not bound by and had not affirmed agreement — A Inc. was unsecured creditor and should have applied for priority charge — As there was no evidence of intention to create trust, listing agreement did not create express trust over commission — A Inc. not prohibited from terminating agreement by s. 65.1(1) of Act — Receiver's request to have A Inc. accept lesser commission did not constitute approval or guarantee of payment — Scheme established under Act provided juristic reason for giving priority to secured claims like those of B Inc., with result they did not constitute unjust enrichment.

Table of Authorities

Cases considered by *S.J. LoVecchio J.*:

Allan Realty of Guelph Ltd., Re (1979), 1979 CarswellOnt 184, 24 O.R. (2d) 21, 6 E.T.R. 50, 97 D.L.R. (3d) 95, 29 C.B.R. (N.S.) 229 (Ont. Bktcy.) — followed

Bank of Montreal v. Scaffold Connection Corp. (2002), 2002 ABQB 706, 36 C.B.R. (4th) 13, 2002 CarswellAlta 932 (Alta. Q.B.) — referred to

Bassano Growers Ltd. v. Price Waterhouse Ltd. (1997), *(*sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt))* 214 A.R. 380, 6 C.B.R. (4th) 188, 1997 CarswellAlta 1182 (Alta. Q.B.) — referred to

Bassano Growers Ltd. v. Price Waterhouse Ltd. (1998), 1998 CarswellAlta 555, *(*sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt))* 216 A.R. 328, *(*sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt))* 175 W.A.C. 328, 66 Alta. L.R. (3d) 296, 6 C.B.R. (4th) 199, 1998 ABCA 198 (Alta. C.A.) — referred to

Becker v. Pettkus (1980), 1980 CarswellOnt 299, 1980 CarswellOnt 644, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — followed

Carling Development Inc. v. Aurora River Tower Inc. (2005), 2005 ABCA 267, 2005 CarswellAlta 1095, 257 D.L.R. (4th) 627, 46 Alta. L.R. (4th) 40, 371 A.R. 152, 354 W.A.C. 152, [2006] 2 W.W.R. 208 (Alta. C.A.) — followed

5 Under the Listing Agreement, 3 Eau Claire agreed to pay Avison a $400,000 commission in the event the Lands were sold, or $800,000 upon a binding partnership agreement, payable on the closing date of the applicable agreement. The Listing Agreement also provided that deposits called for in offers to purchase were to be held in trust by Avison and could be used to offset the commission earned.

6 On April 2, 2014, Bosa made a demand for payment and gave a Notice of Intention to Enforce Security on 3 Eau Claire. On April 11, 2014, 3 Eau Claire filed a Notice of Intention to Make a Proposal pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act* [1] . Deloitte Restructuring Inc. consented to act as Trustee of 3 Eau Claire's proposal.

7 3 Eau Claire was granted several extensions to the initial 30-day stay of proceedings to give it additional time to file a proposal and an Administrative Charge to secure payment of the professional fees of Deloitte and its Counsel was established. The amount of this charge was in the end set by the Court at $100,000.

8 On August 15, 2014, Deloitte was appointed as Receiver without security over all of 3 Eau Claire's current and future assets, undertakings and properties pursuant to a Limited Receivership and Extension Order. As Receiver, it was granted certain powers including the power to engage agents to assist with the exercise of its duties, and the power to market any or all of the property of 3 Eau Claire including the Lands.

9 The Receiver continued to rely on Avison's services in a limited way and in September 2014, Deloitte asked Avison whether it would accept a discounted commission of $350,000. Avison agreed.

10 On September 25, 2014, the Court expanded Deloitte's powers and also granted a first priority charge on the estate of 3 Eau Claire, to be ranked *pari passu* with the Administrative Charge, in favour of the Receiver and its legal counsel in order to secure payment of the Receiver's reasonable fees and disbursements. The obligation of 3 Eau Claire for the payment of the reduced commission was never brought under the umbrella of either the Administrative Charge or the Receiver's Charge contemplated by the September 25, 2014 Order.

11 The Court also approved the sale of the Lands to Bentall Kennedy (Canada) LP with the net proceeds from the sale to stand in place and stead of the Lands. Under that Order, all encumbrances on the Lands were discharged but attached with the same validity and priority and in the same amounts to the proceeds of sale as if the property had not been sold. The proceeds of the sale, amounting to $39.4 million, were paid to the Receiver in November 2014.

12 At the hearing, Bosa stated for the first time that it intended to oppose the payment of Avison's commission in priority to its secured claim.

13 On September 29, 2014, the extension of the stay of proceedings lapsed without 3 Eau Claire having filed a BIA proposal. Accordingly, 3 Eau Claire was deemed to have made an assignment in bankruptcy and Deloitte was appointed as trustee of the bankrupt estate.

14 As of September 29, 2014, Deloitte had filed four reports as Proposal Trustee and one report as Receiver. The reports describe in detail Avison's marketing activities. Avison had continued its services pursuant to the Listing Agreement with 3 Eau Claire during the proposal period. It assisted the Trustee in marketing the Lands, assessing interested parties, analyzing their offers, and negotiating purchase agreements. Avison's direct involvement in the marketing process ended by the August 15, 2014 hearing.

15 As of September 29, 2014, 3 Eau Claire had seven listed secured creditors who held registered mortgages against the Lands. The total secured claims amounted to approximately $47.5 million. As such, the claims exceeded the total proceeds held by the Receiver.

that Deloitte, Miller Thompson and Blakes sought and received priority charges with respect to their fees. Accordingly, Avison should have sought a priority charge for the payment of its commission as an advisor to 3 Eau Claire or Deloitte.

