Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

APPLICANTS

MEMORANDUM OF LAW OF THE APPLICANTS
(Re Claims Procedure Order and Stay Extension Order)

April 8, 2010

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Overview

1. This memorandum of law is submitted by the Applicants and Canwest Limited Partnership (together with the Applicants, the "**LP Entities**") in support of their motion seeking two Orders:

(a) the first Order (the "**Claims Procedure Order**") establishing a procedure for the identification and quantification of certain claims against the LP Entities (the "**Claims Procedure**"); and

(b) the second Order (the "**Stay Extension Order**"): (i) approving the activities of the Monitor and the fees and disbursements of the Monitor and counsel to the Monitor for the period from January 8, 2010 through March 20, 2010; (ii) extending the Stay Period (as defined below) to June 30, 2010; and (iii) authorizing the LP Entities to make a payment of approximately $1,000,000 of that portion of the rent owing under a building lease with London Life Insurance Company that is attributable to the period between October 1, 2009 and January 8, 2010.

2. The LP Entities have commenced a sale and investor solicitation process (the "**SISP**") that is being carried out with the assistance of RBC Capital Markets, as financial advisor, and the Monitor. The SISP is being conducted in two phases, and has proceeded to

Phase 2 on the basis of the Special Committee's acceptance of the Monitor's determination that there is a reasonable prospect that the LP Entities will receive a cash offer for the acquisition of or investment in all or substantially all of their assets. Depending upon the outcome of the SISP, the LP Entities may be in a position to propose a plan of compromise or arrangement to their general unsecured creditors (an "**LP Plan**"). In order to hold a meeting of creditors to approve any LP Plan, and to establish the procedure for identifying and valuing creditor claims for voting and distribution purposes at such a meeting, it is necessary to implement a claims process and bar procedure. It may also be necessary for the LP Entities to understand the scope and nature of potential claims against them in order to consummate a sale or recapitalization transaction.

3. The LP Entities submit that they have fulfilled the necessary prerequisites to an order extending the stay, and that the extension of the stay is both necessary and desirable. The LP Entities have acted and continue to act in good faith and with due diligence in carrying out the terms of the Initial Order and in seeking to secure a going concern outcome for the businesses of the LP Entities through the conduct of the SISP. The extension of the Stay Period to June 30, 2010 is required because the Phase 2 Bid Deadline, which marks the end of the SISP, is not until April 30, 2010. Moreover, the Support Agreement provides that the LP Administrative Agent may terminate the Support Agreement if the Support Transaction is not completed by June 30, 2010. As a result, it is the intention of the LP Entities to complete the implementation of the Support Transaction or a Superior Offer as soon as possible after the conclusion of the SISP and, in any event, no later than June 30, 2010. The stability provided by the stay of proceedings is essential to the conduct of the SISP and the implementation of either a Superior Offer or the Support Transaction.

4. The LP Entities also seek authorization to make the Edmonton Journal Building Rent Payment that is attributable to the pre-filing period between October 1, 2009 and January 8, 2010. In the view of the LP Entities, it is important that the LP Entities continue to make payments and otherwise act in accordance with the terms of the Lease. The LP Entities intend to exercise their option to acquire the Property at the end of the Lease. The LP Entities wish to keep the Lease in good standing. Making payment of $994,936.95 in respect of that portion of the Rent attributable to the pre-filing period (the "**Edmonton Journal Building Rent Payment**") helps to preserve enterprise value and advance the business and restructuring objectives of the LP Entities.

5. The evidence filed in support of this motion is principally contained in the Affidavit of Douglas E.J. Lamb sworn April 6, 2010 (the "**Lamb Affidavit**"), and the Sixth Report of the Monitor. Capitalized terms used herein have the meaning ascribed to them in the Lamb Affidavit, unless otherwise indicated.

6. The issues for determination by the Court on this Motion are as follows:

(a) should this Honourable Court approve the proposed Claims Procedure?

(b) should this Honourable Court approve the requested extension to the Stay Period? and

(c) should this Honourable Court authorize and direct the LP Entities to make the Edmonton Journal Building Lease Payment?

7. For the reasons set out herein, the LP Entities submit that the answer to all three questions is yes.

The Approval of the Proposed Claims Procedure

8. There is no specific provision within the CCAA governing the establishment or conduct of a claims process. At the same time, there is nothing in the CCAA that prohibits the Court from exercising its authority to approve a claims procedure. Courts therefore rely on their broad authority under the CCAA and their inherent jurisdiction when granting claims procedure orders.

9. Claims procedure orders are routinely granted in CCAA proceedings, where circumstances warrant. The Nova Scotia Supreme Court in *Re ScoZinc* referred to the establishment of a claims procedure as a "well accepted practice"[1]

10. The Court has broad authority under s. 11 of the CCAA to make any order that it considers appropriate, subject to certain restrictions set out in the statute. This authority is highly flexible, and has been used to fashion a wide variety of orders in furtherance of the objective of achieving fair and successful restructurings. The LP Entities submit that the establishment of a claims procedure is well within the jurisdiction of the Court pursuant to section 11.

[1] *Re ScoZinc Ltd.* (2009), 53 C.B.R. (5th) 96 (Hereinafter referred to as "ScoZinc") at para. 25.

11. There is limited case law concerning claims procedures. In *ScoZinc*, the Court observed that the typical claims process is "both flexible and expeditious".[2] The Claims Procedure proposed by the LP Entities is both flexible and expeditious. It has been designed having regard to the time lines established in the SISP and the Support Agreement. The LP Entities, in consultation with the Monitor, the LP CRA and the LP Administrative Agent, are of the view that the proposed Claims Procedure is both fair and efficient.

12. The LP Entities acknowledge that the results of Phase 2 of the SISP are not known. Nevertheless, the LP Entities submit, and the Monitor, LP CRA and Administrative Agent agree, that it is prudent to commence a call for claims immediately. In the event that it is necessary to close a Successful Bid, the Claims Procedure contemplates a process for the resolution and adjudication of claims. The LP Entities have likewise consulted with the Monitor and believe that the proposed timelines will not materially prejudice LP Creditors.[3]

13. The LP Entities submit that the approval of the proposed Claims Procedure is a valid exercise of both the Court's inherent jurisdiction and the authority conferred on it pursuant to s. 11 of the CCAA. Furthermore, the granting of the Claims Procedure Order will advance the restructuring objectives of the LP Entities and may help to facilitate a going concern outcome for the businesses of the LP Entities.

Extension to Stay Period

14. The Court has the authority under s. 11.02(2) of the CCAA to extend the stay of proceedings (the "**Stay Period**") as granted in the Initial Order. Pursuant to s. 11.02(3) of the CCAA, in order to obtain an extension of the Stay Period, the LP Entities must satisfy the court that: (i) the circumstances are appropriate; and (ii) the LP Entities have acted, and are acting, in good faith and with due diligence.

> Burden of proof on application
>
> The court shall not make the order unless

[2] *ScoZinc, supra*, at paras 23-24.

[3] Lamb Affidavit, at paragraph 19

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

15. The LP Entities submit that the requested extension is appropriate under the circumstances and that the LP Entities have acted and continue to act in good faith and with due diligence in operating their businesses and conducting the SISP.

16. The current Stay Period expires on April 14, 2010. The extension of the Stay Period to June 30, 2010 is required because Phase 2 of the SISP is currently underway and the LP Entities require the stability provided by the stay of proceedings to complete the implementation of the Support Transaction or a Superior Offer, as applicable.[4]

17. Since the granting of the Initial Order, the LP Entities have continued to operate their businesses as going concerns. During this period, the LP Entities have worked diligently to carry out the terms of the Initial Order and to solicit an acquisition or investment offer that will secure a going concern outcome for their businesses. It is essential that the Stay Period be extended to June 30, 2010 so that the LP Entities can conclude the SISP and work toward the completion of the Support Transaction or a Superior Offer.

18. The Monitor has filed an updated cash flow forecast with its report. The cash flow forecast demonstrates that the LP Entities can continue to fund this proceeding through the proposed extension of the Stay Period.[5]

19. The Monitor and the LP CRA support the proposed extension to the Stay Period, and the LP Administrative Agent does not oppose the extension. As such, it is necessary and appropriate to extend the Stay Period under the circumstances.[6]

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[4] Lamb Affidavit, at paragraph 35

[5] Lamb Affidavit, at paragraph 37

[6] Lamb Affidavit, at paragraph 38

Edmonton Journal Building Lease Payment

20. Pursuant to paragraph 14 of the Initial Order, the LP Entities are generally prohibited from making payments in respect of pre-filing obligations. This general prohibition is typical in CCAA cases. Nevertheless, courts have, in a wide variety of circumstances made exceptions to the rule where necessary to further the restructuring objectives of a debtor.

21. Although there is no specific authority in the CCAA to permit such an order, the Court had broad discretion under s. 11 of the CCAA to make any Order in a CCAA proceeding that is appropriate under the circumstances. Even before the recent amendments to the CCAA and the enactment of s. 11.4, which arguably codify the court's inherent authority to approve critical supplier payments, courts recognized that the broad and flexible powers under the CCAA included the power to approve arrangements for payment of pre-filing amounts in certain circumstances. Although the aim of the CCAA is to maintain the *status quo* while an insolvent company attempts to negotiate a plan of arrangement with its creditors, courts have clearly stated that preservation of the *status quo* does not necessarily entail the preservation of the relative pre-stay debt status of each creditor:

> The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.[7]

22. In this CCAA proceeding, the Court authorized the LP Entities to make payments in respect of pre-filing obligations to certain critical suppliers with the consent on the Monitor on the basis of submissions by the LP Entities that that the failure to make such payments would be damaging to their ongoing operations and restructuring efforts.[8] Although the Edmonton Journal Building Rent Payment is not a payment to a critical supplier, the same rationale for the critical

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[7] *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.) at para. 105.

[8] *Re Canwest Publishing Inc. et al.* [2010] O.J. No. 188 at para. 51.

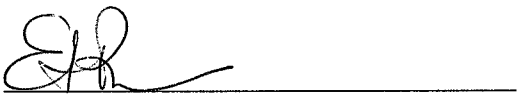
supplier payments applies in this context: the payment is in respect of a pre-filing obligation that is necessary to the operations and restructuring of the LP Entities.

23. In the view of the LP Entities, it is important that the LP Entities continue to make payments and otherwise act in accordance with the terms of the Lease. The LP Entities intend to exercise their option to acquire the Property at the end of the Lease and want to keep the Lease in good standing. Making the Edmonton Journal Building Rent Payment helps to preserve the enterprise value of the LP Entities by ensuring the stability of a property that is a critical part of the operations of the LP Entities. The failure to make the Edmonton Journal Building Rent Payment could have a detrimental effect on the restructuring objectives of the LP Entities.[9]

24. The LP Entities believe that it would be damaging to both the ongoing operations of the LP Entities and their ability to restructure if they are not provided the ability to pay their obligations under the Lease. It is submitted that this Honourable Court should exercise its discretion to permit the LP Entities to make this payment. The Monitor, the LP CRA and the LP Administrative Agent all support this request.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

per Lyndon A.J. Barnes



per Alexander Cobb

Elizabeth Allen Putnam

[9] Lamb Affidavit, at paragraph 47

Schedule "A"

STATUTORY PROVISIONS

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

General power of court

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

.....

Stays, etc. — other than initial application

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

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

Burden of proof on application

(3) The court shall not make the order unless

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

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

Schedule "B"

LIST OF AUTHORITIES

1. *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.)