25 In its Supplemental Bench Brief, Bosa responds to Avison's arguments.

26 First, Bosa argues that the Listing Agreement does not create a valid trust. On intention, Bosa argues that the Listing Agreement does not establish that 3 Eau Claire intended to create a trust in favour of Avison. Bosa argues that instead, the Agreement evinces an intention to create a contractual agreement to pay Avison for its services, and provides that Avison will hold any deposit in trust for 3 Eau Claire, not for Avison itself. On subject matter, Bosa argues that the commission was not identifiable or held apart in trust for Avison. Rather, the $2.0 million dollars held in trust flowed from the purchaser to the bank account of the purchaser's solicitors subject to the terms of the Asset Purchase Agreement. That agreement was between the Receiver and Bentall as purchaser, with no relevance to the commission.

27 Second, Bosa argues that section 65.1(1) of the BIA is not applicable. Bosa argues that the section is intended to prevent contracting parties from taking advantage of clauses allowing for termination based solely upon insolvency and not for any other breach of contract. Bosa argues that the section is primarily with respect to the supply of goods which are necessary for the continuation of a debtor's business, and as Avison was not supplying goods upon which 3 Eau Claire relied for operations, Avison could have terminated, or at least sought direction from the Court. Further, Bosa argues that even if Avison was not entitled to terminate, it was not required to make advance of credit to 3 Eau Claire. In addition, Bosa argues that regardless, Avison could have secured a priority charge. Thus, by not terminating and continuing to market the lands without entering into a listing agreement with the Receiver or seeking a priority charge, Avison chose to provide services on unsecured credit.

28 Third, Bosa argues that the Receiver does not have unilateral authority to approve the payment of a commission to Avison where doing so would alter the priorities set out in the BIA. Absent an express assumption of the Listing Agreement or a section 64.2 priority charge, an obligation of 3 Eau Claire cannot be elevated to priority status.

29 Fourth, Bosa contests Avison's argument of unjust enrichment. Bosa argues that any deprivation suffered by Avison was not caused by Bosa but rather was due to the financial status of 3 Eau Claire and Avison's failure to contract with the Receiver or to seek a priority charge pursuant to section 64.2 of the BIA. Bosa also argues that the operation of the BIA, including its statutory regime establishing the relative priority of claims, is an adequate juristic reason for any enrichment to a bankrupt estate or its creditors. In particular, Bosa points to the valid security interest as the juristic reason for permitting the enrichment of the secured lender and the corresponding deprivation of unsecured claimants. Bosa objects to Avison's estoppel argument on the basis that it is permitted to protect its position when Avison seeks to subvert the BIA. In Bosa's view, Bosa had no obligation to compel Avison to exercise options available to it under the BIA. Bosa argues that it has no legal relationship with Avison and thus any estoppel argument fails.

Decision

30 This Court has some sympathy for Avison. The company successfully secured a lucrative sale of the Lands to the benefit of all creditors including Bosa. At the end of the day, however, Avison failed to protect its own financial position and remains an unsecured creditor after a long line of secured creditors.

Discussion

31 Avison's arguments must be viewed in the context of the alternative steps it could have taken.

32 Avison had an agreement with 3 Eau Claire. That agreement was never affirmed by the Receiver so there is no privity of contract between Avison and the Receiver. And, the Receiver is not bound by existing contracts made by 3 Eau Claire. [2]

33 It is a matter of record that Avison attended every court date in the proceedings and was in regular contact with Deloitte. It was almost certainly aware that priority charges were granted in favour of Deloitte, Miller and Blakes. Avison failed to pursue

a similar course of action to its own detriment. That is what could have been. But it was not so I must address each of Avison's arguments.

Existence of an Express Trust

Avison's argument that the Listing Agreement creates an express trust is unpersuasive. Section 67(1)(a) of the BIA provides that "[t]he property of a bankrupt divisible among his creditors shall not comprise (a) property held by the bankrupt in trust for any other person ... ." As the Alberta Court of Appeal sets out in *Carling Development Inc. v. Aurora River Tower Inc.*, an express trust requires three elements: (i) certain beneficiaries; (ii) clear subject matter; and (iii) intention to create a trust. [3] The third element, intention, is not present here.

34 Clauses 5 and 7 the Listing Agreement provide as follows:

> 5. **Payment of Commission**. We will unconditionally and without any set off or deduction, pay the Commission on the closing date provided for in any Agreement, or upon the execution of a partnership agreement provided that all of the buyer's conditions have been satisfied or waived, whether or not closing of the purchased and sale of the Property has occurred (the "**Closing Date**"). In the event the Property is sold or deemed to be sold or a partnership agreement is entered into during the Term other than by way of Agreement, the Property will be deemed to be sold for a price equal to the gross sale price payable by the buyer, and the Commission will be fully earned, due and unconditionally payable to Avison Young immediately upon such disposition taking place.
>
> . . .
>
> 7. **Deposit**. We agree that Avison Young will hold any deposit called for in any Agreement (the "**Deposit**") and that the Deposit will be held by Avison Young in its trust account. We authorize Avison Young to deduct earned Commission and other amounts that may be or become owing by us to Avison Young from any such Deposit held when such Commission becomes payable. In the event of a sale not being completed as result of a default by the buyer, and the Deposit being forfeited by the buyer, we authorize Avison Young to deduct and pay to itself one-half of the Deposit, up to a sum equivalent to the Commission. The remaining balance of the Deposit will then be paid to us.

35 In my opinion, the Listing Agreement does not disclose an intention to create a trust. Read plainly, Clause 5 provides that the commission will be payable on the closing date. Clause 7 authorizes Avison to deduct funds from the trust to offset its commission when the commission becomes payable. The Agreement in no way transfers ownership of the funds to Avison; no beneficial property rights attach to the deposit in favour of Avison. Rather, 3 Eau Claire may use the funds to satisfy its contractual obligation to pay Avison for its services. That the funds are held in a real estate trust account does not create a trust relationship: it is simply a mechanism for efficient payment.