2. *Re Canwest Publishing Inc.,* [2010] O.J. No. 188 (S.C.J.) [Commercial List]

3. *Re ScoZinc Ltd.* (2009), 53 C.B.R. (5th) 96 (N.S.S.C.)

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COMMERCIAL LIST

Proceeding commenced at Toronto

MEMORANDUM OF LAW

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BOOK OF AUTHORITIES OF THE APPLICANTS

April 8, 2010

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TAB # CASELAW

TAB 1

Indexed as:

Alberta-Pacific Terminals Ltd. (Re)

IN THE MATTER of The Company Act R.S.B.C. 1979, c. 59
AND IN THE MATTER of The Business Corporation Act, R.S.A. 1981, c. B-15
AND IN THE MATTER of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. c-36
AND IN THE MATTER of Alberta-Pacific Terminals Ltd., Fraser Surrey Docks Ltd., Pacific Terminals Ltd., Johnston Marine Terminals Limited, Johnston International Services (Hong Kong) Ltd., Petitioners

[1991] B.C.J. No. 1065

8 C.B.R. (3d) 99

26 A.C.W.S. (3d) 958

Vancouver Registry No. A903661

British Columbia Supreme Court
Vancouver, British Columbia
(In Chambers)

Huddart J.

Heard: April 18 and 19, 1991
Judgment: May 8, 1991

(12 pp.)

Counsel for the Applicants, Fraser River Harbour Commission: M. Copping Hollis and G. Hughes.
Counsel for the Petitioners: R. Holmes and Mr. G. Matei.
Counsel for the Her Majesty The Queen in Right of the Province of Alberta and The Alberta Treasurey Branch: J. Dixon and A. Perry.
Counsel for Rico Equipment, an unsecured creditor: S. Jermyn.

HUDDART J.:-- This application is about the right of the Fraser River Harbour Commission to be paid monies pursuant to its agreement with Fraser Surrey Docks Ltd. ("FSDL") under which FSDL operates the deep sea common user terminal of the Fraser Port, while all proceedings against FSDL and its associated companies are stayed by orders made under the Companies' Creditors Arrangement Act.

Under the terms of the Operating Agreement made January 1, 1989, FSDL is the Terminal Agent and Wharfinger for the Commission. The Commission administers the Fraser Port under the Harbour Commissions Act. The Johnston Group of companies has operated the terminal for more than 20 years, but since the 1989 agreement and related expansion, it has run into financial difficulties. The petitioners attribute these difficulties to a chemical spill in August, 1989, and consequential claims for damages; a very high debt/equity ratio and the refusal of the Alberta Treasury Branch and Government to convert their debt to equity; a fire on November 14, 1990; and finally, the Commission's threat on November 16, 1990, to terminate the Operating Agreement.

To assist FSDL with the earlier of these difficulties, the Commission had agreed on July 27, 1990, to defer payments due under the Operating Agreement for the months of June to September inclusive, the same to be paid on December 31, 1990. When FSDL defaulted on the regular payment for October due on November 15, 1990, the Commission refused a request for a further deferral, advising that it would consider termination of the Operating Agreement if payment was not made within the seven days of grace allowed under the contract.

FSDL considers that the Commission has the right to terminate the Operating Agreement only upon its insolvency. When FSDL and its related companies admitted they were insolvent and sought the protection available to them under the Companies' Creditors Arrangement Act ("the CCAA") on November 22, 1990, FSDL owed the Commission about $976,000. The Commission claims that Johnston Marine Terminals Limited ("JMTL") then owed it $353,000. The total debt of the petitioners to the Alberta government and the Alberta Treasury Branches ("Alberta") was $13 million, some of it secured.

The Operating Agreement is the primary asset of FSDL. Without it and the operating line of credit from the Alberta Treasury Branches the petitioners would be unable to operate the terminal.

The ex parte order Mr. Justice Skipp made on November 22, 1990, stayed all proceedings against the petitioners until May 31, 1991, specifically enjoined the Commission from taking any steps to terminate the Operating Agreement and the option to lease in favour of Pacific Terminals Ltd. ("Pacific") without further order, and ordered that contracts that might give a benefit to any petitioner "be maintained in full force and effect pending further order of this Court".

In December, the petitioners paid $28,544 to the Commission, the amount attributable to the period in November following the CCAA order.

On December 18, Mr. Justice Spencer varied the order to provide for the continued provision by the Alberta Treasury Branches of the "existing $1.25 million operating credit facility" to the petitioners or any of them. included in that order was a provision that "interest calculated on the daily outstanding principal amount under the Facility is to be paid monthly". The order was made with the consent of the petitioners, Alberta, and the Commission. No similar provision was made with regard to the monthly payments required by the Operating Agreement.

FSDL did not make the payment due on January 15 or any subsequent payments. The payments due exceed $200,000 per month. FSDL claimed that it could not afford to make the payments, that the payments were prohibited under the order, and that, in any event, to make any payment on account of the Operating Agreement would be to favour an equity participant over general creditors.

The Commission interpreted the order and its relationship with FSDL differently. It considered that the order required payments under the Operating Agreement to be continued. The matter came before Mr. Justice Arkell who concluded on March 28:

> The present orders of the court require the Commission to continue and maintain the operating agreement for the benefit of the Petitioners, pending the reorganization plan, or further order of the court. The present court orders neither prohibit nor do they require the continuation of the monthly payments due under the operating agreement.
>
> The Commission is at liberty to apply to the court to vary the present court orders for a right of preference over other creditors and to receive continuing payments under the terms of the operating agreement. Alternatively, the Commission may apply to the Court for leave to commence an action against the Petitioners and sue for damages or ultimately for termination of the operating agreement.
>
> Because he had reached this conclusion accepting the position of the Commission that it was a "creditor" within the meaning of the CCAA, Mr. Justice Arkell did not find it necessary to resolve the dispute as to the nature of the relationship between the petitioners and the Commission.

This application is a sequel to the application before Mr. Justice Arkell. It revisits the issue as to the nature of the relationship between the petitioners and the Commission and it asks this court to direct the payment by the petitioners of the amounts that fall due monthly under the Operating Agreement.

I find that I need consider only the second issue. The authorities cited by both counsel persuade me that the categorization of any commercial relationship will vary with the issue before the court. If and when a determination of the rights and obligations of the parties to the Operating Agreement is required, the court may be called upon to determine the nature of their relationship. If and when the court is called upon to fix the classes of creditors for the purpose of voting on a reorganization plan, the court may be required to determine whether or not the Commission is a "creditor" within the meaning of the CCAA. Until some such occasion arises I can see no reason for saying anything about their relationship.

It may be that the Commission is anxious that the court determine the nature of its relationship with FSDL, JMTL, and Alberta-Pacific Terminals Ltd, before the fixing of the classes of creditors. If so, it did not say so.

There is no doubt that the Commission is concerned at the hint in the petitioners' argument that they may be seeking the court's and the creditors' approval of a reorganization plan that will restructure their "revenue sharing arrangements" with the Commission without the approval of the Commission. A question about the judicial nature of the relationship might arise if the petitioners successfully exclude the Commission from voting as a creditor, then seek to have it bound by any

reorganization plan. From the information available to me on this application and from my understanding of the purpose and scheme of the CCAA, I consider such an idea so far-fetched as not to require further comment.

It may be that the Commission considers the nature of the relationship material to the issue as to whether or not it should be paid the monies that have fallen due since November 30 or that will fall due before May 31 or any later termination of the stay. I do not find it to be so because I have not had recourse to the arguments put forward by the petitioners based on joint venture, debt or equity contribution, or equitable subordination, in reaching the conclusion that I should not order the petitioners or any of them to pay monies pursuant to the Operating Agreement pending the termination of the stay orders.

I have come to that conclusion having regard to the purpose and scheme of the CCAA, the terms of the Operating Agreement, and the financial circumstances of the petitioners as revealed in the Monitor's Report.

The purpose of the CCAA is to facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue in business, said Mr. Justice Gibbs in Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 51 B.C.L.R. 84 at page 88. No creditor is exempted. But neither is anyone who is not a creditor included within its ambit.

At page 90 of the Chef Ready case, Mr. Justice Gibbs said of the effect of the CCAA on the property interest acquired by a bank under s. 178 security:

> But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the bank under ss. 178 and 179? It does not detract from the bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not breach the "complete code". All that it does is postpone the exercise of the right to seize and sell. And here the bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise.

From a similar perspective it can be said that all that the orders pursuant to the CCAA do with regard to the Commission's rights under the Operating Agreement is to postpone the exercise of the right to terminate the agreement on insolvency or to sue for payments not made as they fall due. The Commission had already allowed a four month postponement. So the petitioners argue. However, the Commission seeks neither to sue nor to terminate the agreement. It does not wish to prevent FSDL from carrying on business. It recognizes the purpose of the stay of proceedings.

Rather, it says that the orders requiring it to continue to provide its land and facilities without current recompense and without any guarantee of future recompense make it unique among the creditors of the petitioners, unlike the Alberta Treasury Branches, who are to continue the line of credit facility, but who are to receive current interest on the credit advanced under it, and unlike those creditors who are paid for current supply of goods and services. In effect, it says that the monthly payments should be made in the ordinary course of business for the continued use of the land and facilities because if they are not, the Commission's position is eroding relative to other creditors. Its debt is growing each month, not only by accrual of interest, but by an additional $200,000, on average. It is providing the land and facilities from the use of which income is being

derived without any compensation from that income. Thus it seeks an order for payment of the monies as they accrue due to "preserve the status quo."

The petitioners say that to accede to the Commission's request to be paid would be to give it a preference over general creditors to which it is not entitled given the terms of the Operating Agreement and particularly the way in which the payments are structured. The Commission disagrees, saying that the Operating Agreement is valid, and enforceable, there being neither an agreement nor an order suspending or prohibiting payments under it and that to require current payments to be made would not be to prefer one creditor over another with regard to debt accumulated before the stay orders.

In Chef Ready, supra, Mr. Justice Gibbs described the court's function on applications such as these at pages 88 and 89 in these words:

> When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

The status quo is not always easy to find. It is difficult to freeze any on-going business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the Prairie Provinces. The status quo is to be preserved in the sense' that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

Obviously the Commission is one Of the most important of those interests because it holds and administers the public's interest in the land and facilities.

When I have regard to all of the materials put before me by the Commission, I find no proof of hardship or even of need. For example, I see no suggestion that the Commission is incurring expenses related to the Fraser Surrey Dock that it must pay from other sources of revenue. Its only concern is that its position not be eroded relative to the position of other creditors. If the reorganization is successful it is unlikely the Commission will suffer any loss in the value of its position to which it has not agreed. If the reorganization turns out not to be possible, the Commission's loss because of the stay may be substantial. Or it may not be. The owner of land and facilities is not in the same position as a creditor owed a fixed sum of money, easily valued.

When I have regard to the Monitor's Cash Flow statements I do not find the money to make the payments sought. The original ex parte order and the subsequent consent order left to management of the petitioners a considerable area of discretion in the application of its current cash flow. Given

the terms of the Operating Agreement, the history of the relationship between the commission and the petitioners, the nature of the terminal operation, the nature of the line of credit facility, and those cash flow statements, I have decided that it is inappropriate for the court to intervene in management's exercise of that discretion without some reason, perhaps evidence of hardship to the Commission or of erosion of its property value.