36 This language is consistent with the circumstances in *Allan Realty of Guelph Ltd., Re*. [4] In that case, the insolvent Allan Realty was a listing broker and at the time of bankruptcy held in trust a purchaser's deposit on a property. Another broker was responsible for the sale of the property. Under that trust, on completion, the vendor was entitled to the deposit, and the broker could access the funds to satisfy the claim for commission. As the Court observed at para 31:

> It will be at once apparent that this is not a case in which the source of funds can be described as the settlor. It is clear that at the time the contract of purchase and sale comes into existence and the deposit is paid, neither the purchaser, who is the source of the deposit, nor the vendor, upon whom ultimately the obligation to pay commission will rest, has the intention of creating a trust in favour of either listing or selling broker. If, therefore, a trust is to be found, it is not at that stage of the transaction, nor with respect to the deposit.

37 Avison points to paragraph 18 of the same decision, which notes that the agreement to pay commission contains the added direction by which the vendor instructs his solicitor "to pay direct to the said agent any unpaid balance of commission

TAB 8

2001 ABCA 209
Alberta Court of Appeal

Smoky River Coal Ltd., Re

2001 CarswellAlta 1035, 2001 ABCA 209, [2001] 10 W.W.R. 204, [2001] A.J. No. 1006, 107 A.C.W.S. (3d) 724, 205 D.L.R. (4th) 94, 266 W.A.C. 125, 28 C.B.R. (4th) 127, 299 A.R. 125, 95 Alta. L.R. (3d) 1

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; And In the Matter of Smoky River Coal Limited; Allstate Insurance Company, Allstate Life Insurance Company, Security Life of Denver Insurance Company, Indiana Insurance Company, Peerless Insurance Company, Pacific Life Insurance Company, AH (Michigan) Life Insurance Company, Northern Life Insurance Company, Reliastar Life Insurance Company, Modern Woodmen of America, Phoenix Home Life Mutual Insurance Company, American International Life Assurance Company of New York and Phoenix American Life Insurance Company (Petitioners)

Montreal Trust Company of Canada Ltd. (Plaintiff) and Smoky River Coal Limited, Copton Excol Ltd. and 378419 Alberta Ltd. (Defendants)

Canadian National Railway Company, Municipal District of Greenview No. 16, Finning (Canada) - A Division of Finning International Inc., Coneco Equipment Inc., Atco Electric Ltd. and Ro-Dar Contracting Ltd. (Appellants / Not named parties to the Queen's Bench Action) and Montreal Trust Company of Canada (Respondent / Plaintiff) and Pricewaterhousecoopers Inc. in its capacity as Interim Receiver of Smoky River Coal Limited, Her Majesty the Queen in right of Alberta as represented by the Department of Resource Development, Non-Union Employees of Smoky River Coal Limited and United Steelworkers of America Local 7621 (Respondents / Not named parties to the Queen's Bench Action)

Picard, Fruman, Wittmann JJ.A.

Heard: June 13-14, 2001
Judgment: August 2, 2001
Docket: Calgary Appeal 00-18924, 00-18944, 00-18947, 00-18950, 00-18957, 00-18958, 00-18975

Proceedings: reversing in part (2000), 2000 CarswellAlta 830 (Alta. Q.B.)

Counsel: *T.M. Warner*, *D.R. Peskett*, *R.T.G. Reeson*, *Q.C.*, *J. Di Pinto*, for Appellants
D. LeGeyt, *K. McHugh*, *S. McDonough*, *B. Clapp*, *D.T. Williams*, for Respondents

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Application of Act

Company obtained protection under Companies' Creditors Arrangement Act, pursuant to court order — Court order provided that "post-petition trade creditors" who provided essential goods and services during re-organization would benefit from charge securing company's indebtedness in respect of same — Interim receiver was appointed under Bankruptcy and Insolvency Act, and Arrangement Act proceedings were stayed, but obligations established throughout proceedings were preserved — Several creditors brought applications for recognition as post-petition trade creditors — Certain applications allowed, certain applications dismissed — Two lessees, municipality and employees appealed dismissal of applications — Certain applications allowed, certain applications dismissed — Lessees were entitled to cost of repairs to leased equipment as obligation to maintain equipment was set out in lease agreements with company — Municipality was not entitled to recognition as post-petition creditor for property taxes as services provided by community were not traded services — Employees were entitled to recognition as

post-petition creditor for vacation pay and severance pay as entitlement to vacation pay had been arranged between counsel, and trial judge's decision deserved deference regarding severance pay — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

APPEAL by creditors from judgment reported at [2000] 10 W.W.R. 147, 83 Alta. L.R. (3d) 127, 19 C.B.R. (4th) 281, 2000 ABQB 621, 2000 CarswellAlta 830 (Alta. Q.B.), respecting designation as post-petition creditors.

***Per curiam*:**

1 The central issue in this appeal is determining which creditors of Smoky River Coal Ltd. are entitled to participate in a post-petition trade creditors' charge.

FACTS

2 The facts are set out in detail in the decision of LoVecchio, J.: *Re Smoky River Coal Ltd.*, [2000] A.J. No. 925 (Alta. Q.B.). They are briefly recapped here.

3 Until very recently, Smoky River operated a coal mine located in Grande Cache, Alberta. It had been experiencing financial difficulties since 1998. Effective July 31, 1998, Smoky River obtained the protection of the Companies' *Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") pursuant to an order of Cairns, J. dated August 10, 1998. This order stayed all proceedings against Smoky River and provided for the creation of charges.