I have reached that conclusion despite some considerable reservations about the way in which management has exercised that discretion as revealed in the Monitor's Reports. Those Reports suggest that payments have been made to other creditors from the petitioners' cash flows contrary to this court's orders. I do not consider that I should discuss this matter further in these reasons. I advised counsel at the hearing of this application that such matters should be considered on another occasion on notice to all interested parties. On this hearing only one unsecured creditor appeared. That creditor did not suggest that it had reason to remain after ascertaining the nature of the application and that its presentation would require the disclosure of information contained in the Monitor's Reports, sealed by order of Mr. Justice Spencer. It may be that unsecured creditors will wish to request further information if they receive notice of an application authorizing other payments.

HUDDART J.

TAB 2

Case Name:

Canwest Publishing Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.

[2010] O.J. No. 188

2010 ONSC 222

Court File No. CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

January 18, 2010.

(66 paras.)

Bankruptcy and insolvency law -- Assignments and petitions into bankruptcy -- Voluntary assignments -- By corporations and partnerships -- Canwest Global Canadian newspaper entities' application for a Companies' Creditors Arrangement Act protection order allowed -- The order applied to the applicants' limited partnership -- The limited partnership was the applicants' administrative backbone, exposing it to the demands of creditors would make a successful restructuring impossible -- The applicants could treat certain suppliers as critical suppliers but they could not be paid without the Monitor's consent -- The proposed DIP facility, financial advisor charge, directors and officers charge and management incentive plan charges were approved -- Companies' Creditors Arrangement Act, s. 4, s. 5, s. 11.2(1), s. 11.2(4), s. 11.4, s. 11.52.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Affiliated debtor companies -- Canwest Global Canadian newspaper entities' application for a Companies' Creditors Arrangement Act protection order allowed -- The order applied to the applicants' limited partnership -- The limited partnership was the applicants' administrative backbone, exposing it to the demands of creditors would make a successful restructuring impossible -- The applicants could treat certain suppliers as critical suppliers but they could not be

paid without the Monitor's consent -- The proposed DIP facility, financial advisor charge, directors and officers charge and management incentive plan charges were approved -- Companies' Creditors Arrangement Act, s. 4, s. 5, s. 11.2(1), s. 11.2(4), s. 11.4, s. 11.52.

The Canwest Global Canadian newspaper entities applied for an order for protection pursuant to the Companies' Creditors Arrangement Act (CCAA). The applicants also sought a stay of proceedings and to have the order extend to protect the Canwest Limited Partnership/Canwest SociÚtÚ en Commandite (the Limited Partnership). The applicants proposed to present the plan only to the secured creditors and sought approval of a $25 million DIP facility. The applicants asked they be authorized but not required to pay pre-filing amounts owing in arrears to critical suppliers, including newsprint and ink suppliers. The applicants sought a $3 administration charge, a $10 million charge in favour of the financial advisor and a $35 directors and officers charge. The applicants also sought a $3 million charge to secure obligations arising out of amendments to two key employees' employment agreements and a management incentive plan.

HELD: Application allowed. The applicants' chief place of business was Ontario, they qualified as debtor companies under the CCAA and they were affiliated companies with total claims against them that far exceeded $5 million. The Limited Partnership was the applicants' administrative backbone. Exposing the assets of the Limited Partnership to the demands of creditors would make a successful restructuring impossible. Debtors had the statutory authority to present a plan to a single class of creditors and it was appropriate in the circumstances. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability. The applicants could treat certain suppliers as critical suppliers but they could not be paid without the Monitor's consent. The administration charge, financial advisor charge and directors and officers charge were granted as requested. The management incentive charge was granted as requested and a sealing order was made over the sensitive personal and compensation information, as it was an important commercial interest that should be protected.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. c. 36, s. 4, s. 5, s. 11.2(1), s. 11.2(4), s. 11.4, s. 11.52, s. 11.7(2)

Counsel:

Lyndon Barnes, Alex Cobb and Duncan Ault, for the Applicant LP Entities.

Mario Forte, for the Special Committee of the Board of Directors.

Andrew Kent and Hilary Clarke, for the Administrative Agent of the Senior Secured Lenders' Syndicate.

Peter Griffin, for the Management Directors.

Robin B. Schwill and Natalie Renner, for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders.

David Byers and Maria Konyukhova, for the proposed Monitor, FTI Consulting Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act*[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consoli-

dated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6] and *Re Lehndorff General Partners Ltd*[7].

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s. 4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s. 5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(d) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immedi-

ately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and

that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described

in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
> (b) the proposed role of the beneficiaries of the charge;
> (c) whether there is an unwarranted duplication of roles;
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
> (e) the position of the secured creditors likely to be affected by the charge; and
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensi-

tive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

S.E. PEPALL J.

cp/e/qlafr/qljxr/qlltl/qljyw/qlaxw

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (S.C.J.).

6 [2009] O.J. No. 4286, 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

8 [1999] O.J. No. 4232, 1999 CarswellOnt 4673 (S.C.J.).

9 Ibid at para. 16.

10 (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C., [2002] S.C.C.A. No. 389, refused (March 6, 2003).

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (S.C.J.).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522.

19 Supra, note 7 at para. 52.

TAB 3

Case Name:
ScoZinc Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of ScoZinc Ltd., Applicant

[2009] N.S.J. No. 187

2009 NSSC 136

277 N.S.R. (2d) 251

53 C.B.R. (5th) 96

2009 CarswellNS 229

Docket: Hfx No. 305549

Registry: Halifax

Nova Scotia Supreme Court
Halifax, Nova Scotia

D.R. Beveridge J.

Heard: April 3, 2009.
Oral judgment: April 3, 2009.
Released: April 28, 2009.

(49 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Directions -- Monitors -- Powers, duties and functions -- Upon motion by monitor in proceedings under the Companies' Creditors Arrangement Act, the monitor was held to have the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the monitor to complete its assessment of claims -- To suggest the monitor did not have the authority to receive evidence and submissions and to consider them was to say it did

not have any real authority to carry out its court-appointed role to assess the claims that had been submitted.

Motion by monitor in proceedings under the Companies' Creditors Arrangement Act seeking directions from the court on whether it had the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the monitor to complete its assessment of claims. On Dec. 22, 2008, ScoZinc Ltd. had been granted protection by means of a stay of proceedings of all claims against it. The determination of creditors' claims was set by a **claims procedure** order of Feb. 18, 2009 setting dates for the submission of claims to the monitor, and for the monitor to assess the claims. The monitor was directed to review all proofs of claim filed on or before March 16, 2009 and accept, revise or disallow the claims. In three cases, revised proofs of claim were filed after this date.

HELD: Order granted. The monitor had the necessary authority. The Act gave no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. The determination that the claims must initially be identified and assessed by the monitor, and heard first by a claims officer, was a valid exercise of the court's inherent jurisdiction. It was not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the Bankruptcy and Insolvency Act. The Feb. 18, 2009 order accomplished this. It did not matter that revised claims were submitted after the claims bar date. In essence, the monitor simply acted to revise the proofs of claim already submitted to conform with the evidence elicited by the monitor, or submitted to it. The monitor had the necessary authority to revise the claims, either as to classification or amount. To suggest the monitor did not have the authority to receive evidence and submissions and to consider them was to say it did not have any real authority to carry out its court-appointed role to assess the claims that had been submitted.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.7, s. 12

Probate Act, R.S.N.S. 1900, c. 158,

Counsel:

John G. Stringer, Q.C., and Mr. Ben R. Durnford, for the applicant.

Robert MacKeigan, Q.C., for Grant Thornton.

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1 D.R. BEVERIDGE J. (orally):-- On December 22, 2008, ScoZinc Ltd. was granted protection by way of a stay of proceedings of all claims against it pursuant to s. 11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36. The stay has been extended from time to time. Grant Thornton was appointed as the Monitor of the business and financial affairs of ScoZinc pursuant to s. 11.7 of the *CCAA*.

2 The determination of creditors' claims was set by a **Claims Procedure** Order. This order set dates for the submission of claims to the Monitor, and for the Monitor to assess the claims. The Monitor brought a motion seeking directions from the court on whether it has the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the Monitor to complete its assessment of claims.

3 The motion was heard on April 3, 2009. At the conclusion of the hearing of the motion I concluded that the Monitor did have the necessary authority. I granted the requested order with reasons to follow. These are my reasons.

BACKGROUND

4 The procedure for the identification and quantification of claims was established pursuant to my order of February 18, 2009. Any persons asserting a claim was to deliver to the Monitor a Proof of Claim by 5:00 p.m. on March 16, 2009, including a statement of account setting out the full details of the claim. Any claimant that did not deliver a Proof of Claim by the claims bar date, subject to the Monitor's agreement or as the court may otherwise order, would have its claim forever extinguished and barred from making any claim against ScoZinc.

5 The Monitor was directed to review all Proofs of Claim filed on or before March 16, 2009 and to accept, revise or disallow the claims. Any revision or disallowance was to be communicated by Notice of Revision or Disallowance, no later than March 27, 2009. If a creditor disagreed with the assessment of the Monitor, it could dispute the assessment before a Claims Officer and ultimately to a judge of the Supreme Court.

6 The three claims that have triggered the Monitor's motion for directions were submitted by Acadian Mining Corporation, Royal Roads Corp., and Komatsu International (Canada) Inc.

7 ScoZinc is 100% owned by Acadian Mining Corp. These two corporations share office space, managerial staff, and have common officers and directors. Acadian Mining is a substantial shareholder in Royal Roads and also have some common officers and directors.

8 Originally Royal Roads asserted a claim as a secured creditor on the basis of a first charge security held by it on ScoZinc's assets for a loan in the amount of approximately $2.3 million. Acadian Mining also claimed to be a secured creditor due to a second charge on ScoZinc's assets securing approximately $23.5 million of debt. Both Royal Roads and Acadian Mining have released their security. Each company submitted Proofs of Claim dated March 4, 2009 as unsecured creditors.

9 Royal Roads claim was for $579,964.62. The claim by Acadian Mining was for $23,761.270.20. John Rawding, Financial Officer for Acadian Mining and ScoZinc, prepared the Proofs of Claim for both Royal Roads and Acadian Mining. It appears from the affidavit and materials submitted, and the Monitor's fifth report dated March 31, 2009 that there were errors in each of the Proofs of Claim.

10 Mr. Rawding incorrectly attributed $1,720,035.38 as debt by Acadian Mining to Royal Roads when it should have been debt owed by ScoZinc to Royal Roads. In addition, during year end audit procedures for Royal Roads, Acadian Mining and ScoZinc, other erroneous entries were discovered. The total claim that should have been advanced by Royal Roads was $2,772,734.19.

11 The appropriate claim that should have been submitted by Acadian Mining was $22,041,234.82, a reduction of $1,720,035.38. Both Royal Roads and Acadian Mining submitted revised Proofs of Claim on March 25, 2009 with supporting documentation.

12 The third claim is by Komatsu. Its initial Proof of Claim was dated March 16, 2009 for both secured and unsecured claims of $4,245,663.78. The initial claim did not include a secured claim for the equipment that had been returned to Komatsu, nor include a claim for equipment that was still being used by ScoZinc. A revised Proof of Claim was filed by Komatsu on March 26, 2009.

13 The Monitor, sets out in its fifth report dated March 31, 2009, that after reviewing the relevant books and records, the errors in the Proofs of Claim by Royal Roads, Acadian Mining and Komatsu were due to inadvertence. For all of these claims it issued a Notice of Revision or Disallowance on March 27, 2009, allowing the claims as revised "if it is determined by the court that the Monitor has the power to do so".

14 The request for directions and the circumstances pose the following issue:

ISSUE

15 Does the Monitor have the authority to allow the revision of a claim by increasing it based on evidence submitted by a claimant within the time period set for the monitor to carry out its assessment of claims?