4 On August 17, 1998, Prowse, J. issued an order creating an express charge and priority over Smoky River's assets in favour of what were termed in the order "post-petition trade creditors" ("PPTC Charge"). Paragraphs 2(c) and (d) of the August 17, 1998 order state (AB 32):

> (c) obligations incurred by Smoky to trade creditors after the date of filing of the Petition ("Post-Petition Trade Creditors") shall be paid in accordance with their terms of credit;
>
> (d) Post-Petition Trade Creditors shall be entitled to the benefit of and are hereby granted a charge ("Post-Petition Trade Creditors' Charge") against, and security interest in, the Property, as security for indebtedness incurred to them [...].

5 The purpose of the PPTC Charge was to encourage the regular trade creditors of Smoky River to continue to provide essential goods and services to Smoky River during its reorganization period. The order did not define the term "post-petition trade creditor", but called for a special hearing as soon as possible to delineate post-petition trade creditors' entitlement to, and priority in, the PPTC Charge. That hearing was never held.

6 LoVecchio, J. was appointed the CCAA judge. On June 16, 1999, he capped the amount of the PPTC Charge at $7 million.

7 On March 17, 2000, the CCAA judge lifted the CCAA stay of proceedings, allowing the Petitioners, the holders of $75 million of secured notes, to accelerate their claims, make a demand for payment, and deliver a notice to Smoky River pursuant to s. 244 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3. The order further stipulated that Smoky River should only operate and make expenditures as required in the ordinary course of business, or to preserve the status quo.

8 On March 22, 2000, the Petitioners applied to issue a Statement of Claim, and appoint a Receiver/Manager over Smoky River and its subsidiary corporations. They also proposed a "wind-down" of the mining operations, given the large number of employees involved. A plan for the "ramping down" of activities was created to ensure a smooth transition into receivership.

9 On March 25, 2000, Smoky submitted an "orderly Shutdown Plan" to the Monitor. On March 29, 2000, the CCAA judge limited the payments that could be made by Smoky River. Notwithstanding the provisions of the *Employment Standards Code*, S.A. 1996, c. E-10.3, Smoky River was ordered to pay only outstanding wage claims of employees. The order specified that "the

rights of any employee shall not otherwise be prejudiced by this order, nor shall this order be used as a basis for an argument to alter the legal entitlement of employees" (AB 158).

10 On March 31, 2000, the Petitioners were granted leave to commence proceedings under the *Bankruptcy and Insolvency Act* and the CCAA proceedings were stayed. By a second order on the same date, PricewaterhouseCoopers was appointed the interim receiver of Smoky River. The obligations established throughout the CCAA proceedings were preserved by the following provisions (AB 49):

> 7. The Receiver may without further order of the Court and on notice to the Noteholders make payments:
>
> (a) to employees of Smoky River Coal Limited up to the extent of their statutory priority; [...]
>
> (e) to creditors entitled to the benefit of the CCAA post-petition trade creditors' charge;
>
> provided that the priority of such payments is in accordance with the priorities set out in previous orders of the Court relating to The CCAA proceedings of the Defendant Smoky River Coal Limited, and shall make no other distribution to the Plaintiff or other creditors of any class without first having obtained the leave of this Court.
>
> 19. The Receiver shall be bound by all the charges, priorities and obligations created or approved by this Court in The CCAA proceedings, and the Receiver is directed to:
>
> (a) determine which creditors are entitled to the benefit of the post-petition trade creditors' charge; and
>
> (b) determine what other charges, priorities and obligations need to be maintained;
>
> and if necessary seek the direction of this Court within 45 days hereof. [...]

11 On May 9, 2000, the Receiver was authorized to send out notices to all creditors claiming refuge under the PPTC Charge, informing them whether or not their claims had been accepted. Creditors were provided with a mechanism for court review of the Receiver's decisions.

12 On July 4 and 5, 2000, the CCAA judge heard the applications of several creditors, including all the parties to this appeal, appealing the Receiver's determination of their entitlement, or lack of entitlement, to the PPTC Charge.

THE CCAA JUDGE'S DECISION

13 In his decision of July 31, 2000, *supra*, the CCAA judge set out two requirements for eligibility for the PPTC Charge. The first criteria was that the debt in question was incurred by Smoky River during the CCAA period, between July 31, 1998 and March 31, 2000.

14 The second criteria for eligibility was that the debt in question was incurred in connection with the daily operating activities of Smoky River, as opposed to debts that arose from the cessation or termination of services. As stated by the CCAA judge (*supra,* at para. 40):

> The main purpose of the Charge was to encourage the creditors who supply Smoky with goods and services to continue to deal with Smoky during the reorganization period. The critical characteristic of the service provided by the creditors must have been that it was essential to keeping "the lights of the company on". Thus, the costs or expenses incurred must be essential to the continued day to day operations of the mine. Penalties or obligations associated with a breach are not expenses associated with continued operations.

We are in substantial agreement with the two eligibility criteria delimited by the CCAA judge.

15 After setting out these requirements, the CCAA judge applied them to the applications of the various creditors. His decisions are discussed below, in the analysis of the individual appeals.

CREATING CCAA CHARGES

16 CCAA orders become the roadmap for the proceedings and the litigation which may follow. Orders must therefore be drafted with clarity and precision. The purpose of the CCAA must be kept at the forefront in both drafting and interpreting a CCAA order. The CCAA is remedial legislation. As was stated in *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]):

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan *[sic]* of compromise or arrangement to be prepared, filed and considered by their creditors and the court.

17 It is particularly important that the terms and scope of any charge created by an order be clearly defined. Creditors need to know from the outset whether or not they are entitled to benefit in any charge or other priority created by the order. Those extending credit, be it trade credit or otherwise, should not be forced to participate in litigation after the CCAA proceeding to discover whether or not they hold some form of security or are entitled to a super-priority. Similarly, secured creditors of a troubled company need to know from the outset the effect the CCAA process will have on their security. They should not be forced to wait until the end of the proceedings to discover that their security has been whittled away due to a broad judicial interpretation of qualification for super-priority status. A precise CCAA order will ensure commercial practicality by allowing all creditors of the debtor company to properly adjust the terms of their credit.