ANALYSIS

16 The jurisdiction of the Monitor stems from the jurisdiction of the court granted to it by the *CCAA*. Whenever an order is made under s. 11 of the *CCAA* the court is required to appoint a monitor. Section 11.7 of the *CCAA* provides:

> 11.7 (1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.
>
> (2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.
>
> (3) The monitor shall
>
> (a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;
>
> (b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,
>
> (i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
>
> (ii) at least seven days before any meeting of creditors under section 4 or 5, or
>
> (iii) at such other times as the court may order;

(c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and

(d) carry out such other functions in relation to the company as the court may direct.

...

17 It appears that the purpose of the *CCAA* is to grant to an insolvent company protection from its creditors in order to permit it a reasonable opportunity to restructure its affairs in order to reach a compromise or arrangement between the company and its creditors. The court has the power to order a meeting of the creditors or class of creditors for them to consider a compromise or arrangement proposed by the debtor company (s. 4, 5). Where a majority of the creditors representing two thirds value of the creditors or class of creditors agree to a compromise or arrangement, the court may sanction it and thereafter such compromise or arrangement is binding on all creditors, or class of creditors (s. 6).

18 Section 12 of the *Act* defines a claim to mean "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." However, as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order.

19 The only guidance provided by the *CCAA* is that in the event of a disagreement the amount of a claim shall be determined by the court on summary application by the company or by the creditor. Section 12(2) of the *Act* provides:

Determination of amount of claim

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

20 The only parties who appeared on this motion were the Monitor, ScoZinc and Komatsu. No specific submissions were requested nor made by the parties with respect to the nature of the court's jurisdiction to determine the mechanism and time lines to classify and quantify claims against the debtor company.

21 Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s. 135(2) *BIA)*. A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

22 In contrast, the *CCAA* does not set out the procedure beyond the language in s. 12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on "summary application".

23 The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.

24 If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

25 The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., (Re)* 2007 NSSC 384; *Olympia & York Developments Ltd. (Re)* (1993), 17 C.B.R. (3d) 1 (Ont. S.C.J.); *Air Canada, (Re)* (2004) 2 C.B.R. (5th) 23 (Ont. S.C.J.); *Triton Tubular Components v. Steelcase Inc.*, [2005] O.J. No. 3926 (Ont. S.C.J.); *Muscletech Research & Development Inc.,(Re)*, [2006] O.J. No. 4087 (Ont. S.C.J.); *Pine Valley Mining Corp., (Re)* 2008 BCSC 356; *Blue Range Resource Corp.*, Re 2000 ABCA 285; *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222 (N.B.Q.B.).)

26 I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article "The CCAA and the Claims Bar Process", (2000), 13 Commercial Insolvency Reporter 6, endorsed the utilization of a claims process on the basis of reliance on the

court's inherent jurisdiction, provided the process adhered to the specific mandates of the *CCAA*. In unrelated contexts, caution has been expressed with respect to reliance on the inherent jurisdiction of the superior court as the basis for dealing with the myriad issues that can arise under the *CCAA* (See: *Clear Creek Contracting v. Skeena Cellulous Inc.*,(2003), 43 C.B.R (4th) 187) (B.C.C.A.) and *Stelco Inc.(Re)*, [2005] O.J. No. 1171 (CA.)).

27 Sir J.H. Jacob, Q.C. in his seminal article "The Inherent Jurisdiction of the Court", (1970) Current Legal Problems 23, concluded that it has been clear law from the earliest times that superior courts of justice, as part of their inherent jurisdiction, have the power to control their own proceedings and process. He wrote:

> Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. Some of the instances of the exercise of this power have been of far-reaching importance, others have dealt with matters of detail or have been of transient value. Some have involved the exercise of administrative powers, others of judicial powers. Some have been turned into rules of law, others by long usage or custom may have acquired the force of law, and still others remain mere rules of practice. The exercise of this power has been pervasive throughout the whole legal machinery and has been extended to all stages of proceedings, pre-trial, trial and post-trial. Indeed, it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice.
>
> p. 32-33

28 The *CCAA* gives no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. As noted earlier, the only reference is in s. 12 of the *Act* that if there is a dispute as to the amount of a claim, then the amount shall be determined by the court "on summary application". In *Re Freeman Estate*, [1922] N.S.J. No. 15, [1923] 1 D.L.R. 378 (en banc) the court considered the words "on summary application" as they appeared in the *Probate Act* R.S.N.S. 1900 c. 158. Harris C.J. wrote:

> [17] The words "summary application" do not mean without notice, but simply imply that the proceedings before the Court are not to be conducted in the ordinary way, but in a concise way.
>
> [18] The Oxford Dictionary p. 140 gives as one of the meanings of "summary" dispensing with needless details or formalities -- done with despatch.
>
> [19] In the case of the Western &c R. Co. v. Atlanta (1901), 113 Ga. 537, the meaning of the words "summary proceeding" is discussed at some length and the Court held at pp. 543-544:--

> "In a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."
>
> [20] I cite this not because it is a binding authority, but because its reasoning commends itself to my judgment and I adopt it.

29 In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction.

30 The *CCAA* gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s. 11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s. 11.7(3)(d)).

31 In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The **Claims Procedure** Order of February 18, 2009 accomplishes this.

POWER OF THE MONITOR

32 The Monitor was required by the Order to publish a notice to claimants in the newspaper regarding the **claims procedure.** It was also required to send a claims package to known potential claimants identified by the Monitor through its review of the books and records of ScoZinc. The claims bar date was set as March 16, 2009, or such later date as may be ordered by the court.

33 The duties of the Monitor, once a claim was received by it, were set out in paragraphs 9 and 10 of the **Claims Procedure** Order. They provide as follows:

> 9. Upon receipt of a Proof of Claim:
>
> a. The Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;
>
> b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the claimant prior to accepting, revising or disallowing such Claim; and
>
> ...