18 Terms for which there is no common and easily discernable meaning, such as "post-petition trade creditor", should be defined with as much precision as possible. In this case, the term was not defined in the original order, but was to be delineated in a special hearing to be "scheduled as soon as counsel can secure a special chambers date" to determine "whether or not and on what terms, including priority, if any, Post-Petition Trade Creditors shall be entitled to the benefit of and granted a charge against, and security interest in, the Property, as security for indebtedness incurred to them from and after the date of the Special Hearing" (AB 33-34). The parties charged with scheduling that hearing were Smoky River, the monitor, the Petitioners, the Canadian Imperial Bank of Commerce and Canadian National Railway Company. Their failure to convene the hearing has led to costly litigation and the appeals before us.

19 Parties in a CCAA proceeding, with the supervision of a CCAA judge, may define a post-petition trade creditors' charge as they see fit. Because they failed to do so in this case, the court must attempt to balance the interests of the parties. Most secured creditors are already protected, as they obtained an order capping the PPTC Charge at $7 million. Creditors who extended credit to Smoky River under the PPTC Charge have no similar protection. However, they are taken to understand the purpose of the CCAA and to expect that the PPTC Charge would be interpreted to accord with the commercial reality that the insolvent business would operate in its ordinary course. Therefore, while we accept the CCAA judge's requirement that to qualify, a debt must have been incurred in connection with the daily operating activities of Smoky River, in the circumstances of this case, we interpret that requirement on commercially reasonable terms.

THE APPEALS

20 The appeals have been consolidated. The CCAA judge's decisions, grounds of appeal and our conclusions are as follows:

Appeal of Coneco Equipment Inc.

21 Coneco Equipment Inc. leased heavy equipment to Smoky River during the CCAA period. The CCAA judge decided that Coneco was a post-petition trade creditor, entitled to the benefit of the PPTC Charge for the rental fee. Coneco appeals, asking for a declaration that it is also entitled to participate in the PPTC Charge for the cost of repairs to the equipment.

22 Coneco argues that the provisions of the August 17, 1998 order creating the PPTC Charge must be interpreted in a commercially reasonable manner -- in the manner that an unsecured creditor or business person being asked to provide credit

would interpret them. It contends that it was commercially reasonable to assume that repair costs to the equipment leased to Smoky River were part of the terms of credit, and would be included in the PPTC Charge. Conoco bases its argument on the lease agreements, which provided that Smoky River would pay the repair costs.

23 The application of commercially reasonable terms to Conoco's claim for repairs involves applying a legal test to a particular set of facts. We review on a standard of correctness.

24 Coneco was clearly a post-petition trade creditor. The covenant to repair the equipment was just as much a term of the lease and a term of credit as Smoky River's obligation to pay rent. The repair costs were not a damage claim, but a clear contractual obligation that arose during the CCAA period. It is not commercially reasonable that Coneco would lease valuable equipment to Smoky River unless Smoky River maintained it in good operating condition. Had there been no obligation to maintain the equipment, the rental rate would have been considerably higher. This interpretation is consistent with commercial reasonableness.

25 The order states that post-petition trade creditors will be paid in accordance with their terms of credit and will have the benefit of the PPTC Charge. The repair costs were part of Coneco's terms of credit and Coneco is entitled to the benefit of the PPTC Charge. Coneco's appeal is allowed.

Appeal of Finning (Canada)

26 Finning (Canada) also leased heavy equipment to Smoky River during the CCAA period. The CCAA judge decided that Finning was a post-petition trade creditor, and was entitled to the benefit of the PPTC Charge for rental only. Finning appeals, asking for a declaration that it is also entitled to participate in the PPTC Charge for the costs of the maintenance, repairs, servicing and required change-outs of the leased equipment.

27 Finning relies on the terms and conditions of its leases with Smoky River, which contained a clear obligation to maintain the equipment in good repair and operating condition. In addition, contemporaneous with the execution of the leases, Finning and Smoky River established a maintenance schedule for the equipment. The schedule outlined the number of operating hours the equipment could be used before maintenance, repairs and change-outs were required, and set out the fees Smoky River agreed to pay Finning for the change-outs.

28 Finning's appeal is similar to Coneco's, and the same analysis and standard of review apply. The cost of maintenance, repairs, servicing and required change-outs to the equipment were part of Finning's terms of credit and it is entitled to the benefit of the PPTC Charge. Finning's appeal is allowed.

Appeal of the Municipal District of Greenview No. 16

29 The CCAA judge ruled that property taxes owed to the Municipal District of Greenview No. 16 were not a "traded commodity" and were not entitled to the benefit of the PPTC Charge.

30 Greenview appeals, asking for a declaration that it is a post-petition trade creditor entitled to participate in the PPTC Charge for all of its 1999 property tax claim and for the pro-rated portion of its 2000 tax claim for the time period in which Smoky River continued to operate under the protection of the CCAA.

31 Greenview argues that it provided Smoky River with services which were a benefit to Smoky River. It submits that taxes were a necessary obligation incurred by Smoky River in connection with its daily operating activities during the CCAA period, and Greenview is therefore entitled to the benefit of the PPTC Charge.

32 Trade is defined in *Black's Law Dictionary*, 6th ed., as "the act or the business of buying and selling for money." In fact, Greenview was not selling its services to Smoky River for money. Counsel for Greenview conceded in oral argument that Greenview did not deny and could not have denied Smoky River the services it provided, although Smoky River did not pay

its property taxes. Property taxes are not the purchase price for the services provided by Greenview; instead they are the means of generating the revenue to provide those services.

33 Greenview was not engaged in the act of trading and cannot be a trade creditor. While nothing prevents a government that exchanges goods or services for money from being a trade creditor, in this case the nature of the property tax is determinative.

34 Greenview was not entitled to the benefit of the PPTC Charge. Its appeal is dismissed.

Appeal of CNR re: Royalty Payments to the Alberta Department of Resource Development

35 The CCAA judge decided that resource royalties on coal leases payable to the Alberta Department of Resource Development were entitled to the benefit of the PPTC Charge. CNR appeals this decision. It argues that ADRD is not a trade creditor, and that because the royalties in issue are in the nature of a tax, they are not properly considered trade debt.

36 Smoky River was required to pay monthly royalties to the ADRD to keep its most fundamental asset, its coal leases, in good standing. Because Smoky River needed its coal leases to continue its coal mine operations, the ADRD provided goods to Smoky River that were essential to "keeping the lights on" during the CCAA period. The royalty payments were not a tax but an exchange of money for goods, which could properly be characterized as a trade debt. The CCAA judge did not err in deciding that the ADRD was entitled to participate in the PPTC Charge. CNR's appeal is dismissed.

Appeal of CNR re: Vacation Pay

37 The CCAA judge made the receiving order retroactive to April 1, 2000. With the agreement of counsel, he also held that the employees were entitled to the benefit of the PPTC Charge for their vacation pay.

38 CNR appeals these decisions. It argues that the employment relationship is not one which would give rise to a "trade debt". Employees, therefore are not "trade creditors", and as such cannot participate in the PPTC Charge.

39 CNR also argues that because the time and date of bankruptcy is established by s. 2.1(a) of the *Bankruptcy and Insolvency Act*, the CCAA judge did not have the discretion to make that date retroactive. As the date of the receiving order was July 31, 2000, this also was the date of bankruptcy. Accordingly, vacation pay would have been paid before the bankruptcy, would have been given super-priority status under s.109(3) of the *Employment Standards Code*, and should not have been included in the PPTC Charge. CNR argues that including vacation pay in the PPTC Charge diluted the payments to *bona fide* trade creditors.

40 Because the decision to include vacation pay in the PPTC Charge was based on a concession by counsel for all the parties that Smoky River's employees were PPTC creditors for wages and vacation pay accrued during the CCAA period, we will not interfere. However, we offer no opinion whether employees should be characterized as trade creditors or whether wages and vacation pay should be characterized as trade debts. It is also unnecessary for us to decide and we express no opinion whether the CCAA judge erred in making the receiving order retroactive to April 1, 2000. CNR's appeal is dismissed.

Appeal of CNR re: Severance Pay

41 Severance payments calculated under the *Employment Standards Code* were paid to all Smoky River employees whose employment was terminated before March 29, 2000. Severance payments were suspended under the March 29, 2000 order. However, the order indicated that employees' rights were not affected and that the order could not be used to alter their legal entitlement. The CCAA judge decided that severance obligations for employees terminated between March 29 and March 31, 2000 were entitled to benefit from the PPTC Charge.

42 CNR appeals this decision. It argues that employees were not trade creditors and that severance pay was not an obligation that was incurred in connection with the daily operating activities of Smoky River, but rather arose from the cessation or termination of services.

43 In a complex case such as this, a great deal of deference must be given to the CCAA judge. The CCAA judge dealt with more than 100 applications, attempting to balance the rights and equities of many parties. The lack of precision in the initial order of August 17, 1998, and the failure to hold the special hearing to define the scope of the PPTC Charge made this task even more complex.

44 *Alberta v. Bank of Canada* (1991), 84 D.L.R. (4th) 335 (Alta. C.A.), at 337 sets forth the proper standard of review to be taken by an appellate court in these circumstances:

> [The chambers judge] has heard numerous applications and has made many orders and directions with respect to these proceedings. He, better than anyone, has gained insight into the problems relating to this matter and how to attempt to resolve them. At times, no doubt, resolutions to these problems require some innovation. Suffice it to say that we will not lightly interfere with the enormous task undertaken by this chambers judge. We would do so only if clear error is shown.

45 This court also commented on the appropriate standard in *Re Smoky River Coal Ltd.* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.), at 724:

> The fact that an appeal lies only with leave of an appellate court (s. 13, CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

46 The CCAA judge, in permitting the severance pay to be included in the PPTC Charge, clarified his March 29, 2000 order which expressly stated that it was not meant to alter the legal entitlements of employees. The CCAA judge interpreted his earlier order to mean that employees were to be treated equally: those terminated after March 29 were not to be denied the severance pay that employees terminated before March 29 had received. By deciding that the March 29, 2000 order did not create two classes of employees, the CCAA judge attempted to balance the equities.

47 Based on the unusual circumstances of this case and the standard of review, we dismiss CNR's appeal. In doing so we do not suggest that employees are properly considered trade creditors, or that severance pay is properly included in a PPTC Charge. We offer no opinion on either of these issues.

SUMMARY

48 The appeals of Coneco and Finning are allowed. The appeals of the Municipal District of Greenview No. 16 and CNR are dismissed. The judgment of the CCAA judge will be varied in accordance with these reasons.

Order accordingly.

TAB 9

2007 SKCA 72
Saskatchewan Court of Appeal

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.

2007 CarswellSask 324, 2007 SKCA 72, [2007] 9 W.W.R. 79, [2007] S.J. No. 313,
159 A.C.W.S. (3d) 671, 299 Sask. R. 194, 33 C.B.R. (5th) 50, 408 W.A.C. 194

ICR Commercial Real Estate (Regina) Ltd. (Appellant) and Bricore Land Group Ltd., Bricore Investment Group Ltd., 624796 Saskatchewan Ltd. 603767 Saskatchewan Ltd.,(Respondents)

Klebuc C.J.S., Jackson, Smith JJ.A.

Heard: June 7, 2007
Judgment: June 13, 2007
Docket: 1443, 1452

Proceedings: affirming *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157 (Sask. Q.B.); additional reasons at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.); and reversing *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.)