> 10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

34 Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim. A claimant or the Monitor may appeal the Claims Officer's decision to the court.

35 The Monitor suggests that the power given to it under paragraph 9(a) and 10 is sufficient to permit it to accept the revised Proofs of Claim filed after the claim's bar date of March 16, 2009, but before its assessment date of March 27, 2009.

36 Reliance is also placed on the decision of the Alberta Court of Appeal in *Blue Range Resource Corp.* 2000 ABCA 285. As noted by the Monitor, the decision in *Blue Range* did not directly deal with the issue on which the Monitor here seeks directions. In *Blue Range*, the **claims procedure** established by the court set the claims bar date of June 15, 1999. Claims of creditors not proven in accordance with the procedures set out were deemed to be forever barred. Some creditors filed their Notice of Claim after the claims bar date. The monitor disallowed their claims. There were a second group of creditors who filed their Notice of Claim prior to the applicable claims bar date, but then sought to amend their claims after the claims bar date had passed. The monitor also disallowed these claims as late. What is not clear from the reported decisions is whether this second group of creditors requested amendments of their claims during the time period granted to the Monitor to carry out its assessment.

37 The chambers judge allowed the late and amended claims to be filed, [1999] A.J. No. 1308. Enron Capital Corp. and the creditor's committee sought leave to appeal that decision. Leave to appeal was granted on January 14, 2000 with respect to the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?
>
> *Re Blue Range Resources Corp.*, 2000 ABCA 16

38 Wittmann J.A. delivered the judgment of the court. He noted that all counsel conceded that the court had the authority to allow the late filing of claims and that the appeal was really a matter of what criteria the court should use in exercising that power. Accordingly, a **Claims Procedure**

Order that contains a claims bar date should not purport to forever bar a claim without a saving provision. Wittmann J.A. set out the test for determining when a late claim may be included to be as follows:

> [26] Therefore, the appropriate criteria to apply to the late claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> [27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.
>
> 2000 ABCA 285

39 The appellants claimed that they would be prejudiced if the late claims were allowed because if they had known the late claims would be allowed they would have voted differently. This assertion was rejected by the chambers judge. With respect to what is meant by prejudiced, Wittmann J.A. wrote:

> 40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd., [1995] B.C.J. No. 1600. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

40 In considering how the Monitor should carry out its duties and responsibilities under the **Claims Procedure** Order it is important to note that the Monitor is an officer of the court and is

obliged to ensure that the interests of the stakeholders are considered including all creditors, the company and its shareholders (See *Laidlaw Inc. Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J.).

41 In a different context Turnball J.A. in *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 commented that the monitor is an agent of the court and as a result is responsible and accountable to the court, owing a fiduciary duty to all of the parties (para. 28).

42 In my opinion, para. 9(a) is not of assistance in determining the authority of the Monitor to revise upward a claim filed after the claim's bar date but before the assessment date. Paragraph 9(a) authorizes the Monitor to use reasonable discretion as to the adequacy of compliance as to **the manner** to which Proofs of Claim are completed and executed. If it satisfied that the claim has been adequately proven it may waive strict compliance with the requirements of the order as to **completion** and the **execution** of a Proof of Claim.

43 Paragraph 10 of the **Claims Procedure** Order mandates the Monitor shall review all Proofs of Claim filed on or before the claims bar date. It shall "accept, revise or disallow such Proofs of Claim as contemplated herein". While normally a monitor's revision would be to reduce a Proof of Claim, there is in fact nothing in the **Claims Procedure** Order that so restricts the Monitor's authority. It is obviously contemplated by para. 10 that the monitor is to carry out some assessment of the claims that are submitted.

44 In my view, the Proofs of Claim that are filed act both as a form of pleading and an opportunity for the claimant to provide supporting documents to evidence its claim. In the case before me, the creditors discovered that the claims they had submitted were inaccurate and further evidence was tendered to the Monitor to demonstrate. The Monitor, after reviewing the evidence, accepted the validity of the claims.

45 Courts in a general way are engaged in dispensing justice. They do so by setting up and applying procedural rules to ensure that litigants are afforded a fair hearing. The resolution of disputes through the litigation process, including the ultimate hearing, is fundamentally a truth-seeking process to determine the facts and to apply the law to those facts. Can it be any different where the process is not in the court but under its supervision pursuant to a claims process under the *CCAA.?*

46 To suggest that the monitor does not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess the claims that have been submitted. The notion that the monitor cannot look at documentary evidence on its own initiative or at the instance of a claimant, and even consider submissions, is to deny it any real power to consider and make a preliminary determination of the merits of a claim.

47 The **Claims Procedure** Order contains a number of provisions that anticipate the exchange of information between the Monitor, the company and a creditor. Paragraph 9(b) authorizes the Monitor and ScoZinc to attempt to consensually resolve the classification and the amount of any claim with a claimant prior to accepting, revising or disallowing such claim. Paragraph 17 of the **Claims Procedure** Order directs that the Monitor shall at all times be authorized to enter into negotiations with claimants and settle any claim on such terms as the Monitor may consider appropriate.

48 In my opinion, it does not matter that revised claims were submitted after the claims bar date. In essence, the Monitor simply acted to revise the Proofs of Claim already submitted to con-

form with the evidence elicited by the Monitor, or submitted to it. The Monitor had the necessary authority to revise the claims, either as to classification or amount.

49 If a claimant seeks to revise or amend its claim after the assessment date set out in the **Claims Procedure** Order, different considerations may come into play. The appropriate procedure will depend on the provisions of the **Claims Procedure** Order. In addition, the court, as the ultimate arbiter of disputed claims under s. 12 of the *CCAA*, should always be viewed as having the jurisdiction to permit appropriate revision of claims.

D.R. BEVERIDGE J.

cp/e/qlrxg/qlpxm/qlaxw/qlced/qlaxr/qlced

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

APPLICANTS

Court File No: CV-10-8533-00CL

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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