Counsel: Fred C. Zinkhan for Appellant
Jeffrey M. Lee for Respondents
Kim Anderson for Monitor, Ernst & Young

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish "prima facie case" — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — "Sound reasons" test was better than "prima facie case" test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO's position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

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

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish "prima facie case" — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — "Sound reasons" test was better than "prima facie case" test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO's position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.'s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Debtors and creditors --- Receivers — Actions by and against receiver — Actions against receiver

Against chief restructuring officer — Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for acts of fraud, gross negligence or wilful misconduct, but order was ambiguous about acts of bad faith — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against CRO personally based on bad faith was dismissed — Supervising judge held that realtor was required to allege fraud, gross negligence or wilful misconduct, and failed to do so — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge did not err in refusing to lift stay to permit action against CRO personally — Supervising judge considered status of CRO as officer of court, noted ambiguity in order, and weighed evidence to certain extent.

Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — Costs

On application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial

indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Against chief restructuring officer — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

Table of Authorities

Cases considered by *Jackson J.A.*:

Air Canada, Re (2004), 47 C.B.R. (4th) 182, 2004 CarswellOnt 643 (Ont. S.C.J. [Commercial List]) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

Caterpillar Financial Services Ltd. v. 360networks corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95 (B.C. C.A.) — referred to

Hadmor Productions Ltd. v. Hamilton (1982), [1983] 1 A.C. 191, [1982] 1 All E.R. 1042 (U.K. H.L.) — referred to

Hashemian v. Wilde (2006), [2007] 2 W.W.R. 52, 40 C.P.C. (6th) 10, 2006 SKCA 126, 2006 CarswellSask 740, 382 W.A.C. 105, 289 Sask. R. 105 (Sask. C.A.) — followed

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

Ivaco Inc., Re (2003), 2003 CarswellOnt 6097, 1 C.B.R. (5th) 204, 6 P.P.S.A.C. (3d) 261 (Ont. S.C.J. [Commercial List]) — considered

Ivaco Inc., Re (2006), 2006 CarswellOnt 8025 (Ont. S.C.J.) — considered

Ma, Re (2001), 143 O.A.C. 52, 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68 (Ont. C.A.) — followed

Martin v. Deutch (1943), [1943] O.R. 683, 1943 CarswellOnt 36, [1943] 4 D.L.R. 600 (Ont. C.A.) — referred to

Mosaic Group Inc., Re (2004), 2004 CarswellOnt 2254, 3 C.B.R. (5th) 40 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

Ptarmigan Airways Ltd. v. Federated Mining Corp. (1973), 1973 CarswellNWT 10, [1973] 3 W.W.R. 723 (N.W.T. S.C.) — referred to

44 I agree with Bricore's counsel. When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the *CCAA*, s. 11.3 allows the supplier the right:

> (a) to refuse to supply any such goods or services at all;
>
> (b) to supply such goods or services on a "cash on demand" basis only;
>
> (c) to negotiate with the insolvent corporation for the amendment of the *CCAA* Order to create a post-filing supplier's charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or
>
> (d) to take the risk of supplying goods or services on credit.

Where the Initial Order imposes a stay of proceedings and prohibits further proceedings, s. 11.3 does not permit the supplier of goods or services to sue without obtaining leave of the court to do so.

VI. Issue #3: If Leave Is Required, Did the Supervising CCAA Judge Commit a Reviewable Error in Refusing ICR Leave to Commence an Action Against Bricore?

45 Having determined that the stay and prohibition of proceedings applies to ICR, notwithstanding its status as a post-filing creditor, the next issue is whether Koch J. erred in refusing to lift the stay on the basis that the claim was not tenable.

46 The claim against Bricore is presumably against Bricore both in its own right and pursuant to its indemnification agreement with the CRO. Paragraph 18 of the CRO Order requires Bricore to indemnify the CRO:

> 18. Bricore Group shall indemnify and hold harmless the CRO from and against all costs (including, without limitation, defence costs), claims, charges, expenses, liabilities and obligations of any nature whatsoever incurred by the CRO that may arise as a result of any matter directly or indirectly relating to or pertaining to any one or more of:
>
> (a) the CRO's position or involvement with Bricore Group;
>
> (b) the CRO's administration of the management, operations and business and financial affairs of Bricore Group;
>
> (c) any sale of all or part of the Property pursuant to these proceedings;
>
> (d) any plan or plans of compromise or arrangement under the CCAA between Bricore Group and one or more classes of its creditors; and/or
>
> (e) any action or proceeding to which the CRO may be made a party by reason of having taken over the management of the business of Bricore Group. [40]

47 The authority to lift the stay imposed by the Initial Order against Bricore is contained in s. 11(4) of the *CCAA*:

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> . . . . .
>
> (c) prohibiting, **until otherwise ordered by the court**, the commencement of or proceeding with any other action, suit or proceeding against the company. [Emphasis added.]

48 This is a discretionary power, which invokes the standard of appellate review stated as follows:

TAB 10

2019 BCSC 1880
British Columbia Supreme Court

Ascent Industries Corp. (Re)

2019 CarswellBC 3203, 2019 BCSC 1880, 311 A.C.W.S. (3d) 692, 31 B.C.L.R. (6th) 363, 74 C.B.R. (6th) 117

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

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

In the Matter of Ascent Industries Corp., Agrima Botanicals Corp., Bloom Holdings Ltd., Bloom Meadows Corp., Pinecone Products Ltd., Agrima Scientific Corp., and West Fork Holdings NV Inc. (Petitioners)

Fitzpatrick J., In Chambers

Heard: July 26, 2019
Judgment: November 4, 2019
Docket: Vancouver S192188

Counsel: J. Dutrizac, for Petitioners
L. Williams, for Monitor, Ernst & Young Inc.
A. Taylor, J. Buysen, for Clarus Securities Inc.
S. Turner, B. Khatra (A/S), for Blair Jordan and Karin Lelani
K. Robertson, for Green Sage, LLC and OpenFource, Inc. dba Trek Global

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Payments to creditors — Petitioners, number of companies involved in cultivation, processing and distribution of cannabis products in British Columbia and United States, suffered serious loss in ability to do business when their Canadian cannabis licenses were suspended — Parent company, petitioner A Corp., engaged C Inc. to assist in review of strategic alternatives — Petitioners later instructed C Inc. to pursue formal sale and investment solicitation process (SISP) of Canadian assets — Although SISP resulted in multiple bids and letters of intent, various difficulties led petitioners to decide it was in their best interests to continue restructuring efforts in proceeding under Companies Creditors Arrangement Act (CCAA) and, within that proceeding, to secure outside financing to extend SISP — Petitioners filed for protection under CCAA and court authorized interim financing facility in favour of major secured creditor, G Ltd. — Following representation by proposed monitor that SISP was expected to raise sufficient funds to satisfy all creditors, and that any late change to hearing materials could pose risk to timing of CCAA filing and anticipated sale, C Inc. did not seek court-ordered charge to protect its fee — At end of SISP, petitioners accepted bid from G Ltd. and entered into asset purchase agreement with affiliate — Court approved sale after finding SISP had been conducted in fair and reasonable manner — After paying all secured claims, petitioners had net proceeds of $19.1 million remaining — When new developments came to light, specifically $45.3 million claim against A Corp. as guarantor of lease in California, which suggested for first time there might not be sufficient funds to satisfy all creditors, C Inc. applied for order approving immediate payment of fee of $949,200 — Application granted — According to C's engagement letter, successful closing of sale triggered obligation to pay fee immediately — Neither petitioners nor monitor had any dispute with adequacy or quality of services provided by C Inc., or with amount owing — Issues were priority and timing — While it would have been prudent for C Inc. to seek charge to protect its fee when initial order under CCAA was made, there had been no reason to doubt petitioners would raise sufficient funds to satisfy all creditors at that time — Given unique circumstances, it would be unfair to deny C Inc. fee for work that had benefited all stakeholders significantly — Petitioners were ordered to make immediate payment as sought.

[Bold emphasis in original; underlining emphasis added.]

54 Here, paragraph 6 of the Initial Order contemplated, but did not require, ongoing payment of expenses incurred by Ascent in carrying on its business in the ordinary course. Paragraph 5(b) of the Initial Order similarly allowed, but did not require, payment of fees and disbursements of any "Assistants" employed by Ascent which were related to the restructuring. No one argues on this application that these provisions would allow payment to Clarus in these circumstances, likely having accepted that Clarus cannot argue that its fee is payable by reason of ordinary course dealings by Ascent.

55 There are examples, albeit unusual ones, of a debtor incurring unsecured liabilities after a *CCAA* filing which remain outstanding when restructuring efforts fail and stop and there are insufficient funds to pay those creditors after payment of secured debts. In that sense, such creditors take some risk in allowing payables to remain outstanding without taking action to pursue recovery in the *CCAA* proceedings.

56 This was the case in *Sanjel Corporation, Re*, 2017 ABQB 69 (Alta. Q.B.), leave to appeal ref'd 2017 ABCA 120 (Alta. C.A.). That case involved an application by a financial advisor for an order requiring payment of its full fees (namely the unsecured portion that exceeded the court-ordered charge granted in the initial order) in priority to the claim of the secured creditor. In that case, at para. 28, Justice Romaine commented that this was a pre-filing claim even if it was payable after the *CCAA* filing and even if services had been rendered after the filing.

57 The present case is somewhat different in that all secured claims have been paid and it is only pre-filing claims that remain outstanding. Accordingly, per *Doman Industries*, all other post-filing claims (as "Unaffected Claims") incurred by Ascent (with some exceptions for "Restructuring Claims" similar to that noted in *Doman Industries*) are expected to be paid before consideration of the pre-filing creditors.

58 The Claims Process and Clarus' involvement in that Claims Process are unusual given the circumstances. It is an interesting question whether its claim is a pre or post-filing claim given the timing of the Engagement Letter (pre-filing), the timing of the services (pre and post-filing), the triggering of the payment obligation (post-filing) and the process under the Claims Process. As the Monitor notes, Clarus' claim arguably was unaffected by its participation in the Claims Process.

59 In my view, however, it is not necessary to decide the issue on this application arising from the Claims Process and Clarus' decision not to dispute the Notice of Revision and Disallowance. Rather, I will consider Clarus' argument as to the circumstances of its claim and its participation under the Claims Process as substantially framing its unique circumstances in this *CCAA* proceeding.

Should Clarus' Fee Be Paid Now?

60 Pursuant to s. 11 of the *CCAA*, this Court has the general authority to make any order that it considers "appropriate" in the circumstances. That general authority and the discretion to grant relief is substantially informed by any restrictions found in the *CCAA* (as noted in s. 11) and a consideration of the statutory objectives of the *CCAA*: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services] at para. 70.

61 I agree that there are unique circumstances in this case to support that a payment to Clarus at this time, and in priority to pre-filing claims, is appropriate.

62 As set forth in detail in the Affidavit #1 of Mr. Drake and the Monitor's First Report, the SISP was an extensive and challenging process that included numerous steps and retracing of steps due to multiple leading bidders dropping out of the process after executing LOIs. I am satisfied that Clarus' employees were extensively involved in that process and provided real and substantial value to Ascent in formulating, conducting and assessing the SISP process.

63 There is no question that Clarus conducted the SISP in a professional manner from early December 2018 until the *CCAA* filing on March 1, 2019.

